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A TREATISE ON THE LAW OF MARRIAGE AND DIVORCE

WITH SYNOPSES OF THE MARRIAGE AND DIVORCE STATUTES OF ALL STATES AND CONTAINING COMPLETE FORMS FOR ALL PURPOSES

By

FRANK H KEEZER

SECOND EDITION

REVISED AND ENLARGED

BY

THE PUBLISHERS EDITORIAL STAFF

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PREFACE

The purpose of the author of this work as expressed in the preface to the original edition was: "To present in a concise manner how marriage, the most important institution of human society may be legally entered into and dissolved, stating the laws of the different states and citing the most important decisions of the courts."

The present edition does not depart from this plan, but to more fully realize the purpose of the author it has been thought proper in this edition to include and develop many matters either not touched upon in the original edition or at most only adverted to and to present this mutable branch of the law in its present day aspects as disclosed by the latest statutes and decisions.

Cases of this character are the law bearing upon the promise of marriage and its breach; alienation of the affections of one of the parties to the marriage; the annulment of marriages contracted in violation of law and good morals without resort to divorce; the matter of separate maintenance where there is separation but no divorce is contemplated.

The statutes of all the states and territories bearing on the subject of marriage and divorce have been brought down to date.

That part of the book devoted to applicable forms has been greatly expanded and made more serviceable in the variety of matters covered.

The entire body of the work has been revised and very largely rewritten and its order changed to present a logical and orderly treatment of the marital relation from the time of its inception to its close by complete dissolution through the decree of divorce.

A comparison of the present chapters devoted to the subject of alimony with the same topic in the former edition will give an idea of the extent of this work of revision in this new edition.

This volume is submitted to the bench and bar of this country as a conscientious attempt of the author to present a logically developed treatment of a most interesting and vital legal subject.

September 3, 1923.

TABLE OF CONTENTS

CHAPTER 1

Promise of Marriage

Sec.

1. Nature of the engagement to marry in general.
2. Capacity of parties in general.
3. Capacity of parties—Infancy.
4. Capacity of parties—Mental capacity.
5. Mutuality of promise—Offer and acceptance.
6. Evidence of acceptance of offer.
7. Consideration.
8. Statute of frauds.
9. Conditions in contract.
10. Contract of marriage made on Sunday.
11. Contracts in violation of public policy or morals.
12. Bona fide of parties.
13. Agreement to marry under rules of certain church.
14. Time, place and manner of performance of contract.
15. Postponement of performance.
16. Duress, fraud and concealment.

Breach of Marriage Promise and Remedies

CHAPTER 2

Sec.

20. Duration of contract and its dissolution in general.
21. Essentials of breach in general.
22. Breach of contract induced by third parties.
23. Demand for performance and offer to perform.
24. Jurisdiction.
25. Abatement and survival.
26. Limitation of actions.
27. Attachment and arrest.
28. Defenses in general.
29. Defenses—Diseases and impediments.
30. Defenses—Unchastity of plaintiff.
31. Defenses—Offer to marry.
32. Defenses—Release.
33. Pleading in general.
34. Pleading damages.
35. Pleading defenses.
36. Evidence—Burden of proof.
37. Evidence of contract.
38. Evidence of contract—Letters.
39. Evidence of contract—Opinions.
40. Questions for court and jury.
41. Damages in general.
42. Compensatory damages.
43. Mitigation of damages.
44. Aggravation of damages.
45. Seduction as aggravation of damages.
46. Attacks on character of plaintiff as aggravation of damages.

Sec.
47. Exemplary damages.
48. Damages affected by pecuniary circumstances of parties.
49. Damages—Amount of award.

CHAPTER 3

Marriage in General

Sec.
55. Nature and status created in general.
56. Definitions of marriage.
57. Consent as element—Consummation.
58. Effect of collateral agreements.
59. State regulation of marriage in general.
60. State regulation of legal capacity of parties.
61. State regulation of ceremonial incidents.
62. Effect of marriage on wills.
63. What law governs.
64. What law governs—Illustrations.
65. What law governs—Exceptions to rule of validity everywhere of marriage legal in contractual state.

CHAPTER 4

Common-Law Marriage

Sec.
70. Common-law marriage in general.
71. Common-law marriage—Per verba de praesenti.
72. Common-law marriage—Per verba de futuro cum copula.
73. Common-law marriage—Form and essentials of contract in general.
74. Common-law marriage—Binding effect.
75. Common-law marriage—Necessity of matrimonial intent.
76. Common-law marriage—Cohabitation as element.
77. Common-law marriage—Consummation after removal of impediments.

CHAPTER 5

Marriage by Letter or Telephone

Sec.
80. By letter.
81. By telephone.

CHAPTER 6

Mental and Physical Qualifications and Impediments

Sec.
85. Mental capacity to marry.
86. Physical capacity to marry.
87. Physical capacity—Marriage of epileptics.
88. Physical capacity—Eugenics laws.
89. Marriage between persons of same sex.

CHAPTER 7

Age Qualifications—Marriage of Infants in General

Sec.
95. Marriage of infants in general.
96. Marriage of infants—Consent of parents.
97. Marriage of infants—Consent of probate court.
98. Marriage of infants—Table of nonage.

CHAPTER 8

Racial Marriages

Sec.
105. Marriage between persons of different races—Miscegenation.
106. Indian marriages.
107. Slave marriages.

CHAPTER 9

Marriage Within Forbidden Degrees of Relationship

Sec.
110. Incestuous marriages in general.
111. Affinity and consanguinity.
112. Construction of statutes on question.

CHAPTER 10

Devises, Gifts and Contracts in Restraint or Derogation of Marriage

Sec.
115. Restraints generally.
116. Wills.
117. Devises conditional on marriage to particular person.
118. Contracts.
119. Contracts partially invalid for illegal restraint.
120. Restraint of second marriages.
121. Deeds.
122. Marriage of school teachers.
123. Marriage brokage contracts.
124. Contracts to facilitate divorces.

CHAPTER 11

Proof of Marriage and Presumptions

Sec.
130. Necessity of proof of marriage.
131. Presumptions and burden of proof in general.
132. Admissions.
133. Declarations.
134. Confession.
135. Circumstantial evidence.
136. Cohabitation and repute—Presumption.
137. Cohabitation as proof of marriage when it begins unlawfully.
138. Eyewitnesses.
139. Marriage certificates.
140. Records.
141. Collateral and unofficial records.
142. Divorce as evidence of marriage.
143. Testimony of persons officiating.
144. Proof of foreign marriage.

CHAPTER 12

Alienation of Affections

Sec.
150. Nature of action in general.
151. Husband's right of action.
152. Wife's right of action.
153. Alienation from parental or family interference.
154. Parties to actions.
155. Validity of agreement not to prosecute suit for alienation.
156. Defenses.
157. Pleadings.
158. Presumptions and burden of proof.
159. Evidence in general.
160. Evidence—Declarations or admissions of husband or wife.
161. Evidence—Mitigation of damages.
162. Damages.

CHAPTER 13

Nullity of Marriage

Sec.
165. Void and voidable marriages in general.
166. Distinction between "divorce" and "nullity."
167. Grounds—Want of mental capacity.
168. Grounds—Duress.
169. Grounds—Marriage under age of consent.
170. Grounds—Marriage of persons within prohibited degrees of affinity.
171. Grounds—Disease or incapacity—Impotency.
172. Grounds—Mock marriage.
173. Grounds—Fraud and misrepresentation.
174. Grounds—Mistake.
175. Grounds—Prior existing marriage—Absence for statutory period.
176. Grounds—Pregnancy by another at time of marriage.
177. Grounds—Marriage with intent not to consummate.
178. Grounds—Intoxication of one of the parties.
179. Effect of statutes forbidding remarriage of guilty party after decree of divorce.
180. Jurisdiction of nullity suits.
181. Parties to nullity suit.
182. Delay in bringing suit.
183. Pleading.
184. Evidence.
185. Alimony in nullity suits.
186. Custody of children.
187. Determination of property rights.
188. Damages for fraudulently inducing marriage.

CHAPTER 14

Divorce and Separation Generally

Sec.
195. Origin and development of modern laws.
196. State control of divorce.
197. Judicial character of divorce proceedings.
198. Divorce and public policy—State as third party.

Sec.
199. Partial divorce—Divorce from bed and board.
200. Divorce from bed and board under the civil law of Louisiana.
201. Application of doctrine of lis pendens to divorce proceedings.
202. Appointment of receiver.
203. Injunction to protect rights.
204. Contracts to facilitate divorce.

CHAPTER 15

Separation Agreements

Sec.
210. Nature in general.
211. Validity of agreements.
212. Construction of agreements.
213. Interposition of trustee.
214. Consideration.
215. Support of wife after agreement.
216. Surviving interest.
217. Effect of divorce on agreement.
218. Termination of the agreement.
219. Actions on agreements.

CHAPTER 16

Adultery

Sec.
225. Adultery as a ground for divorce in general.
226. The act must be voluntary.
227. Appearance of particeps criminis.
228. Effect of separation.
229. Connivance.
230. Keeping concubine.
231. Mistake of law as defense.
232. Mistake of fact as defense.
233. Knowledge of adultery.
234. Effect of divorce for adultery on legitimacy of children.
235. Non-access.
236. Joinder of other causes of action.
237. Specifications in complaint in general.
238. Particeps criminis must be named if known.
239. Connivance should be pleaded.
240. Amendment to libel or petition.
241. Burden of proof.
242. Circumstantial evidence.
243. Evidence of adulterous disposition.
244. Evidence of opportunity.
245. Evidence of private detectives.
246. Entering house of ill-fame as evidence.
247. Venereal disease as evidence.
248. Evidence and letters of paramour.
249. Corroboration—Confessions.
250. Evidence of prostitutes and pimps.
251. Evidence—Reputation for chastity.
252. Evidence of familiarities.
253. Record of criminal conviction as evidence.

CHAPTER 17

Bigamy

Sec.
260. General rule—Jurisdiction.
261. Prior marriage must have been valid.
262. Unheard of for years.
263. Defense of unheard of absence for statutory period.

Sec.
264. Meaning of the term "cohabitation."
265. Legitimacy of children.
266. Remarriage before decree is made absolute.
267. Evidence of bigamy.
268. Proof of marriage.

CHAPTER 18

Cruelty

Sec.
275. In general—Physical and mental cruelty.
276. Reasonable apprehension of violence.
277. Physical cruelty—Actual personal violence.
278. Cruel treatment endangering life.
279. Cruel treatment endangering health.
280. Communicating disease.
281. Denial of sexual intercourse.
282. Abuse of sexual intercourse.
283. Mental cruelty—Mental suffering.
284. Mutual cruelty or family jars.
285. False accusations.
286. Attempts to have spouse declared insane.
287. Abuse of child or others to punish spouse.
288. Unconcealed aversion—Discourtesy—Refusal to entertain.
289. Profanity—Vile language.
290. Associating with objectionable characters or compelling such association.
291. Abortion.
292. Indignities by others.
293. Failure or refusal to provide.
294. Masturbation not cruelty.
295. Drunkenness no defense to cruelty.
296. Pleading acts of cruelty.

CHAPTER 19

Conviction of Crime

Sec.
300. General rule.
301. Imprisonment in foreign state.
302. Necessity of conviction—Finality of conviction.
303. Compliance with statutes in manner of sentence.
304. Effect of pardon after sentence.
305. Marriage to a criminal pending appeal.
306. Statutory time of sentence.

CHAPTER 20

Habitual Drunkenness

Sec.
310. Use of alcoholic liquors.
311. Use of opium or other drugs.
312. Habitual drunkenness defined.
313. Degree of drunkenness.
314. Dipsomaniacs.
315. Court records.
316. Necessity of conviction.
317. Complainant furnishing liquor.
318. Periodical debauches.
319. Occasional intoxication.
320. Knowledge of drunkenness at time of marriage.
321. Habitual intemperance.

CHAPTER 21

Desertion

Sec.
325. Desertion as ground for divorce in general.
326. Definition of desertion.
327. Intention to desert—Permanency of separation.
328. Intention to desert must be wilful.
329. Desertion must be continuous.
330. Interruption by insanity.
331. Interruption by divorce proceedings.
332. Interruption by involuntary absence.
333. Refusal of sexual intercourse.
334. Constructive desertion.
335. Misconduct of party complaining as a defense to action for desertion—Justification.
336. Separation by mutual consent is not desertion—Offers of reconciliation.
337. Desertion where both parties dwell under same roof.
338. Refusal to follow husband.
339. Refusal to follow wife.
340. Refusal to leave native country.
341. Duty of spouse at fault to seek renewal of cohabitation.
342. Refusal to renew cohabitation.
343. Refusal to cohabit.
344. Husband's liability for support of wife.
345. Posting wife.
346. Desertion is not excused by continuing support.
347. Presumption of death.

CHAPTER 22

Discretionary Causes

Sec.
350. In general.
351. Rhode Island.
352. Washington.

CHAPTER 23

Fraud, Duress and Mistake

Sec.
355. Fraud generally.
356. Prenuptial pregnancy and unchastity.
357. Concealment of fact of conviction of crime.
358. Duress.
359. Mistake.

CHAPTER 24

Impotency

Sec.
365. In general.
366. Knowledge of defect.
367. Causes of impotency.
368. Advanced age.
369. Existence at time of marriage.
370. Natural impotency.

Sec.
371. Temporary impotency.
372. Curable impotency.
373. The defect must be one of copulation.
374. Burden of proof.
375. Absence of sexual intercourse.
376. Examination of defendant's person.
377. Refusal to submit to examination.
378. Impotency must be alleged.
379. Time of instituting proceedings.

CHAPTER 25

Insanity

Sec.
385. In general.
386. Degree of insanity.
387. Collateral attack.
388. Insanity after marriage—Statutory provisions.
389. Insane person plaintiff.

CHAPTER 26

Refusal to Support

Sec.
395. Non support as ground for divorce in general.
396. Time of failure to support.
397. Wife able to support herself.
398. Physical weakness.
399. Pecuniary ability.
400. Squandering wife's property.

CHAPTER 27

Exceptional Causes

Sec.
405. Sodomy.
406. Crime against nature.
407. Immoral or criminal conduct.
408. Fleeing from justices.
409. Gross neglect of duty.
410. Joining Shakers or like societies.
411. Indignities.
412. Defamation of character.
413. Living apart for years.
414. Unsafe or intolerable cohabitation.
415. Violent temper—Incompatability of temper.
416. Causes within court's discretion.

CHAPTER 28

Defenses

Sec.
420. Collusion.
421. Connivance in commission of matrimonial offense.
422. Insincerity.
423. Undue influence of third persons in inducing suit.
424. Condonation.
425. Revival of condoned offense.
426. Delay in bringing suit.
427. Recrimination.
428. Mistake.
429. Notice of grounds.

Sec.
430. Insanity.
431. Drunkenness.
432. Separation agreements.
433. Provocation.
434. Justification or excuse.
435. Invalidity of marriage.
436. Abatement—Death—Other cause pending.
437. Estoppel.

CHAPTER 29

Jurisdiction

Sec.
440. Courts having jurisdiction.
441. Effect of place of marriage and place of offense on jurisdiction.
442. Domicil as basis of jurisdiction.
443. Domicil defined.
444. Intention as an element in domicil.
445. Change of domicil.
446. Different domicil for husband and wife.
447. Extra-territorial effect of decree.
448. Statutory time of residence.
449. Acquired jurisdiction.
450. Jurisdiction by appearance.
451. Jurisdiction of counter-claim.
452. Cross-bill by nonresident.
453. Domicil for annulment suit.

CHAPTER 30

Parties

Sec.
455. Who may be plaintiffs.
456. Who are proper defendants.
457. Aliens.
458. Authority to sue for annulment.
459. Incompetency of parties.
460. Incompetent defendants and their guardians.
461. Legal status of wife as a party.
462. Intervening parties.

CHAPTER 31

Intermediate Process

Sec.
465. Cross-bill, libel, or petition.
466. Contest by guardian.
467. Amendments discretionary.
468. Interlocutory orders.
469. Interlocutory decrees.
470. Protection of wife pending suit.
471. Bill of particulars.

CHAPTER 32

Venue, Process and Service

Sec.
475. Venue.
476. Summons and its service in general—Appearance.
477. Entry and order of notice
478. Who may serve process.
479. Personal service.

Sec.
480. Notice by publication or constructive notice.
481. Notice by registered letter.
482. Validity of decree obtained on publication or service outside of the state where defendant did not appear.
483. Personal service outside of state.
484. Acceptance of service.
485. Identifying witness.
486. Proof of service.
487. Regularity in service.

CHAPTER 33

Pleadings

Sec.
490. Drawing bill or libel—Affidavits.
491. Amendments.
492. Residence.
493. Alleging causes—Generally.
494. Desertion.
495. Intoxication—Incapacity.
496. Cruel treatment.
497. Adultery.
498. Issues can be no broader than the pleadings.
499. No waiver by pleadings.
500. Answer—Cross-complaint.
501. Reply.
502. Who may sign libel.
503. Verification of libel.
504. Any number of causes may be inserted.
505. Amenability to charge of libel. because of allegations in complaint.

CHAPTER 34

Evidence

Sec.
510. Rules of evidence in general.
511. Burden of proof in general.
512. Pleadings as evidence.
513. Parties as witnesses.
514. Domicil and residence.
515. On plea of jurisdiction.
516. Presumption and evidence in general.
517. Evidence of libellee.
518. Corroboration.
519. Degree of proof.
520. Depositions and affidavits.
521. Records of conviction.
522. Evidence of young children.

CHAPTER 35

Decrees

Sec.
525. Decrees in general.
526. Decree of nullity.
527. Decree of affirmation.
528. Judgment by default.
529. Decree a vinculo matrimonii.
530. Decree nisi.
531. Decree a mensa et thoro—Decree on denial of absolute divorce.
532. Divorce a mensa et thoro—Louisiana procedure.
533. Modification of decree.

Sec.
534. Collateral attack on decrees.
535. Effect of the decree.
536. Conclusiveness of decrees—Res judicata.
537. Divorced woman's right to resume her maiden name or name of former husband.
538. Separate support and maintenance.
539. Restrictions against marrying after divorce.
540. Reporting criminal offense to civil authorities.

CHAPTER 36

Vacating Decrees

Sec.
545. General rule.
546. Motion to vacate at term of rendition.
547. Remedy where evidence insufficient to sustain decree.
548. By the court on its own motion.
549. Petition to vacate.
550. Who may bring petition.
551. False testimony.
552. Impersonation.
553. Collusion.
554. Miscellaneous grounds for or against setting aside.
555. Laches in vacating decree.
556. Decree under repealed statute.
557. Objection to decree nisi becoming absolute.
558. Decree vacated after subsequent marriage.
559. Death of either party not a bar.
560. Declaring decree of other state void not unconstitutional.
561. Effect of vacation.

CHAPTER 37

Dismissal of Suit

Sec.
565. Dismissal in general.
566. General dismissal as bar to subsequent libel.
567. Dismissal without prejudice.

CHAPTER 38

Trial—New Trial—Appeal

Sec.
570. Trial procedure in general.
571. Time of hearing.
572. Continuances.
573. Exclusion of public from hearing.
574. Examination of witnesses by the court.
575. Questions of law and fact.
576. Reference.
577. Findings of the court.
578. Reopening case to hear additional evidence.
579. New trial.
580. Appeal.

CHAPTER 39

Custody and Maintenance of Children

Sec.
585. Jurisdiction of court.
586. Proceedings other than divorce.
587. Fitness of parents.
588. Custody pending divorce proceedings.
589. Grounds for award—Welfare of child.
590. Preference of children.
591. Agreement of parties as to custody.
592. Access of parents to child in custody of other spouse.
593. Nature and effect of order or decree for custody.
594. Modification of award.
595. Support of children of divorced persons in general.
596. Liability for maintenance where custody awarded but no provision for support.
597. Agreements between parties.
598. Orders fixing allowance and proceedings therefor.
599. Orders for support against nonresident father.
600. Change of amount allowed for support.
601. Termination of liability for support.

CHAPTER 40

Effect of Divorce or Annulment

Sec.
605. Limited divorce in general.
606. Absolute divorce in general.
607. Rights of husband.
608. Rights of wife.
609. Divorce affecting wife's right to insurance upon her husband's life.
610. Rights in property.
611. Marriage settlement.
612. Effect of divorce on homestead right.
613. Effect of nullity decree on legitimacy of children.
614. Alienation of affections and criminal conversation.

CHAPTER 41

Foreign Divorces

Sec.
620. Recognition of foreign divorces in general—Full faith and credit clause.
621. Conclusiveness of foreign decrees in general—Res judicata.
622. Conclusiveness of foreign decrees—Alimony.
623. Conclusiveness of foreign decrees—Custody and support of children.
624. Necessity of jurisdiction.
625. Personal service outside of state.
626. Review and decision on questions of domicil and fraud.
627. Nonresident state may refuse relief.

Sec.
628. Validity of a divorce granted in a foreign country.
629. Rabbinical divorces granted in foreign countries.
630. Marriage under foreign divorce.
631. Prohibition of remarriage.

CHAPTER 42

Separate Maintenance Without Divorce

Sec.
635. In general.
636. Jurisdiction of equity to decree maintenance.
637. Necessity of valid marriage.
638. Necessity of separation—Effect of living under one roof.
639. Matters operative as a bar in general.
640. Agreements and settlements as bar to action.
641. Causes for granting separate maintenance in general.
642. Causes for separate maintenance —Desertion by husband.
643. Causes justifying the wife in leaving husband—Constructive desertion—Cruel treatment—Adultery.
644. Necessity of wife's freedom from fault.
645. Effect of wife's unchastity on her right to maintenance.
646. Effect of offer to resume marital relation.
647. Effect of condonation on right to maintenance.
648. Right of nonresident wife to maintain action—Venue.
649. Application of statutes of limitations.
650. Pleading.
651. Evidence.
652. Reference to find facts necessary to determination of amount.
653. The allowance and its incidents in general.
654. Injunction against conveyance or incumbrance of property.
655. Termination of right to separate maintenance.

CHAPTER 43

Alimony Generally

Sec.
660. In general.
661. Valid marriage as a prerequisite.
662. Alimony distinguished from wife's equity.
663. Alimony distinguished from dower.
664. Alimony under common-law marriage.
665. Necessity of separation of parties.
666. Persons liable.
667. Liability of nonresident defendant.
668. Manner of awarding alimony.
669. Alimony in nullity suits.
670. Alimony allowed without divorce proceedings—Separate maintenance.
671. Husband's general denial under oath—Effect on allowance.
672. Divorce to husband, alimony to wife.

Sec.
673. Husband's right to alimony.
674. Liability of alimony to attachment or execution—Set-off.
675. Adjustment of property rights.
676. Assignment and anticipation of alimony.
677. Jurisdiction to grant alimony in general.
678. Jurisdiction to award dependent on nature of service of process.
679. Jurisdiction to award acquired by appearance.
680. Pleading—Prayer for alimony.
681. Liability for necessities after grant of alimony.
682. Jurisdiction dependent on domicil of parties.
683. Jurisdiction to grant alimony though none to grant divorce.
684. Appeal.
685. Alimony pending appeal.
686. Effect of discharge of bankruptcy on liability.

CHAPTER 44

Temporary Alimony, Suit-Money, Counsel Fees and Expenses

Sec.
690. Temporary alimony or alimony pendente lite in general.
691. Jurisdiction of court to grant temporary alimony.
692. Proceedings in which allowed.
693. Allowance in annulment suits.
694. Discretion of court.
695. Necessity of existence of marital relation.
696. Husband's ability.
697. Right of husband to allowance.
698. Wife's good faith.
699. Effect of agreements between the parties as to support on separation.
700. Defenses and objections.
701. Effect of wife's ownership of property on right to temporary alimony.
702. Necessity of notice of proceedings.
703. Application for temporary alimony.
704. Hearing and determination.
705. Evidence to establish marital relation.
706. Order for temporary alimony.
707. Conditional orders.
708. Amount of allowance.
709. Commencement and termination of temporary alimony.
710. Vacation or revision of order by trial court.
711. Suit money allowance in general.
712. In what proceedings suit money allowed.
713. When allowance of suit money to be made.
714. Allowance of suit money as dependent on wife's necessities and husband's ability to pay.
715. Allowance of suit money as dependent on merits of action.
716. For what purposes suit money may be allowed.
717. In whose name suit money to be allowed.
718. Right to suit money on dismissal of action.
719. Suit money allowance—Amount.
720. Counsel fees in general.
721. Counsel fees—Proceedings in which allowed.
722. Counsel fees—Time of allowance.

Sec.
723. Counsel fees—Amount.
724. Counsel fees — Allowance — Order.
725. Counsel fees—Allowance in case of wife's adultery or other fault.
726. Counsel fees—Effect of death.
727. Counsel fees—Allowance where parties have become reconciled.
728. Counsel fees—Contingent fees.
729. Counsel fees—Number of counsel.
730. Counsel fees—Allowance on appeal.
731. Counsel fees—Independent suit therefor.
732. Liability of husband and wife for legal services to wife in divorce suit.
733. Costs.

CHAPTER 45

Permanent Alimony

Sec.
751. Cruelty to wife.
752. Condition of family.
753. Previous provision for wife's support — Agreements between parties.
754. Wife's property or income.
755. Source of property.
756. Requiring husband to disclose on oath.
757. Necessity of divorce.
758. Reference to master.
759. Reference to arbitrator.
740. Permanent alimony in general.
741. Allowance of gross sum.
742. Dependent on valid marriage.
743. Husband's resources.
744. Conduct of parties.
745. Both parties at fault.
746. Wife at fault.
747. Separation by mutual agreement.
748. Husband living in adultery.
749. Abandoning of wife.
750. Impotency.

CHAPTER 46

Modification, Suspension and Termination of Alimony

Sec.
765. Modification of decree for alimony.
766. Alimony based on agreement.
767. Changed conditions.
768. Effect of wife's subsequent adultery upon alimony.
769. Termination of alimony.
770. Reconciliation.
771. Effect of imprisonment of wife to suspend alimony.
772. Remarriage.

CHAPTER 47

Foreign Decrees for Alimony

Sec.
775. Power of courts to render decrees affecting other states.
776. Sister state may enforce payment.
777. Foreign decrees as to property generally.
778. Effect on land without the jurisdiction.

CHAPTER 48

Enforcement of Alimony

Sec.
785. Jurisdiction of courts to enforce.
786. Requirement of security for payment of alimony.
787. Lis pendens to preserve status quo.
788. Appointment of receiver to preserve status quo.
789. Injunction to maintain status quo.
790. Issuance of writ of ne exeat.
791. Setting aside fraudulent conveyance.
792. Enforcement of temporary alimony by striking out pleadings and evidence and denial of privileges to defendant.
793. Contempt proceedings to compel payment of alimony in general.
794. Contempt proceedings—Procedure.
795. Defenses to contempt proceedings.
796. Issuance of execution.
797. Attachment of husband's property.
798. Decree of alimony as lien.
799. Husband out of jurisdiction—Extradition.
800. Oath for poor debtors.
801. Wife as creditor after decree for alimony.
802. Appointment of trustees of wife's property.

CHAPTER 49

Synopsis of the Marriage Statutes of the States and Territories

Sec.
805. Alabama.
806. Alaska.
807. Arizona.
808. Arkansas.
809. California.
810. Colorado.
811. Connecticut.
812. Delaware.
813. District of Columbia.
814. Florida.
815. Georgia.
816. Hawaii.
817. Idaho.
818. Illinois.
819. Indian Territory.
820. Indiana.
821. Iowa.
822. Kansas.
823. Kentucky.
824. Louisiana.
825. Maine.
826. Maryland.
827. Massachusetts.
828. Michigan.
829. Minnesota.
830. Mississippi.
831. Missouri.
832. Montana.
833. Nebraska.
834. Nevada.
835. New Hampshire.
836. New Jersey.
837. New Mexico.
838. New York.
839. North Carolina.
840. North Dakota.
841. Ohio.
842. Oklahoma.
843. Oregon.
844. Panama.

Sec.
845. Pennsylvania.
846. Philippine Islands.
847. Porto Rico.
848. Rhode Island.
849. South Carolina.
850. South Dakota.
851. Tennessee.
852. Texas.
853. Utah.
854. Vermont.
855. Virginia.
856. Washington.
857. West Virginia.
858. Wisconsin.
859. Wyoming.

CHAPTER 50

Synopsis of the Divorce Statutes of the States and Territories

Sec.
865. Alabama.
866. Alaska.
867. Arizona.
868. Arkansas.
869. California.
870. Colorado.
871. Connecticut.
872. Cuba.
873. Delaware.
874. District of Columbia.
875. Florida.
876. Georgia.
877. Hawaii.
878. Idaho.
879. Illinois.
880. Indian Territory.
881. Indiana.
882. Iowa.
883. Kansas.
884. Kentucky.
885. Louisiana.
886. Maine.
887. Maryland.
888. Massachusetts.
889. Michigan.
890. Minnesota.
891. Mississippi.
892. Missouri.
893. Montana.
894. Nebraska.
895. Nevada.
896. New Hampshire.
897. New Jersey.
898. New Mexico.
899. New York.
900. North Carolina.
901. North Dakota.
902. Ohio.
903. Oklahoma.
904. Oregon.
905. Panama.
906. Pennsylvania.
907. Philippine Islands.
908. Porto Rico.
909. Rhode Island.
910. South Carolina.
911. South Dakota.
912. Tennessee.
913. Texas.
914. Utah.
815. Vermont.
916. Virginia.
917. Washington.
918. West Virginia.
919. Wisconsin.
920. Wyoming.

CHAPTER 51

Forms

Sec.
925. Instructions for drawing bill, complaint, libel or petition.
926. Complaint—Title of court—Title of cause.

Sec.
927. Formal opening.
928. Formal opening—An infant wife by her guardian.
929. Complaint on ground of cruel treatment—Indiana.
930. Bill for divorce for cruelty, the complainant asking for the custody of the children, for alimony, and for alimony pendente lite.
931. Bill for divorce for adultery—Illinois.
932. Bill for divorce for desertion and conviction of husband for felony, and praying for resumption of maiden name—Illinois.
933. Complaint for divorce for desertion—Iowa.
934. Libel for divorce—Massachusetts.
935. Libel for divorce—Grounds for divorce that may be inserted in foregoing bills and complaints.
936. Petition for divorce and to set aside fraudulent conveyances.
937. General prayer.
938. General prayer—Massachusetts.
939. General prayer and for custody of children and for alimony—Indiana.
940. Prayer for summons.
941. Prayer for alimony.
942. Prayer for restoration of maiden name.
943. Prayer for restraining order to prevent violence.
944. Prayer for custody of children.
945. Pleas and answers—Venue, title of court, title of cause.
946. Plea or answer—Formal opening.
947. Plea to the jurisdiction.
948. Answer—General denial.
949. General denial and condonation.
950. Answer—Condonation.
951. Answer—Collusion.
952. Answer—Connivance.
953. Answer—Consent and connivance.
954. Answer—Recrimination.
955. Answer—Existing marriage to another.
956. Answer to bill for cruelty.
957. Justification for alleged cruelty.
958. Motion for specifications.
959. Affidavit to be attached to answer under oath.
960. Answer of co-respondent.
961. Conclusion of answer and cross-bill.
962. Replication.
963. Cross-complaint.
964. Cross-bill—Denial of abandonment and prayer for divorce from bed and board for cruelty.
965. Separate maintenance—Complaint.
966. Separate maintenance—Petition.
967. Separate maintenance—Findings of fact and conclusions of law.
968. Decree for separate maintenance.
969. Decree of separation and alimony.
970. Decree of divorce a mensa et thoro (from bed and board).
971. Decree from bed and board—Custody of children—Alimony.
972. Bill for rescission of a voluntary conveyance made by a husband to his wife by means of the latter's fraudulent procurement.
973. Complaint to have marriage declared void.
974. Complaint for annulment of marriage for nonage.
975. Complaint for annulment of marriage for unsound mind.

Sec.
976. Complaint for annulment of marriage for insanity.
977. Complaint for annulment for insanity—Restoration to reason.
978. Complaint for annulment of marriage for impotency.
979. Complaint for annulment of marriage for physical incapacity.
980. Complaint for annulment for former undissolved marriage.
981. Petition for annulment for marriage outside of state to evade its laws.
982. Complaint for annulment for false representations as to chastity.
983. Complaint for annulment for false representations as to betrothal ceremony.
984. Complaint for annulment with prayer to legitimize children.
985. Answer to complaint for annulment for nonage.
986. Answer to complaint for annulment for fraud.
987. Answer to complaint for annulment for impotency.
988. Answer to complaint for annulment for intoxication.
989. Annulment—Decree of validity.
990. Decree of annulment.
991. Breach of promise—Complaint.
992. Breach of promise—Complaint—Special damages.
993. Breach of promise—Answer setting up fraud.
994. Breach of promise—Answer setting up duress.
995. Breach of promise—Answer setting up unchastity of plaintiff.
996. Breach of promise—Denial of breach.
997. Breach of promise—Answer setting up existing marriage of plaintiff.
998. Alienation of affections—Wife's complaint against husband's parents.
999. Alienation of affections—Husband's complaint against seducer of his wife.
1000. Necessaries furnished wife—Complaint.
1001. Complaint for wife's antenuptial debt.
1002. Order—Default of defendant—Personal service.
1003. Order—Default of defendant—Service by publication.
1004. Petition to open decree of divorce taken by default against nonresident.
1005. Petition to vacate decree.
1006. Summons.
1007. Order of notice by publication.
1008. Affidavit of notice.
1009. Affidavit for publication against nonresident.
1010. Notice with copy of bill to be served on nonresident defendant.
1011. Affidavit of service of notice with copy of complaint.
1012. Affidavit of notice to co-respondent.
1013. Petition for writ of ne exeat.
1014. Ne exeat—Endorsement on petition.
1015. Masters' order for issuance of writ of ne exeat.
1016. Order of judge in vacation allowing an issuance of a writ of ne exeat.
1017. Ne exeat—Bond to be executed by complainant.
1018. Ne exeat—Bond to be given by defendant.
1019. Attachment clause.
1020. Prayer for attachment by trustee process.
1021. Affidavit for injunction.

Sec.
1022. Order of notice by publication and attachment by trustee process.
1023. Order for attachment of real and personal property, and attachment by trustee process.
1024. Averment for injunction in complaint for divorce.
1025. Order restraining libelee from imposing any restraint upon the personal liberty of the libelant.
1026. Affidavit for injunction.
1027. Restraining order.
1028. Order of reference as to temporary alimony, suit money and counsel fees.
1029. Order confirming master's report as to alimony.
1030. Order granting alimony pendente lite.
1031. Notice of application for suit money.
1032. Motion for alimony pendente lite and counsel fees.
1033. Application for suit money.
1034. Order of reference to determine alimony.
1035. Report of master in chancery or other referee as to alimony.
1036. Order as to allowance.
1037. Order to pay temporary alimony, counsel fees and suit money on defendant's petition.
1038. Order to pay temporary alimony, counsel fees, and suit money on plaintiff's petition.
1039. Order granting alimony pendente lite.
1040. Order allowing maintenance pendente lite.
1041. Demand on party liable for temporary alimony.
1042. Notice of application for rule to show cause why attachment for contempt should not be issued.
Sec.
1043. Petition for contempt for non-payment of alimony.
1044. Petition to show cause why attachment as for contempt should not issue for failure to pay permanent alimony.
1045. Petition to show cause why attachment should not issue for failure to pay temporary alimony.
1046. Order to show cause.
1047. Order of notice on petition for contempt for non-payment of alimony.
1048. Answer in discharge of rule to show cause.
1049. Recognizance to appear and answer rule to show.
1050. Judgment for commitment as for contempt.
1051. Attachment as for contempt.
1052. Execution and order for commitment.
1053. Order convicting of contempt after order to show cause.
1054. Order purging contempt.
1055. Custody of children—Averment in complaint.
1056. Petition for custody of minor children.
1057. Provision for maintenance of child after divorce.
1058. Order as to custody of child.
1059. Petition and order for third party to have care and custody of child.
1060. Order of notice on prayer for custody of children, suit money, and for restraining order.
1061. Order for custody of children.
1062. Order to produce child in court.
1063. Decree for custody of children.
1064. Decree awarding temporary custody of child.

Sec.
1065. Decree, libel continued after hearing, with custody of children.
1066. Order that writ of habeas corpus issue to produce minor child.
1067. Habeas corpus.
1068. Decree awarding custody of children and use of homestead.
1069. Decree assigning homestead to wife.
1070. Decree assigning homestead to parties as tenants in common.
1071. Decree for sale of homestead with division of proceeds.
1072. Caption of decree or order with title of court and cause.
1073. Decree of divorce.
1074. Decree for divorce, alimony and custody of children.
1075. Decree for divorce on verdict of jury.
1076. Decree for divorce, upon default, for conviction of crime, and granting right to resume maiden name.
1077. Decree for divorce on default —Personal service.
1078. Decree for divorce on default— Service by publication.
1079. Decree nisi or interlocutory.
1080. Objection to decree absolute.
1081. Decree nisi or interlocutory with findings of fact and conclusions of law.
1082. Decree nisi after appointment of guardian ad litem.
1083. Final decree of divorce after nisi or interlocutory decree.
1084. Order that decree nisi shall not become absolute.
1085. Decree for permanent alimony and other specific support.
1086. Decree on cross-complaint and amendment — Allowance of alimony and counsel fees.

Sec.
1087. Decree to set aside decree when defendant not personally notified.
1088. Decree dismissing libel for adultery.
1089. Dismissal of appeal from the probate court.
1090. Decree dismissing bill after cause has been heard by jury and allowing an appeal—Illinois.
1091. Decree dismissing libel, the marriage being void.
1092. Decree dismissing libel without prejudice.
1093. Decree dismissing libel for want of jurisdiction.
1094. Decree dismissing cross-bill.
1095. Decree for costs.
1096. Petition for alimony after divorce decree.
1097. Petition for alimony after divorce—Massachusetts.
1098. Order of reference to master to take proof as to permanent alimony to be allowed complainant.
1099. Master's report—Testimony.
1100. Decree requiring security for payment of alimony.
1101. Decree for permanent alimony.
1102. Decree for permanent alimony with lien upon real estate.
1103. Agreement to sustain decree of probate court.
1104. Agreement to modify decree.
1105. Order to modify decree.
1106. Petition to modify decree for alimony—Husband's petition to reduce.
1107. Motion to transfer suit to another county.
1108. Order directing issue to be tried by a jury.
1109. Certificate of decree of divorce —Absolute.

Sec.
1110. Order of court for the examination of person alleged to be impotent.
1111. Affidavit of physician that witness is unable to attend court.
1112. Petition for writ of protection.
1113. Marriage settlement.
1114. Deed of wife confirming marriage settlement made during infancy.
1115. Antenuptial agreement.
1116. Separation agreements.
1117. Deed of separation—Another form.

TABLE OF CASES

[References are to Sections.]

A

Abbott v. Abbott, 192 Ill. 439 425
v. Abbott, 203 Mich. 265 424, 425
v. Abbott, 75 Pa. Super. Ct. 483 411, 511, 514
Abington v. North Bridgewater, 40 Mass. 170 444, 445
Abramowitz v. Abramowitz, 140 N. Y. S. 275 280, 464, 701, 704
Abrams v. Rosenthal, 151 La. 987 700
A. C. v B. C., 11 Wkly. Notes of Cas. (Pa.) 479 376
Ackerman v. Ackerman, 200 N. Y. 72 196, 225, 441, 626
Adair v. Adair, 54 Ill. App. 502 706
v. Adair, 31 Ky. L. 956 511
Adams v. Abbott, 21 Wash. 29 678
v. Adams, 150 Ga. 346 598
v. Adams, 1 Duv. (Ky.) 167 587
v. Adams, 33 Mass. 254 471
v. Adams, 100 Mass. 365 636, 670
v. Adams, 154 Mass. 290 60, 447
v. Adams, 20 N. H. 299 238, 467
v. Adams, 51 N. H. 388 545, 550, 624
v. Adams, 91 N. Y. 381 204
v. Adams, (N. Y.) 179 App. Div. 152 795
v. Adams, 30 Okla. 327 880
v. Adams, 74 Pa. Super. Ct. 502 684, 708, 723
v. Byerly, 123 Ind. 368 5, 7, 14, 15, 21, 37
v. Hurst, 9 La. 243 200, 230
v. Maine, 3 Ind. App. 232 153, 157, 162
v. Scott, 93 Nebr. 537 167, 894
v. Storey, 135 Ill. 338 660, 662, 663
Adams, In re, 161 Iowa 88 424
Addams v. State (Ohio St.), 135 N. E. 667 440, 585, 594
Adkins v. Kendrick, 131 Ky. 779 162
Adkisson v. State, 34 Tex. Cr. 296 268
Ahlbom v. Ahlbom (Utah), 204 Pac. 99 427, 565
Ahrenfeldt v. Ahrenfeldt, 4 Sandf. Ch. (N. Y.) 493 767
Ahrens v. Ahrens (Okla.), 169 Pac. 486 218
Ahrns v. Ahrns, 160 Ky. 342 746
Aikens v. Aikens, 57 Pa. Super. Ct. 424 518
Aitchison v. Aitchison, 99 Iowa 93 242, 290, 641
Albee v. Albee, 141 Ill. 550 514
Albert v. Albert, 5 Mont. 577 433
Alberts v. Alberts, 78 Wis. 72 2, 15, 29, 30, 43, 46
Alderman, In re, 157 N. Car. 507 589, 594, 620
Alderson v. Alderson, 113, Ky. 830 646, 765
Aldrich v. Aldrich, 74 Hun (N. Y.) 638 694
v. Aldrich, 166 Mich. 248 772
v. Aldrich, 21 Ont. Rep. 449 645
Aldridge v. Aldridge, 116 Miss. 385 742, 891
Alexander v. Alexander, 13 App. D. C. 334 690
v. Alexander, 36 App. D. C. 78 184, 874
v. Alexander, 165 N. Car. 45 900
v. Frary, 9 Ind. 481 32
Allan v. Allan, 21 Ariz. 70 546
v. Allan, 72 Iowa 502 792
Allard v. Smith, 59 Ky. (2 Metc.) 297 5, 32
Allbee v. Allbee, 38 Nev. 191 336
Allcock v. Allcock, 174 Ky. 665 153
Allen v. Allen, 73 Conn. 54 198, 310
v. Allen, 72 Iowa 502 792
v. Allen, 108 Kans. 765 218

[*References are to Sections.*]

Allen v. Allen, 100 Mass. 373 76, 793, 801
v. Allen, 188 Mich. 532 518, 565, 755
v. Allen, 31 Mo. 479 411
v. Allen, 44 Nev. 243 520
v. Allen, 85 N. J. Eq. 55 167, 897
v. Allen, 101 N. Y. 658 242
v. Allen, 125 App. Div. (N. Y.) 838 225, 414
v. Allen, 8 Abb. N. C. (N. Y.) 175 690, 692
v. Allen, 180 N. Car. 465 653
v. Allen, 2 Sw. & Tr. 107 716
v. Baker, 86 N. Car. 91 15, 29
v. Besecker, 55 Misc. (N. Y.) 366 162
v. Farmers Loan & Trust Co., 18 App. Div. (N. Y.) 27 662
v. Forsythe, 160 Mo. App. 262 151, 160
v. Hall, 2 Nott & McC. (S. Car.) 114 136
v. Maclellan, 12 Pa. St. 328 60, 558
v. Superior Ct., 133 Cal. 504 693, 711, 792
Allen's Appeal, 99 Pa. St. 196 355, 356
Allers v. Allers, 194 App. Div. (N. Y.) 96 335, 586
Alley v. Winn, 134 Mass. 77 215, 681
Allfree v. Allfree, 175 Mo. App. 344 198
Almond v. Almond, 4 Rand. (Va.) 663 636, 643, 646, 751, 787
Alsup v. Jordan, 69 Tex. 300 606
Alt v. Banholzer, 39 Minn. 511 606
Alvey v. Hartwig, 106 Md. 254 506
Ambrose v. Ambrose, 46 Wash. 463 610
Ambrose, In re, 170 Cal. 160 869
Americus Gas & Electric Co. v. Coleman, 16 Ga. App. 17 876
American Woolen Co. v. Lesher, 267 Ill. 11 141
Ames v. Ames, 109 Misc. (N. Y.) 161 240
v. Chew, 46 Mass. 320 530, 605
Amos v. Amos, 4 N. J. Eq. 171 461, 690, 710, 721
Amspoker v. Amspoker, 99 Nebr. 122 211
Anders v. Anders, 224 Mass. 438 888
Anderson v. Anderson, 165 Ala. 181 587
v. Anderson, 5 Alaska 138 866
v. Anderson, 124 Cal. 48 202, 788
v. Anderson, 137 Cal. 225 690
v. Anderson (Cal. App.), 204 Pac. 426 528, 591
v. Anderson, 45 Ill. App. 168 644
v. Anderson, 205 Ill. App. 595 794
v. Anderson, 65 Ind. 196 793
v. Anderson, 189 Iowa 95 285, 289
v. Anderson, 191 Iowa 497 288
v. Anderson, 152 Ky. 773 248, 587
v. Anderson, 4 Maine 100 253, 467
v. Anderson, 55 Mo. App. 268 678
v. Anderson, 74 Hun (N. Y.) 56 168
v. Anderson, 110 Misc. (N. Y.) 123 765
v. Anderson, 1 Edw. Ch. (N. Y.) 380 228
v. Anderson, 89 Nebr. 570 424, 425, 500
v. Anderson, 183 N. Car. 139 653
v. Anderson, 54 Utah, 309 653, 654
v. Anderson, 42 Vt. 350 443
v. Anderson, 97 Wash. 202 545
v. Anderson, 74 W. Va. 124 623
v. Anderson, 78 W. Va. 118 242, 511, 918
v. Kirby 125 Ga. 62 9, 21, 34, 35, 41, 42, 45
v. Steger, 173 Ill. 112 716, 717, 720, 721, 722, 724, 727, 731
v. Story, 53 Nebr. 259 677
Anderson In re, 97 Fed. 391 686
Andrade v. Andrade, 14 Ariz. 379 326, 336, 444
Andreas v. Andreas, 88 N. J. Eq. 130 743
Andrew v. Andrew, 53 Ore. 531 904
v. Andrew, 62 Vt. 495 794, 795
Andrews v. Andrews, 120 Cal. 184 289

[*References are to Sections.*]

Andrews v. Andrews, 69 Ill 609 786, 798
v. Andrews, 15 Iowa 423 594
v. Andrews, 176 Mass. 92 444, 447
v. Andrews, 40 S. Dak. 47 911
v. Andrews, 75 Tex. 609 490
v. Andrews, 188 U. S. 14 198, 444, 447, 560, 626
v. Page, 3 Heisk. 667 851
v. Ross, 14 P. D. 15 170
v. Whitney, 82 Hun (N. Y.) 117 674
Angelo v. Angelo, 81 Ill. 251 642, 644, 645, 646, 670
Anichini v. Anichini, 2 Curt. Ec. 210 427
Annarina v. Boland, 136 Md. 365 130, 152, 156, 159, 161
Anonymous, 2 Atk. 211 790
Anonymous, 206 Ala. 295 644
Anonymous, 5 Mass. 197 477
Anonymous, 4 Pick. (Mass.) 32 4
Anonymous, 58 Miss. 15 513
Anonymous, 24 N. J. Eq. 19 171, 180
Anonymous, 15 Abb. Pr. N. S. (N. Y.) 307 685, 692, 720, 727
Anonymous, 17 Abb. Pr. (N. Y.) 48 250
Anonymous, 21 Misc. (N. Y.) 765 173
Anonymous, 158 N. Y. S. 51 86
Anonymous, 2 N. Car. (1 Hayw.) 347 636, 790
Anonymous, 3 Oh. S. & C. P. 450 294, 405
Anonymous, 4 Desaus. (S. Car.) 94 642, 644, 646
Anonymous v. Anonymous, 69 Misc. (N. Y.) 489 171, 899
Anshutz v. Anshutz, 16 N. J. Eq. 162 337, 636, 638, 641, 642, 643, 665, 670, 790
Anthony v. Tarpley, 45 Cal. App. 72 444, 626
Appleby v. Appleby, 100 Minn. 408 120, 204, 211
Applegate v. Applegate, 118 Misc. (N. Y.) 359 175
Appleton v. Appleton, 107 Wash. 280 511
v. Warner, 51 Barb. (N. Y.) 270 175, 185, 661, 693, 695
Application for Support, In re, 164 Iowa 208 595
Arado v. Arado, 205 Ill. App. 261 669
v. Arado, 281 Ill. 123 110, 182, 708, 818, 879
Arbon v. Blyth, 54 Utah 153 48
Archbell v. Archbell, 158 N. Car. 408 210, 211, 212, 217, 218, 336, 432, 699
Archuleta v. Archuleta, 52 Colo. 601 576
Arendall v. Arendall, 61 Fla. 496 652, 694, 695, 696, 704
Arey v. Arey, 22 Wash. 261 690
Arix v. Arix, 212 Mich. 438 225, 240, 589
Arkwright v. Newbold (L. R.) 17 Ch. Div. 317, 318 16
Armant v. Her Husband, 4 La. Ann. 137 277
Arment v. Arment, 154 Iowa 573 341
Armstrong v. Armstrong, 35 Ill. 109 690, 721, 722
v. Armstrong, 27 Ind. 186 424
v. Armstrong, 229 Mass. 592 283
v. Carson, 2 Dall. (U. S.) 302 620
v. Mayer, 60 Nebr. 423 677
Arndt v. Arndt, 177 Mo. App. 420 525
Arnold v. Arnold, 115 Ark. 32 395, 518
v. Arnold, 141 Ga. 158 704
Arrington v. Arrington, 127 N. Car. 190 775, 776
v. Arrington, 131 N. Car. 143 686, 776, 900
Arrowsmith v. Arrowsmith (N. J.), 71 Atl. 702 897
Arthur v. Broadnax, 3 Ala. 557 136
v. Cole, 56 Md. 100 120
v. Israel, 15 Colo. 147 607
Ascher v. Ascher, 202 Mo. App. 622 695, 723
Ash v. Prunier, 105 Fed. 722 160
Ashbrooke v. Ashbrooke, 132 App. Div. (N. Y.) 907 701, 708
Ashburn v. Ashburn, 101 Mo. App. 365 892
Ashdown v. Ashdown, 178 N. Y. S. 565 175, 435
Ashford v. Metropolitan Ins. Co. 80 Mo. App. 638 136
Ashley v. Dalton, 119 Miss. 672 2, 48

[*References are to Sections.*]

Ashmead v. Ashmead, 23 Kans. 262 567
v. Sullivan, 198 App. Div. (N. Y.) 885 215
Ashton v. Grucker, 48 La. Ann. 1194 412, 433
Asling v. Asling, 88 Kans. 331 448
Aspinwall v. Aspinwall, 49 N. J. Eq. 302 441, 442, 492, 662
Aston v. Aston, 14 Cal. App. 323 242, 248
Atchinson v. Baker, Peakes Add. Cas. 103 14, 28
Atherton v. Atherton, 82 Hun. (N. Y.) 179 700, 723
v. Atherton, 181 U. S. 155 217, 444, 620, 624, 775
Atkins v. Atkins, 13 Nebr. 271 710, 765
Atkinson v. Atkinson, 169 Ark. 629 592
v. Atkinson, 43 Utah 53 545, 969
v. Medford, 46 Maine 510 4
Atlantic City R. Co. v. Goodin, 62 N. J. L. 394 132, 137, 836
Atwater v. Atwater, 53 Barb. (N. Y.) 621 636
Atwood v. Atwood, 15 Ont. Pr. Rep. 425 640
Audibert v. Michaud, 119 Maine 295 138
Audley v. Audley, 196 App. Div. (N. Y.) 103 110, 435
Audubon v. Shufeldt, 181 U. S. 575 660, 686, 776
Auld v. Auld, 4 Cranch, C. C. 84 636
Aultman v. National Bank of Tifton, 140 Ga. 250 876
Austin v. Austin, 143 Ark. 222 798
v. Austin, 42 Colo. 130 636, 653
v. Austin, 167 Mich. 164 785
v. Austin, 173 Mich. 47 424, 529, 587, 889
Austin's Estate, 173 Mich. 47 585
Auxier v. Auxier, 155 Ky. 174 446, 884
Avakian v. Avakian, 69 N. J. Eq. 89 180
Averbuch v. Averbuch, 80 Wash. 257 425, 536
Averett v. Averett, 189 App. Div. (N. Y.) 250 288, 415, 518, 796
Avery v. Avery, 33 Kans. 1 285
Axtell v. Axtell, 119 N. Y. S. 644 242
Axton v. Axton, 182 Ky. 286 337, 884
Ayres v. Ayres, 99 Ga. 325 696

B

Babbitt v. Babbitt, 69 Ill. 277 338, 644, 670
Babcock v. Smith, 39 Mass. 61 607, 611
Bachelor v. Bachelor, 30 Wash. 203 685
v. Bachelor, 30 Wash. 639 792
Back v. Back, 148 Iowa 223 111, 882
Backman v. Holman, 92 Wash. 227 160
Bacon v. Bacon, 68 W. Va. 747 326, 336
Badeley v. Mortlock, 1 Holt N. P. R., 151, 3 Esp. R. 236 43
Badger v. Badger, 69 Colo. 564 648
v. Badger, 88 N. Y. 546 132, 136, 137, 705
Baer v. Baer, 3 Pa. Dist. Ct. 379 714, 723
v. Baer, 7 Kulp. (Pa.) 244 703
Bagot v. Bagot, 68 Colo. 562 653
Bahn v. Bahn, 62 Tex. 518 285
Bahrenburg v. Bahrenburg, 88 Misc. (N. Y.) 272 173
Baier v. Baier, 91 Minn. 165 636, 722
Bailey v. Bailey, 157 Ill. App. 74 211, 591
v. Bailey, 69 Iowa 77 792
v. Bailey, 94 Iowa 598 162
v. Bailey, 189 Ky. 449 740
v. Bailey, 97 Mass. 373 275, 276, 279
v. Bailey, 127 N. Car. 474 675
v. Bailey, 22 N. Dak. 553 702
v. Bailey, 67 N. H. 402 421
v. Bailey, 21 Grat. (Va.) 43 653, 677, 696, 743
v. Brown, 4 Cal. App. 515 33
v. Cadwell, 51 Mich. 217 790
v. Dillon, 186 Mass. 244 640, 681, 699
v. Fiske, 34 Maine 77 105
v. Kennedy, 148 Iowa 715 156, 158
v. State, 36 Nebr. 808 833
Bailie v. Bailie, 5 N. Y. Ann. Cas. 193 721
Bain v. Bain, 79 Nebr. 711 310, 319
Baird v. Baird, Phil. Eq. (N. Car.) 317 787
v. Carle, 157 Wis. 565 157, 158, 161
v. People, 66 Ill. App. 671 5, 109
Baity v. Cranfill, 91 N. Car. 293 110

[*References are to Sections.*]

Baker v. Baker, 13 Cal. 87 356
v. Baker, 136 Cal. 302 702
v. Baker, 168 Cal. 346 342, 397
v. Baker, 4 Boyce (Del.) 438 585
v. Baker, 82 Ind. 146 398, 399
v. Baker, 136 Ky. 617 225, 241, 884
v. Baker, 191 Ky. 325 610
v. Baker, 99 Ore. 213 337
v. Barney, 8 Johns. (N. Y.) 72 215
v. Cartwright, 10 C. B. N. S. 124 16, 29, 43
v. Durham, 95 Ark. 355 587
v. Jewell, 114 La. 726 678, 679
v. People, 2 Hill (N. Y.) 325 261
v. Richmond Mill Works, 105 Ga. 225 723
Bakley v. Bakley (N. J.) 111 Atl. 307 587
v. Bakley (N. J. Eq.), 65 Atl. 440 594
Baldwin v. Baldwin, 6 Gray (Mass.) 341 690, 723
v. Kingston, 247 Fed. 163 211
Baldy v. Stratton, 11 Pa. St. 316 34, 41, 45, 46
Ball v. Cross, 231 N. Y. 329 620, 630
v. Cross, 190 App. Div. (N. Y.) 711 620
Ballard v. Caperton, 2 Metc. (Ky.) 412 690, 726
Ballentine v. Ballentine, 5 N. J. Eq. (1 Halst.), 471 704
Balswic v. Balswic, 179 Ill. App. 118 242, 245
Bamford v. Bamford, 4 Ore. 30 636
Bancroft v. Bancroft, 178 Cal. 367 545, 553
v. Bancroft, 4 Boyce (Del.) 9 235, 427, 500, 873
Bandler v. Bandler, 187 N. Y. S. 358 528
Banes v. Banes, 3 Brewst. (Pa.) 612 690
Bange v. Bange, 46 Misc. (N. Y.) 196 184
Banister v. Banister, 150 Mass. 280 475
Banks v. Banks, 42 Fla. 362 695, 715, 720
v. Banks, 118 Miss. 783 512
v. Galbraith, 149 Mo. 529 55
Bankston v. Bankston, 27 Miss. 692 743
Banner v. Banner, 184 Mo. App. 396 211
Barbaras v. Barbaras, 88 Minn. 105 767
Barber v. Barber, 74 Iowa 301 187
v. Barber, 89 Misc. (N. Y.) 519 442, 620, 775
v. Barber, 21 How. (U. S.) 582 440, 605, 620, 626, 630, 775, 776
v. Barber, 2 Pinney (Wis.) 297 767
v. People, 203 Ill. 543 85
v. Root, 10 Mass. 260 179, 199, 529, 539, 560, 606
Barberton Savings Bank Co. v. Belford, 32 Ohio, Cir. Ct. 574 75
Barbour v. Barbour, 46 Maine 9 663
Barclay v. Barclay, 184 Ill. 375 686, 793, 794, 795
v. Commonwealth, 116 Ky. 275 172
Bardin v. Bardin, 4 S. Dak. 305 661, 693, 695, 708
Bardwell v. Collins, 44 Minn. 97 678
Barge v. Haslam, 65 Nebr. 656 8
Barginde v. Barginde, 189 Ill. App. 390 643, 644
Barish v. Barish, 190 Iowa 493 594, 598, 600, 721, 767
Barker v. Barker, 63 N. J. Eq. 593 426
v. Barker, 136 N. Car. 316 702, 706, 708
v. Barker, 25 Okla. 48 275, 276, 283
v. Dayton, 28 Wis. 367 673, 788
v. Valentine, 125 Mich. 336 137
Barkley v. Dumke, 99 Tex. 150 187
Barkshire v. State, 7 Ind. 389 55
Barlow v. Barnes, 172 Cal. 98 159
v. Barlow, 141 Ga. 535 593
Barnard v. Barnard (Va.), 111 S. E. 227 589, 592
Barnes v. Barnes, 95 Cal. 171 283, 572
v. Barnes, 59 Iowa 456 673
v. Buck, 1 Lans. (N. Y.) 268 27, 46
v. Klug, 129 App. Div. (N. Y.) 192 213, 216
v. Long, 54 Ore. 548 587
v. Willis, 65 Fla. 363 555
Barnett v. Miller, 131 Ark. 110 558
Barney v. Barney, 14 Iowa 189 709
v. Cuness, 68 Vt. 51 180
Barngrover v. Barngrover (Cal. App.) 206 Pac. 461 284
v. Pettigrew, 128 Iowa 533 204

[*References are to Sections.*]

Barnhart v. Barnhart, 109 Wash. 110 344
Barnum v. Barnum, 42 Md. 251 705
Barras v. Barras (Tex. Civ. App.), 217 S. W. 252 571
Barrett v. Barrett, 130 Ga. 365 703
v. Barrett (Tex. Civ. App.), 131 S. W. 821 393
v. Failing, 111 U. S. 523 606
Barringer v. Barringer, 153 N. Car. 392 433, 900
v. Dauernheim, 127 La. 679 437, 499
Barrington v. Barrington, 200 Ala. 315 865
v. Barrington, 201 Ala. 185 467
v. Barrington, 206 Ala. 192 59
Barron v. Barron (Cal.), 96 Pac. 273 565
Barry v. Bakeman, 44 Maine 164 16, 541, 542
Bartero v. Real Estate Savings Bank, 10 Mo. App. 76 678
Barth v. Barth, 102 Ky. 56 175, 260, 436, 720
v. Barth, 168 Mo. App. 423 427
Bartlett v. Bartlett, 113 Mass. 312 566
v. Bartlett, Clarke Ch. (N. Y.), 460 185, 693, 690
Bartlow v. Bartlow, 114 Ill. App. 604 644
Barton v. Barton, 119 Mo. App. 507 153
Bascom v. Bascom, Wright (Ohio) 632 644, 745
v. Bascomb, 25 N. H. 267 367, 369, 372
Bashaw v. State, 1 Yerg. 177 851
Bass v. Bass, 165 Ala. 223 865
Bassett v. Bassett, 9 Bush. (Ky.) 696 168, 358
v. Waters, 103 Kans. 853 676, 706
Bast v. Bast, 82 Ill. 584 242, 427
Batchelder v. Batchelder, 14 N. H. 380 310
Bateman v. Bateman, 42 App. D. C. 230 421
Bater v. Bater, (1906) P. (Eng.) 209, 4 Ann. Cas. 854 197, 550
Bates v. Bates, 145 N. Y. S. 411 792
v. Bodie, 245 U. S. 520 775, 777, 894
Battey v. Battey, 1 R. I. 212 638, 644, 653, 665, 677, 696
Batty v. Greene, 206 Mass. 561 173, 175, 188, 260, 888
Bauchle v. Bauchle, 185 App. Div. (N. Y.) 590 219
Bauer v. Bauer, 42 Misc. (N. Y.) 557 576
Baugh v. Baugh, 37 Mich. 59 456, 550
Baughman v. Baughman, 32 Kans. 538 167
Bauman v. Bauman, 18 Ark. 320 692, 722, 767
Baumle v. Verde, 33 Okla. 243 44, 47
Baurens v. Giroux, 117 La. 696 433
v. Giroux, 123 La. 879, 49 So. 605 536, 587
Bay v. Bay, 85 Ohio St. 417 551
Baylies v. Baylies, 196 App. Div. (N. Y.) 677 678
Baylis v. Baylis, 207 N. Y. 446 620, 626
Bayly v. Bayly, 2 Md. Ch. 326 790
Bays v. Bays, 105 Misc. (N. Y.) 492 63, 95, 169
Beach v. Beach, 6 Dak. 371 447
v. Beach, 160 Iowa 346 188
v. Beach, 4 Okla. 359 447
v. Brown, 20 Wash. 266 152, 156, 158, 160, 614
Beachey v. Brown, E. B. & E. 769 16, 29, 903
Beacon Hill Land Co. v. Bowen, 33 R. I. 404 909
Beadleston v. Beadleston, 103 N. Y. 402 700, 716, 754
Beall v. Beall, 80 Ky. 675 289
Beals v. Ares, 25 N. Mex. 459 675
Bean v. Bean, 11 Lanc. Bar (Pa.) 138 317, 319
Beans v. Denney, 141 Iowa 52 6
Bear v. Bear (Mo. App.), 241 S. W. 955 598
Bear Lake Co. v. Budge, 9 Idaho 703 678
Beard v. Beard, 21 Ind. 321 447, 667, 678
Beardsley v. Bass, 287 Mo. 393 211
Bearinger v. Bearinger, 170 Mich. 661 290
Beauchamp v. Beauchamp, 44 Okla. 634 409
Beauley v. Beauley, 190 N. Y. S. 120 579
v. Beauley, 199 App. Div. (N. Y.) 280 240, 424
Beaulieu v. Beaulieu, 114 Minn. 511 727
Beavan v. Beavan, 8 Jur. (N. S.) 1110 696

[*References are to Sections.*]

Beaver v. Bess, 58 Ind. App. 287 559, 561
Beavers v. Beavers, 148 Ga. 506 793
Beavers, Ex parte, 80 W. Va. 34 794
Bechtel v. Bechtel, 101 Minn. 511 445
Beck v. Utah-Idaho Sugar Co. (Utah), 203 Pac. 647 133
Becker v. Becker, 79 Ill. 532 744
v. Becker, 15 Ill. App. 247 702, 703
v. Becker, 160 Ind. 407 447
v. Becker, 153 Wis. 226 55, 70
Becklin v. Becklin, 99 Minn. 307 480
Bedolfe v. Bedolfe, 71 Wash. 60 533, 592
Beebe v. Beebe, 10 Iowa 133 276
v. Beebe, 174 App. Div. (N. Y.) 408 275
Beeby v. Beeby, 1 Hag. Ec. 789 427, 665
Beekman v. Beekman, 53 Fla. 858 276, 415, 492
Beeks v. Beeks, 66 Fla. 256 168
Beeler v. Beeler (Tex. Civ. App.), 218 S. W. 553 571, 685, 796
Beem v. Beem (Ore.), 207 Pac. 604 519
Beers v. Beers, 74 Wash. 458 594
Begbie v. Begbie, 128 Cal. 154 436
v. Begbie, 7 N. J. Eq. 98 700, 704
Beggs v. State, 55 Ala. 108 95, 261
Begraw v. Begraw, 162 Mich. 349 288, 889
Behrle v. Behrle, 120 Mo. App. 677 720
Behsman v. Behsman, 144 Minn. 95 890
Beisel v. Gerlach, 221 Pa. 232 153
Beisenthall v. Williams, 1 Duv. (Ky.) 329 678
Belcher v. Belcher, 145 Ky. 308 642
v. Belcher, 1 Curt. Ecc. 444 711
Belden v. Belden, 82 Conn. 611 646, 653
v. Munger, 5 Minn. 211 204
Belknap v. Belknap, 154 Iowa 213 528, 534
Bell v. Bell, 105 Ark. 194 284
v. Bell, 1 Ga. (Kelly) 637 662
v. Bell, 15 Idaho 7 334, 518
v. Bell, 97 Kans. 616 551, 883
v. Bell, 4 App. Div. (N. Y.) 527 447
v. Bell, 9 Week. No. Cas. (Pa.) 509 520
v. Clarke, 45 Misc. (N. Y.) 272 705
Bell v. Eaton, 28 Ind. 468 11, 16, 30, 36
Bellinger v. Devine, 269 Ill. 72 705
Belmont v. Belmont, 82 Ore. 612 275
Bench v. Merrick, 1 Car. & K. 463 16, 30, 975
Bender v. Bender, 190 Mo. App. 572 708
Benesch v. Benesch, 182 App. Div. (N. Y.) 221 212
v. Benesch, 106 Misc. (N. Y.) 395 211, 217
Benfield v. Benfield, 44 Ore. 94 289
Benham v. Benham, 69 Misc. (N. Y.) 442 625
Benjamin v. Benjamin, 78 Fla. 14 594, 765
Benner v. Benner, 63 Ohio St. 220 678
Bennett v. Beam, 42 Mich. 346 14, 34, 42, 43, 45, 48
v. Bennett, 169 Ala. 618 86, 865
v. Bennett, 48 Cal. App. 670 242, 335, 425
v. Bennett, 50 Cal. App. 48 680
v. Bennett (Cal. App.), 203 Pac. 162 283
v. Bennett, 43 Conn. 313 326, 327, 328
v. Bennett (N. J. Eq.), 59 Atl. 245 653
v. Bennett, 15 Okla. 286 462, 792
v. Bennett, 208 U. S. 505 792
v. Brooks, 9 Allen (Mass.) 118 10, 369
v. Packer, 70 Conn. 357 120
v. Robinson, 180 Mo. App. 56 596
v. Smith, 21 Barb. (N. Y.) 439 95
v. Southard, 35 Cal. 688 691
Benore v. Benore, 198 Mich. 113 293
Bensen v. Bensen, 20 Cal. App. 462 585
v. Benson, 45 Utah 514 496
Bentley v. Bentley, 149 Ga. 707 459, 876
Benton v. Benton, 122 Cal. 395 643, 653
v. Benton, 1 Day (Conn.) 114 173, 811
Benton, Succession of, 106 La. 494 620
Berckmans v. Berckmans, 16 N. J. Eq. 122 244, 248
v. Berckmans, 17 N. J. Eq. 453 242

[*References are to Sections.*]

Berg v. Berg, 119 Ill. App. 422 724
Bergen v. Bergen, 22 Ill. 187 788
Berger v. Berger, 89 N. J. Eq. 430 448, 519, 897
v. Berger, 141 App. Div. (N. Y.) 455 730
v. Berger (R. I.), 117 Atl. 361 545
v. Kirby (Tex.), 153 S. W. 1130 852
v. Kirby (Tex. Civ. App.), 135 S. W. 1122 141
Bergevin v. Bergevin, 168 Wis. 466 211, 753
Bergin v. Deering, 70 Hun (N. Y.) 381 794
Bernard v. Lay, 128 La. 733 511
Berner, In re, 217 Mich. 612. 211
Berney v. Adriance, 157 App. Div. (N. Y.) 628 626
Bernon v. Bernon, 15 Cal. App. 34 514
Bernsdorff v. Bernsdorff, 26 App. D. C. 228 685, 716, 720
v. Bernsdorff, 26 App. D. C. 520 646
Berry v. Bakeman, 44 Maine 164 30
v. Berry, 98 Ga. 393 709, 710
v. Berry, 115 Iowa 543 643
v. DeCosta, L. R. 1 C. P. 131 34, 42
Berryman v. Berryman, 59 Mich. 605 295, 313
Berthelemy v. Johnson, 3 B. Mon. (Ky.) 90 196
Besch v. Besch, 27 Tex. 390 327
Besore v. Besore, 49 Ga. 378 459
Bethany v. State (Tex. Cr.), 237 S. W. 262 260
Bethel v. Bethel, 181 Mo. App. 601 430
Betser v. Betser, 186 Ill. 537 153
v. Betser, 87 Ill. App. 399 156
Betz v. Betz, 70 Pa. Super. Ct. 396 740
Beuter v. Beuter, 1 S. Dak. 94 721
Bevan v. Bevan (R. I.), 114 Atl. 130 319
Beverlin v. Beverlin, 29 W. Va. 732 857
Beverson's Estate, 47 Cal. 621 76
Beyer v. Beyer, 50 Wis. 254 275, 292
Beyerle v. Bartsch, 111 Wash. 287 175
v. Beyerle, 155 Cal. 266 589, 594
Bialy v. Bialy, 167 Mich. 559 889
Bibb v. Bibb, 39 Cal. App. 406 338, 511, 869
Bickerdike v. Allen, 157 Ill. 95 678
Bickford v. Bickford, 74 N. H. 448 180
v. Bickford, 57 Wash. 639 352, 917
Bickley v. Bickley, 136 Ala. 548 645
Biddle v. Biddle, 50 Pa. Super. Ct. 30 433
Biela v. Urbanczyk, 38 Tex. Civ. App. 213 45
Bienvenu v. Her Husband, 14 La. Ann. 387 412
Biggs v. State, 55 Ala. 108 805
Bill v. Bill, 178 Iowa 1025 302, 312
Billan v. Hercklebrath, 23 Ind. 71 663
Billings v. Billings, 11 Pick. (Mass.) 461 249
Bimeler v. Dawson, 4 Scam. (Ill.) 536 678
Bingham v. Bingham (Tex. Civ. App.), 149 S. W. 214 289, 424
Birch v. Anthony, 109 Ga. 349 204, 640
Bird v. Bird, 1 Lee Ecc. 209 661, 669, 690, 695
v. Bird, 1 Lee Ecc. 572 660, 690, 711, 792
v. Bird, 1 Lee Ecc. 575 696
v. Thompson, 96 Mo. 424 34
Birdsong v. Birdsong (Ky. App.), 206 S. W. 22 884
Birdzell v. Birdzell, 33 Kans. 433 455, 459
Birkel v. Powers, 208 Ill. App. 430 42, 49
Birt v. Barlow, 1 Doug. 171 705
Birum v. Johnson, 87 Minn. 362 21, 23, 48
Bisbing's Estate In re, 266 Pa. 529 136
Bischoff v. Harris, 198 Mich. 198 37, 71
Bishop v. Bishop, 155 Ky. 679 335, 493, 884
v. Bishop, 17 Mich. 211 252
v. Bishop, 82 Misc. (N. Y.) 676 424, 530
v. Bishop, 30 Pa. St. 412 340
v. Brittain Inv. Co., 2[illegible] Mo. 699 55, 136, 705
v. Prudential Ins. Co., 217 Ill. App. 112 606
Bissell v. Bissell (N. J.), 117 Atl. 252 171, 518

[*References are to Sections.*]

Bissell v. Bissell, 1 Barb. (N. Y.) 430 701, 704, 706, 708
Bittinger v. Bittinger, 4 Pa. Dist. 441 485
Blachly v. Blachly, 169 Iowa 489 594
Black v. Black, 149 Ga. 506 288
v. Black, 150 Ga. 672 685, 710
v. Black, 5 Mont. 15 706, 711, 729
v. Black, 30 N. J. Eq. 228 244, 248
Blackburn v. Crawfords, 3 Wall (U. S.) 175 141
v. Mann, 85 Ill. 222 8, 14, 26, 37, 46
Blackmore v. Mills, 16 W. R. 893, 18 L. T. (N. S.) 586 695
Blair v. Blair, 74 Iowa 311 685, 723, 730
v. Blair, 96 Kans. 757 559
v. Blair, 106 Kans. 151 210, 740
v. Blair, 131 Mo. App. 571 411
v. Blair, 40 Utah 306 914
v. United States, 45 App. D. C. 353 122
Blaisdell v. Bickhum, 139 Mass. 250 110
Blake v. Blake, 70 Ill. 618 245, 251, 723, 729
v. Blake, 80 Ill. 523 684, 685, 723, 730, 793
v. Blake, 68 Wis. 303 660
v. Blake, 70 Wis. 238 712, 721
v. Dudley, 111 La. 1096 447
v. People, 80 Ill. 11 793, 794
Blakely v. Blakely, 117 Minn. 482 706, 721
Blakeslee v. Blakeslee, 41 Nev. 235 895
Blanchard v. Blanchard, 10 Cal. App. 203 869
v. Blood, 2 Barb. (N. Y.) 352 662
v. Lambert, 43 Iowa 228 705, 821
Blandy v. Blandy, 20 App. D. C. 535 330
Blaney v. Blaney, 126 Mass. 205 312, 318
Blank v. Nohl, 112 Mo. 159 198, 204, 420
Blankenmiester v. Blankenmiester, 106 Mo. App. 390 693
Blankenship v. Blankenship, 19 Kans. 159 798
v. Blankenship, 125 Va. 595 196, 448, 492
Blasini v. Blasini, 30 La. Ann. 1388 705
Blass v. Blass, 194 Mo. App. 624 551
Blauser v. Blauser, Ind. App. 117 514
Bledsoe v. Seaman, 77 Kans. 679 624
Bleiler v. Koons, 132 Pa. St. 401 19 Atl. 140 6, 36
Bleuer v. Bleuer, 27 Okla. 25 622
Bleyer v. Blum, 70 Ga. 558 790
Bleything v. Bleything, 87 Ore. 197 284
Blid v. Blid, 82 Nebr. 294 587
Blind v. Blind, 71 Pa. Super. Ct. 396 580
Bliss v. Bliss, 161 Mo. App. 70 424
Blodget v. Brinsmaid, 9 Vt. 27 111
v. Thornton, 3 Cranch, C. C. 176 705
Blodgett v. Blodgett, 109 Wash. 597 131
v. Moore, 141 Mass. 75 62
Blondin v. Brooks, 83 Vt. 472 444, 626, 915
Bloodgood v. Bloodgood, 59 How. Pr. (N. Y.) 42 669, 693
Bloom v. Bloom, 8 Pa. Dist. R. 563 699
v. Bloom, 17 Pa. Co. Ct. 478 721
v. Richards, 2 Ohio St. 387 10
Blossom v. Barrett, 37 N. Y. 434 188
Blum v. New York Life Ins. Co., 197 Mo. 513 609
Blumenthal v. Tannenholz, 31 N. J. Eq. 194 180
Blundin v. Blundin, 38 Nev. 212 545
Blythe v. Blythe, 25 Iowa 266 695
Boagni v. Breaux, 143 La. 363 885
Boast v. Firth, L. R. 4 C. P. 8 29
Boate v. Boate, 190 N. Y. S. 914 217
Bobbitt v. Bobbitt, (Tex. Civ. App.), 223 S. W. 478 70, 136, 283
Bobowski v. Bobowski, 242 Ill. 524 741, 798
Bocage v. Lombard, 144 La. 1005 740
Bockman v. Ritter, 21 Ind. App. 250 157
Bodie v. Bates, 95 Nebr. 757 622
Bodwell v. Bodwell, 113 Mass. 314 347
Boeck v. Boeck, 16 Nebr. 196 433
Boehs v. Hanger, 69 N. J. Eq. 10 173
Boger v. Boger, 86 W. Va. 590 328, 350, 594, 767

[*References are to Sections.*]

Boggess v. Boggess, 4 Dana (Ky.) 307 642, 644, 670
Boggs v. Boggs, 138 Md. 422 596, 597
Bogue v. Maurer (Cal. App.), 205 Pac. 56 33
Bohanan v. Bohanan, 150 Iowa 182 341
Bohannon v. State (Ala. App.), 92 So. 27 261
Boigneres v. Boulon, 54 Cal. 146 7
Bohnert v. Bohnert, 91 Cal. 428 684, 685, 700, 716
Bokelkamp v. Bokelkamp, 106 Wash. 697 594
Boland v. Stanley, 88 Ark. 562 153, 158
Boles v. Boles, 60 Mont. 411 587
Boling v. State, 91 Nebr. 599 138
Bolmer v. Edsall, 90 N. J. Eq. 299 63, 136, 143, 177, 184, 578
Bolton v. Bolton, 86 N. J. L. 69 622
Bomsta v. Johnson, 38 Minn. 230, 36 N. W. 341 447, 549, 558, 559
Bond v. Bond, 45 Wash. 511 636
Bondies v. Bondies, 40 Okla. 164 596
v. Porter, 40 Okla. 89 596
Bonesteel v. Bonesteel, 28 Wis. 245 700
Bonham v. Bonham, 25 Wyo. 449 920
Bonker v. People, 37 Mich. 4 95
Bonney v. Bonney, 175 Mass. 7 293
Boone v. Purnell, 28 Md. 607 705
Booren v. McWilliams, 26 N. Dak. 558 45
v. McWilliams, 34 N. Dak. 74 37, 49
Boozel v. Boozel, 193 Iowa 78 596, 598
Borda v. Borda, 43 R. I. 384 442, 465, 565
v. Borda (R. I.), 117 Atl. 362 514, 519, 565
Bordeaux v. Bordeaux, 26 Mont. 533 685
v Bordeaux, 29 Mont. 478 685, 713, 714, 716, 721
v. Bordeaux, 43 Mont. 102 336, 575
Borden v. Borden, 166 Cal. 469 336
v. Fitch, 15 Johns (N. Y.) 121 560
Borgerson v. Borgerson (Cal. App.), 208 Pac. 991 585
Bort, In re, 25 Kans. 308 589, 592
Bostick v. Blades, 59 Md. 231 120
v. State, 1 Ala. App. 255 865
Bose's Estate, In re, 158 Cal. 428 644
Bothwell v. Way, 44 Okla. 555 70
Bottom v. Bottom, 143 Ky. 666 531, 587
Bottorff v. Bottorff (Ind.), 125 N. E. 478 653
Botts v. Botts, 142 Ill. App. 216 548
Boubon v. Boubon, 26 N. Y. Super. Ct., 715 701, 704
Boucicault v. Boucicault, 21 Hun (N. Y.) 431 790
Bouillon v. Laclede Gas Light Co., 148 Mo. App. 462 47
Bounds v. Bounds, 135 Md. 220 276, 350
Bourne v. Bourne, 43 Cal. App. 516 152, 158, 159
Boutterie v. Demarest, 126 La. 278 358
Bowen v. Bowen, 179 Mich. 574 275, 284, 288
Bowers v. Bowers, 53 Ind. 430 62
v. Bowers, 88 N. J. Eq. 608 240
v. Bowers, 98 Ore. 548 242, 415
v. Bowers, 10 Rich. Eq. (S. Car.) 551 55, 110
v. State, 29 Ohio St. 542 45
v. Van Winkle, 41 Ind. 432 705
Bowes v. Sly, 96 Kans. 388 23, 34, 42, 45
Bowlby v. Bowlby, 91 Minn. 193 767
Bowman v. Bowman, 30 Fed. 849 440
v. Bowman, 24 Ill. App. 165 664, 690, 695, 704
v. Bowman, 153 Ind. 498 29, 30, 35, 36
v. Webster, 214 Mich. 518 794
v. Worthington, 24 Ark. 522 660, 661, 670, 690, 740
Boxa v. Boxa, 92 Nebr. 78 587
Boyce v. Boyce, 23 N. J. Eq. 337 642, 644
v. Boyce, 31 S. Dak. 12 911
v. McKenna, 211 Mich. 204 131, 175
Boyd v. Boyd, 70 Colo. 561 594
v. Boyd, 188 Ill. App. 136 211, 218
v. Boyd, 226 Mass. 542 551
v. Boyd, Harp Eq. (5 S. Car.), 144 644
v. Boyd, 22 Tex. Civ. App. 200 690
Boyd's Appeal, 38 Pa. St. 241 559, 624
Boyd, Ex parte (Tex. Civ. App.), 157 S. W. 254 623

[*References are to Sections.*]

Boyer v. Sherer, 28 Ill. App. 545 6, 169
Boylan v. Deinzer, 45 N. J. Eq. 485 110
Boynton v. Kellogg, 3 Mass. 189 30, 43, 45
Bracken v. Dinning, 141 Ky. 265 14
Bradbury v. Bradbury (N. J. Eq.), 74 Atl. 150 644, 645
Bradfield v. Bradfield, 154 Mich. 115 444, 448
Bradford v. Abend, 89 Ill. 78 389, 459, 552
v. Bradford, 80 Miss. 467 698
Bradley v. Bradley, 40 Cal. App. 638 684, 767
v. Bradley, 11 Maine 367 521
v. Bradley, 3 Chan. Chamb. (Ont.) 329 695
v. Burges, 109 Kans. 347 211, 216
v. Ramsey (Tex. Civ. App.), 65 S. W. 1112 788
Bradstreet v. Bradstreet, 6 Mackey (17 D. C.) 502 700
Brady v. Brady, 144 Ala. 414 636, 684
Braecklein v. Braecklein, 139 Md. 341 788
Brainen v. Brainen, 79 N. J. 270 897
Brame v. Clark, 148 N. Car. 364 151
Branch v. Branch, 30 Colo. 499 580
v. Branch, 30 Ky. L. 417 211
Brandt v. Brandt, 178 Cal. 548, 285, 644
Branscheid v. Branscheid, 27 Wash. 368 636
Brant v. Brant (Mo. App.), 230 S. W. 325 580
v. Brant, 71 N. J. Eq. 66 480
Brasch v. Brasch, 50 Nebr. 73 708, 711, 719
Brashfield v. Brashfield, 96 Tenn. 580 673
Bratton v. Bratton, 62 Fla. 442 490
v. Bratton, 79 Ind. 588 478
Braun v. Braun, 194 Pa. St. 287 285, 289
Brause v. Brause (Iowa), 174 N. W. 641 277
Brautigam v. Brautigam, 181 Cal. 157 518
Bravo v. Bravo (N. J.), 114 Atl. 790 425
Brawn v. Brawn, 78 N. H. 337 896
Bray v. Bray, 6 N. J. Eq. 27 692, 703, 704
Breadalbane Case, Se. R. 1 H. L. Sc. 182 705
Breakey v. Breakey, 2 U. C. Q. B. 349 705
Breed v. Breed, 73 Pa. Super. Ct. 9 576
Breedlove v. Breedlove, 27 Ind. App. 560 500
Breen v. Breen, 28 Ky. L. 1216 721
Breene v. Breene, 76 Pa. Super. Ct. 568 411
Breinig v. Breinig, 26 Pa. St. 161 690
Brenger v. Brenger, 142 Wis. 26 660, 673, 674, 677
Brenneman v. Hildebrandt, 137 Mo. App. 82 587, 594
Brenner v. Brenner, 5 Kulp. (Pa.) 6 704
Brett v. Brett, 191 Iowa 262 131, 225, 740
Brewer v. Brewer, 79 Nebr. 726 338, 636, 646
v. Estate of Brewer, 68 Colo. 84 136
v. State, 59 Ala. 101 143
Brice v. Brice, 50 Mont. 388 600
Brice's Estate, In re, 11 Phila. 98 705
Brick v. Brick, 65 Mich. 230 528
Bridge v. Bridge (N. J. Ch.), 93 Atl. 690 425
Briggs v. Briggs, 36 Iowa 383 701
v. Briggs, 102 Iowa 318 644
v. Briggs, 20 Mich. 34 411
v. Briggs, 24 S. Car. 377 636, 642, 643, 646
v. Briggs, 56 Wash. 580 239, 277, 411, 917
v. Mitchell, 60 Barb. (N. Y.) 288 662
v. Morgan, 3 Ph. Ecc. 325 368
Brigham v. Brigham, 147 Mass. 159 692
Brightman v. Brightman, 1 R. I. 112 787
Briles v. Briles, 66 Ind. App. 444 153
Brindley v. Brindley, 115 Ala. 474 636, 721
v. Brindley, 121 Ala. 429 643, 644, 645, 710, 720, 728
Brinkley v. Attorney General, 15 P. D. 76 65
v. Brinkley, 50 N. Y. 184 185, 195, 661, 664, 692, 695, 704, 705
Brisack v. King, 199 App. Div. (N. Y.) 213 30, 42, 43
Brisbane v. Brisbane, 67 How. Pr. (N. Y.) 184 792
v. Dobson, 50 Mo. App. 170 776

[*References are to Sections.*]

Brisbin v. Huntington, 128 Iowa 166 71, 136
Brisco v. Brisco, 2 Hag. Con. 199 677, 690
Brisendine v. Brisendine, 152 Ga. 745 644
Brison v. McKellop, 41 Okla. 374 158
Bristol v. Bristol (Nebr.), 185 N. W. 972 283
Britton v. Chamberlain, 234 Ill. 246 622, 776
Broaddus v. Broaddus (Mo. App.), 221 S. W. 804 651
Broadstreet v. Broadstreet, 7 Mass. 474 226, 385
Broderick v. Broderick, 40 Cal. App. 550 251, 285, 425, 518, 580
Brody v. Brody, 190 App. Div. (N. Y.) 806 218
Brokeshoulder v. Brokeshoulder, 84 Okla. 249 131, 165
Bronk v. State, 43 Fla. 461 721, 790, 793
Brook v. Brook, 7 Jur. N. S. 422 59, 63
Brooks v. Brooks, 145 Mass. 574 243
v. Brooks, 18 Wkly. Notes Cas. (Pa.) 115 704
Brotherhood of Railroad Trainmen v. Merideth, 146 Ark. 140 131
Brotherton v. Brotherton, 12 Nebr. 75 758
Brow v. Brightman, 136 Mass. 187 595
Brown v. Brown, 178 Ala. 121 326
v. Brown, 38 Ark. 324 310, 316, 772
v. Brown, 170 Cal. 1 218, 535, 610
v. Brown, 129 Ga. 246 275, 425
v. Brown, 132 Ga. 712 587, 590
v. Brown, 24 Ga. App. 512 622, 623
v. Brown, 27 Idaho 205 242
v. Brown, 142 Ill. 409 60
v. Brown, 18 Ill. App. 445 693, 695, 704, 721
v. Brown, 164 Ill. App. 589 424, 446
v. Brown, 172 Ky. 754 767
v. Brown, 15 Mass. 389 478
v. Brown, 22 Mich. 242 701, 754
v. Brown, 22 Mich. 299 794
v. Brown, 135 Mich. 141 690
v. Brown, 10 Nebr. 349 475
v. Brown, 109 N. Y. S. 637 710
Brown v. Brown, 153 App. Div. 645 175
v. Brown, 83 Misc. (N. Y.) 597 698
v. Brown, 124 N. Car. 19 153
v. Brown (Va.), 24 S. E. 238 695
v. Brown, 53 Wis. 29 548
v. Brown, 1 Hag. Ecc. 523 370
v. Cleveland Trust Co., 187 N. Y. S. 85 213
v. Georgia Min. Co., 106 Ga. 516 723
v. Grove, 116 Ind. 84 552, 559
v. Long Mfg. Co., 213 Mich. 221 70
v. Odill, 104 Tenn. 250 9, 11, 14, 21, 41, 42, 49
v. Scott, 140 Md. 258 173
v. Steele, 23 Kans. 672 106
v. Westbrook, 27 Ga. 102 167, 669
Browne v. Burns, 5 Scotch Sess. Cas. (2d Ser.) 1288 704
Browning v. Browning, 89 Kans. 98 96, 169, 173, 175, 355, 356, 883
v. Headley, 2 Rob. (Va.) 340 607
Broyhill v. Norton, 175 Mo. 190 23, 30, 34, 49
Bruguiere v. Bruguiere, 172 Cal. 109 626
Bruner v. Bruner (Ind.), 135 N. E. 378 496, 516
Bruns v. Cope, 182 Ind. 289 165
Brunson v. Brunson, 94 S. Car. 11 694, 708, 910
Bryan v. Batcheller, 6 R. I. 543 606
v. Bryan, 34 Ala. 516 434
v. Harper, 177 N. Car. 308 120
v. Manning, 101 Misc. (N. Y.) 123 46
v. State, 63 Tex. Cr. 200 268
Bryant v. Bryant, 171 N. Car. 746 253, 356
Buchan v. Buchan, 201 Ill. App. 349 644
Buck v. Buck, 60 Ill. 105 793
Bucki v. Bucki, 70 Hun (N. Y.) 598 690, 704
Buckley v. Buckley, 50 Wash. 213 175, 187, 260, 365, 446, 620, 622, 624
Buckminster v. Buckminster, 38 Vt. 248 585, 595, 766
Bucknam v. Bucknam, 176 Mass. 229 638, 642

[*References are to Sections.*]

Buckner v. Buckner, 118 Md. 101 326
Budd v. Crea, 6 N. J. L. 370 30
v. Morgan, 187 Cal. 741 130
Budington v. Munson, 33 Conn. 481 136, 705
Buelna v. Rhyne, 139 Cal. 630 11, 26, 33
Bueter v. Bueter, 1 S. Dak. 94 636, 640, 643
Buffalo v. Letson, 33 Okla. 261 791
Buffington v. Cook, 147 Ga. 681 876
Buffum v. Buffum, 86 N. J. 119 807
Bukowski v. Kuznia (Minn.), 186 N. W. 311 24, 42, 48, 49
Bulke v. Bulke, 173 Ala. 138 218, 699
Bullock v. Bullock, 51 N. J. Eq. 444 776
v. Bullock, 85 Hun (N. Y.) 373 136
Bundy v. Dickinson, 108 Wash. 52 49, 76
Bunger v. Bunger, 85 Kans. 564 198, 365, 369, 372, 883
v. Bunger, 90 Kans. 39 883
Bunnell v. Bunnell, 25 Fed. 214 678
Burch v. Burch, 116 App. Div. 865 678
Burdick v. Burdick, 7 Wash. 533 503
v. Briggs, 11 Wis. 126 663
Burge v. Burge, 88 Ill. 164 592
Burgess v. Burgess, 25 Ill. App. 525 690, 696, 704
v. Burgess, 1 Duv. (Ky.) 287 727
v. Burgess, 47 N. H. 395 521
v. Burgess, 173 N. Y. S. 505 242, 899
Buritt v. Buritt, 53 Misc. (N. Y.) 24 594
Burke v. Burke, 44 Kans. 307 242
v. Scribner, 16 N. Bruns. 652 30
v. Shaver, 92 Va. 345 7, 21, 23, 36
Burkland v. Johnson, 50 Nebr. 858 677
Burks v. Shain, 2 Bibb. (Ky.) 341 7, 14, 23, 33, 34, 45
Burlen v. Shannon, 115 Mass. 438 441, 626
Burnett v. Simpkins, 24 Ill. 264 30, 46
Burnham v. Cornwell, 16 B. Mon. (Ky.) 284 23, 33, 34, 37
Burns v. Burns, 13 Fla. 369 705
v. Burns, 60 Ind. 259 665
v. Burns, 173 Ky. 105 276
Burns v. Burns, 61 Mo. App. 612 483, 486
v. Burns, 59 Tex. Civ. App. 549 913
v. State, 48 Ala. 195 55
Burr v. Burr, 7 Hill (N. Y.) 207 674, 676, 709
Burroughs v. Burroughs, 160 N. Car. 515 900
Burrow v. Burrow, 6 Lea. (74 Tenn.) 499 704
Burrows v. Purple, 107 Mass. 428 660, 677, 740, 741, 797, 802
Bursler v. Bursler, 22 Mass. 427 677, 752, 765
Burt v. Burt, 168 Mass. 204 311
Burtis v. Burtis, 161 Mass. 508 446, 449
v. Thompson, 42 N. Y. 246 14, 21
v. Burtis, 1 Hopk. (N. Y.) 557 195, 196, 366
Burton v. Burton, 184 Ky. 268 337, 587, 589, 590, 592, 684, 740, 745
v. Burton, 52 N. J. Eq. 215 281
Burtt v. Burtt (Utah), 204 Pac. 91 451, 643
Buseman v. Buseman, 83 W. Va. 496 587, 591, 594
Busenbark v. Busenbark, 150 Iowa 7 158
v. Busenbark, 33 Kans. 572 456
Bush v. Bush, 135 Ark. 512 424
v. Bush, 37 Ind. 164 585
Bushnell v. Bushnell, 15 Barb. (N. Y.) 399 790
v. Cooper, 289 Ill. 260 436, 559, 644
Buskie v. Buskie (Mo. App.), 203 S. W. 468 653
Buswell v. Buswell, 146 Iowa 52 237, 882
Butler v. Butler, 4 Litt. (Ky.) 201 636, 642, 644, 681
v. Butler, 38 N. J. Eq. 626 465
v. Butler, 134 N. Y. S. 108 518
v. Butler, 1 Pars. 329 293
v. Eschleman, 18 Ill. 44 30, 43
v. Washington, 45 La. Ann. 279 402
Butterfield v. Ennis, 193 Mo. App. 638 150, 158
Buttlar v. Buttlar, 57 N. J. Eq. 645 210, 215, 218
Button v. Knight (Vt.), 115 Atl. 499 160, 162
v. McCauley, 1 Abb. Dec. (N. Y.) 282 43

[*References are to Sections.*]

Button v. McCauley, 38 Barb. (N. Y.) 413 43
Butts v. Butts, 152 Ark. 399 621
v. Butts, 185 Iowa 954 242
Bylandt v. Bylandt, 6 N. J. Eq. 28 790
Byrd v. Surles, 77 N. Car. 435 62
Byrne v. Byrne (N. J.), 114 Atl. 754 329, 494

C

C——— v. C———, 158 Wis. 301 171, 919
Cabble v. Hawkins, 186 Ky. 114 107, 139
Cable v. Alvord, 27 Ohio St. 654 790
Cache v. Cache, 12 Ohio App. 140 446, 480, 620
Cadieux v. Cadieux, 180 Mich. 99 395, 397
Cadwalader v. Howell, 18 N. J. L. 138 444
Cain v. Cain, 145 Ark. 224 296
v. Cain, 188 App. Div. (N. Y.) 789 214, 217, 253
v. Milburn, 192 Iowa 705 430
Cairnes v. Cairnes, 29 Colo. 260 716, 792
Calame v. Calame, 24 N. J. Eq. 440 606
v. Calame, 25 N. J. Eq. 548 741
Caldwell v. Caldwell, 141 Iowa 192 587, 882
v. Caldwell, 70 Pa. Super. Ct. 332 328, 336, 338
v. State, 146 Ala. 141 268
v. Wells, 16 Idaho 459 579
v. Williams (Ky.) 118 S. W. 932 136
Calef v. Calef, 54 Maine 365 444, 514
Calhoun v. Calhoun, 146 Ga. 67 668
Calichio v. Calichio, 85 N. J. Eq. 213 280, 338
Call v. Call, 65 Maine 407 685, 720
Callahan v. Callahan, 33 Idaho 241 577, 580
v. Callahan, 65 Misc. (N. Y.) 172 624
v. Callahan, 7 Nebr. 38 685
Callery's Estate, In re, 226 Pa. St. 469 76, 136
Callies v. Callies, 91 Ill. App. 305 706
Calvert v. Calvert, 52 Utah 598 525, 594, 914
Camden v. Belgrade, 75 Maine 126 135, 268
Cameron v. Cameron, 2 Coldw. (Tenn.) 375 512
v. Cameron, 318 Dak. 335 911
Camire v. Camire, 43 R. I. 489 327, 430, 580
Campbell v. Arbuckle, 51 Hun (N. Y.) 641 29
v. Arbuckle, 123 N. Y. 662 49
v. Campbell, 67 Ga. 423 723
v. Campbell, L. R. 1 H. L. 182, 211 136
v. Campbell 90 Hun (N. Y.) 233 626
v. Campbell, 73 Iowa 482 699, 701, 711, 714, 719
v. Campbell, 21 Ky. L. 19 708
v. Campbell, 149 Mich. 147 281, 285
v. Campbell, 28 Okla. 838 622
v. Campbell, 6 Practice Rep. (Ont.) 128 704
v. Campbell, 37 Wis. 206 644, 653, 677, 696, 743, 765, 767, 798
v. Crampton, 2 Fed. 417 28, 110
v. Sassen, 2 Wils. & S. 309 661
v. Trosper, 108 Ky. 602 791
Canavan v. Canavan, 17 N. M. 503 808
v. Canavan, 18 New Mex. 640 793
Canavan, Ex parte, 17 N. Mex. 100 795
Canfield v. Canfield, 34 Mich. 519 280
Canine v. Canine, 13 Ky. L. 124 653
Canning v. Canning, 87 Vt. 492 233, 424, 432
Cannon v. Alsbury, 8 Ky. (1 A. K. Marsh.) 76 1, 3, 28, 33
Canther v. Canther, 46 Ind. App. 504 492, 514, 881
Cantor v. Cantor, 70 Pa. Super. Ct. 108 280
Capehart v. Carradine, 4 Strobh. (S. Car.) 42 30, 40
Capewell v. Capewell, 21 R. I. 101 848
Caples v. Buell (Tex. Civ. App.) 234 S. W. 429 620
Caras v. Hendrix, 62 Fla. 446 814
Carbajal v. Fernandy, 130 La. 812 280, 885
Carden v. Carden (Tenn.), 37 S. W. 1032 720, 722, 727
Cardwell v. Cardwell, 5 N. Y. Week. Dig. 332 703

[*References are to Sections.*]

Carey v. Carey, 2 Daly (N. Y.) 424 788
v. Mackey, 82 Maine 516 210, 217, 606
Cargile v. Wood, 63 Mo. 501 705
Cariens v. Cariens, 50 W. Va. 113 228, 589, 594, 768
Carl v. Carl, 166 N. Y. S. 961 212
Carley v. Carley, 73 Mass. 545 545
Carlin v. Carlin, 65 Ill. App. 160 714
Carling v. Carling, 78 N. J. Eq. 42 626
Carlisle v. Carlisle, 99 Iowa 247 641
v. Carlisle, 96 Mich. 128 579
Carlton v. Carlton, 78 Fla. 252 746
v. Carlton, 44 Ga. 216 793
v. Carlton, 72 Maine 115 606, 662
Carmichael v. Carmichael, 101 Ore. 172 528, 580
Carney v. Carney, 97 Ark. 117 868
v. Carney, 138 Tenn. 647 789
Carpenter v. Carpenter, 19 How. Pr. (N. Y.) 539 680, 703, 704
v. Carpenter, 30 Kans. 712 275, 283, 285, 444, 445, 475
v. Carpenter, 171 Mich. 572 211, 591
v. Carpenter, 78 N. H. 440 522, 545
Carr v. Carr, 6 Ind. App. 377 642, 644, 649
v. Carr, 185 Iowa 1205 675, 653, 656
v. Carr, 92 Ky. 552 555
v. Carr, 22 Gratt. (Va.) 168 677
v. Carr Co., 39 Cal. App. 53 675
Carris v. Carris, 24 N. J. Eq. 516 173, 176, 355, 356
Carroll v. Carroll, 42 La. Ann. 1071 636, 703
v. Carroll, 68 Mo. App. 190 695
v. Huston, 48 Mont. 524 803
Carson v. Carson, 173 Mich. 452 399
v. Carson (Iowa), 171 N. W. 584 283, 740, 882
Carsten v. Carsten, 90 N. J. Eq. 181 518, 576
Cartan v. Cartan (N. J.), 115 Atl. 353 242, 493
Carter v. Carter, 62 Ill. 439 519
v. Carter, 283 Ill. 324 608
v. Carter, 89 Kan. 367 620
v. Carter, 139 Md. 265, 114 Atl. 902 242
v. Carter, 109 Mass. 306 759
Carter v. Carter, 88 Mo. App. 302 447
v. Carter (Mo. App.), 229 S. W. 231 580
v. Lounger, 112 Ark. 483 218
Cartwright v. Bate, 83 Mass. 514 344
v. McGown, 121 Ill. 388, 391 55, 73, 137, 175, 705
Carty v. Carty, 70 W. Va. 146 441, 446
Caruthers v. Caruthers, 13 Iowa 266 279
Cary v. Cary, 144 App. Div. (N. Y.) 846 554
Case v. Case, 17 Cal. 598 705
v. Case, 205 Ill. App. 507 767
v. Case, 159 Mich. 491 281, 889
Casey v. Casey, 116 Iowa 655 673
v. Casey, 180 Mo. App. 605 411
v. Gill, 154 Mo. 181 48
Cash v. Cash, 201 Ill. App. 151 643, 646, 653
Cason v. Cason, 15 Ga. 405 792
Cass v. Cass. 34 La. Ann. 614 412
Cassan v. Cassan, 27 N. Mex. 256 684
Cassidy v. Leitch, 2 Abb. N. C. (N. Y.) 315 678
Cassidy's Estate, In re, 178 N. Y. S. 366 131
Casteel v. Casteel, 38 Ark. 477 660, 685, 772, 792, 796, 798
Caswell v. Caswell 120 Ill. 377 60
v. Caswell, 64 Vt. 557 305
v. Caswell, 84 W. Va. 575 620, 624
Cates v. Cates, 202 Mo. App. 352 545
v. McKinney, 48 Ind. 562 5, 6, 33, 34, 45
Catts v. Catts, 35 Pa. Super. Ct. 293 555
Caudill v. Caudill, 172 Ky. 460 587
Caujolle v. Ferrie, 23 N. Y. 90 705
Caulk v. Caulk, 91 Neb. 638 186, 894
Cave, In re, 26 Wash. 213 677, 785, 793
Caylor v. Roe, 99 Ind. 1 8, 9
Cayford's Case, 7 Greenl. (Maine) 57 705
Cevene v. Cevene, 143 Wis. 393 279, 919
Chaffee v. Chaffee, 14 Mich. 463 685, 690, 703, 716, 720, 723, 730
Chaires v. Chaires, 10 Fla. 308 660, 714
Chalfant v. Payton, 91 Ind. 202 123

[*References are to Sections.*]

Challoner, In re, 98 Fed. 82 686
Chamberlain v. Chamberlain, 68 N. J. Eq. 736 137, 175, 182, 836
v. Chamberlain, 71 N. Y. 423 705
v. Chamberlin, 193 App. (N. Y.) Div. 784 210, 589, 591
v. Williamson, 2 Maul & S. 408 25
Chambers v. Porter (Iowa) 183 N. W. 431 753
Chandler v. Chandler, 146 Ga. 32 751
v. Chandler, 13 Ind. 492 680
v. Chandler, 149 La. 427 587
v. Chandler (Va.) 112 S. E. 856 333
Chapline v. Stone, 77 Mo. App. 523 167
Chapman v. Brown, 192 Mo. App. 86 2, 31, 35, 43
v. Chapman, 13 Ind. 396 636, 670, 708
v. Chapman, 224 Mass. 427 626
v. Chapman, 194 Mo. App. 483 675
v. Chapman, 74 Nebr. 388 644
v. Chapman, 25 N. J. Eq. 394 379
v. Chapman, 70 W. Va. 522 546, 547, 605
v. Dismer, 14 App. D. C. 446 62
v. Johnston, 237 Mass. 502 173
v. Parsons, 66 W. Va. 307 605, 666, 677, 692, 695, 721
Chappell v. Chappell 45 Wash. 652 594
Chase v. Chase, 55 Maine 21 661, 668, 669
v. Chase, 6 Gray (Mass.) 157 447, 560
v. Chase, 105 Mass. 385 801
v. Chase, 29 Hun (N. Y.) 527 717, 724, 727
v. Fitz, 132 Mass. 359 8
v. McKenzie, 81 Ore. 429 606
Chase Petitioner, 26 R. I. 351 848
Chastain, Ex parte, 94 Ark. 558 794
Chatterton v. Chatterton, 231 Ill. 449 327, 328
Chaves v. Chaves, 79 Fla. 602 71, 72, 73, 648, 651
Chazin v. Chazin, 112 N. Y. S. 525 795
Cheatham v. Cheatham, 10 Mo. 296 279
Cheely v. Clayton, 110 U. S. 701 441
Cheever v. Wilson, 9 Wall. (U. S.) 108 620, 673, 675
Chellis v. Chapman, 125 N. Y. 214 41, 44, 46, 47, 48
Cheney v. Arnold, 15 N. Y. 345 24, 45
Chesley v. Chesley, 10 N. H. 327 41
Chestnut v. Chestnut, 77 Ill. 346 709
Chestnutt v. Chestnutt, 1 Spinks 196 280
Chicago v. Union Stock Yards Co., 164 Ill. 224 356
Chicago & E. I. R. Co. v. Randolph, 199 Ill. 126 39
Chiles v. Drake, 2 Metc. (Ky.) 146 47
Choate v. Choate, 3 Mass. 391 238, 240
Christensen v. Thompson, 123 Iowa 717 159
Christensen's Estate, In re, 17 Utah 412 197, 440
Christlieb v. Christlieb (Ind. App.), 125 N. E. 486 96
Christopher v. Christopher, 18 S. Car. 600 636
Chumos v. Chumos, 105 Kans. 374 587
Churan v. Sebesta, 131 Ill. App. 330 34, 42, 45
Church v. Church, 3 Mass. 157 237, 240
v. Church, 16 R. I. 667, 19 Atl. 244 427
Cignoni v. Cignoni, 139 La. 978 696
Cisco v. Cisco, 178 Ky. 745 214
Civille v. Civille, 22 Cal. App. 707 536
Cizek v. Cizek, 69 Nebr. 797 440, 677
Clancy v. Clancy, 66 Mich. 202 1, 5
Clapp v. Clapp, 97 Mass. 531 235, 239, 427
Clare v. Clare, 19 N. J. Eq. 37 248, 250
Clark v. Barney, 24 Okla. 455 137
v. Cassidy, 64 Ga. 662 815
v. Clark, 78 Ga. 79 721
v. Clark, 187 Ind. 25 158, 160
v. Clark, 19 Kans. 522 537
v. Clark, 62 Mass. 385 447, 620, 630
v. Clark, 97 Mass. 331 426
v. Clark, 191 Mass. 128 480

[*References are to Sections.*]

Clark v. Clark, 191 Mo. App. 278 448, 511
v. Clark, 115 Miss. 726 891
v. Clark, 143 Mo. App. 350 411, 432, 892
v. Clark, 44 Nev. 44 56, 72, 74, 76, 131
v. Clark, 78 N. J. Eq. 304 233, 424
v. Clark, 10 N. H. 380 196, 197, 198
v. Clark, 130 App. Div. (N. Y.) 610 793
v. Clark, 13 Daly (N. Y.) 497 792
v. Clark, 30 N. Y. Super. Ct. 284 725
v. Clark, 55 Okla. 67 277
v. Clark, 6 Watts & S. (Pa.) 85 199, 605, 709
v. Corey, 24 R. I. 137 21, 23
v. Field, 13 Vt. 460 57, 75, 174
v. Fosdick, 118 N. Y. 7 210, 217, 228
v. Hodges, 65 Vt. 273 48
v. Pendleton, 20 Conn. 495 8, 23, 49
v. Phillips, 4 Ky. L. 826 34
v. Reese, 35 Cal. 89 30
v. Reese, 26 Tex. Civ. App. 619 33, 34, 43
v. St. James' Church, 21 Hun (N. Y.) 95 141
v. Slaughter, 38 Miss. 64 529
Clarke v. Burke, 65 Wis. 359 636, 711, 719, 727, 732
v. Clarke, 11 Abb. Pr. (N. Y.) 228 173, 355
v. Lott, 11 Ill. 105 606
v. Lyon, 82 Nebr. 625 594, 623
Clarkson v. Clarkson, 20 Mo. App. 94 685
Claudius v. Melvin, 146 Cal. 257 529
Claunch v. Claunch (Tex. Civ. App.), 203 S. W. 930 913
Claxton v. Pool, 182 Mo. App. 13 158
Clay v. Clay, 21 Hun (N. Y.) 609 227, 462
v. Robertson, 30 Okla. 758 559
v. Waters, 178 Fed. 385 794
Clayton v. Clayton, 4 Colo. 410 132
v. Clayton, 71 W. Va. 656 572
v. Wardell, 4 N. Y. 230 705
Clemans v. Western, 39 Wash. 290 677
Clement v. Skinner, 72 Vt. 159 6
Clements v. Moore, 11 Ala. 35 33
Cline v. Cline, 183 Iowa 1255 587
v. Cline, 1 Phill. 383, 9 Leg. Int. 130 693
Clinton v. Clinton, 60 Mo. App. 296 279
Clisby v. Clisby, 160 Ala. 572 636, 640, 653
Clopton v. Clopton, 162 Cal. 27 639
v. Clopton, 10 N. Dak. 569 448
Close v. Close, 25 N. J. Eq. 526 276
Closz v. Closz, 184 Iowa 739 453
Clough v. Long, 8 Ohio App. 420 765
Clover v. Clover (Tex. Civ. App.) 224 S. W. 916 175
Clover's Estate, In re, 179 Cal. 313 211
Clow v. Chapman, 125 Mo. 101 152
Cloyd v. Trotter, 118 Ill. 391 678
Clubb v. Clubb, 23 Ky. L. 650 642, 646
Clutton v. Clutton, 108 Mich. 267 452, 465
Coad v. Coad, 87 Nebr. 290 70, 76, 182, 435, 833
v. Coad, 40 Wis. 392 700, 701, 714, 730
Coats v. Coats, 160 Cal. 671 187, 669, 869
Cobb v. Cobb, 82 Fla. 287 641, 648, 653
v. Cobb, 43 S. Dak. 388 545
Coble v. Eltzroth, 125 Ind. 429 35
Cochran v. Cochran, 35 Iowa 477 424
v. Cochran, 93 Minn. 284 425
v. Cochran, 42 Nebr. 612 636
Codd v. Codd (1727), 1 Bland's Ch. (Md.) 101 636
Codoni v. Donati, 6 Cal. App. 83 152
Coe v. Hill, 201 Mass. 15 212
Coffey v. Cross, 185 Ala. 86 798
Coffin v. Dunham, 62 Mass. 404 670, 723, 732
Coffman v. Finney, 65 Ohio St. 61 769, 709
Coger v. Coger, 48 W. Va. 135 678
Coggins v. Cannon, 112 S. Car. 225 30, 34
Cogswell v. Cogswell, 49 App. D. C. 31 184
v. Tibbetts, 3 N. H. 41 768
Cohagan v. Cohagan, 294 Ill. 439 448
Cohen v. Cohen, 3 Boyce (Del.) 361 197, 443, 873

[*References are to Sections.*]

Cohen v. Cohen, 11 Misc. (N. Y.) 704 685, 696, 730
v. Cohen, 150 Cal. 99 676, 680, 772
Cohn v. Cohn, 85 Cal. 108 430
v. Scott, 231 Ill. 556 585, 587, 589
Coil v. Wallace, 24 N. J. L. 291 34, 47
Colburn v. Colburn, 70 Mich. 647 445
v. Marble, 196 Mass. 376 28, 30, 43
Colby v. Colby, 59 Minn. 432 551, 555
Colcord v. Conroy, 40 Fla. 97 62
Cole v. Cole, 142 Ill. 19 6, 653, 660, 768
v. Cole, 23 Iowa 433 275, 279
v. Cole, 139 Iowa 609 610
v. Cole, 193 Mich. 655 462
v. Cole, 113 Maine 358 467, 490
v. Cole, 5 Sneed (Tenn.) 57 55, 85, 167, 386
v. Cole, 27 Wis. 531 413
v. Cottingham, 8 Car. & P. 75 37
v. Cunningham, 133 U. S. 107 678
v. Holliday, 4 Mo. App. 94 5, 14, 23, 30, 46
v. Johnson, 103 Ore. 319 151, 160
v. Tucker, 6 Tex. 266 47
Coleman v. Coleman, 198 Ala. 225 708, 865
v. Coleman, 23 Cal. App. 423 448, 499, 525
v. Coleman, 147 Ky. 383 338, 610
v. Coleman, 85 Ore. 99 904
v. James, 67 Okla. 169 Pac. 1064 842
v. McIntosh, 184 Ky. 370 38
v. State, 121 Tenn. 1 794
v. Vollmer (Tex.), 31 S. W. 413 107
Coles v. Coles, 2 Md. Ch. 341 661, 690, 704, 711, 714, 715, 754
Collard v. Collard, 7 Ohio App. 53 776
v. Burch, 138 Mo. App. 94, 119 S. W. 1009 134
Collett v. Collett, 170 Mo. App. 590 338, 427, 694, 708
Collette v. Collette, 211 Mich. 555 293, 326
Colletti v. Tranchina, 151 La. 403 241, 519
Collins v. Collins, 29 Ga. 517 723
v. Collins, 10 Hun (N. Y.) 272 710
v. Collins, 76 Kans. 93 587
v. Collins, 71 N. Y. 269 668, 695
v. Collins, 80 N. Y. 1 653, 661, 694, 695, 699, 701, 705, 711, 714
v. Collins, 62 N. Car. 153 210
v. Collins, 2 Brewst. (Pa.) 515 168, 358
v. Collins, 80 N. Y. 24 790
v. Collins, 2 Paige (N. Y.) 9 708, 714
v. Ryan, 49 La. Ann. 1710, 168, 358
v. Voorhees, 47 N. J. Eq. 555 137
Collinson v. Collinson, 18 Ves. 354 790
Colson v. Colson, 153 Ky. 68 589
Colt v. O'Connor, 59 Misc. (N. Y.) 83 188
Colvin v. Colvin, 15 Wash. 490 416
v. Reed, 55 Pa. St. 375 620
Combs v. Combs, 146 Ga. 112 690
v. Combs, 99 Kans. 626 594
Comer v. Taylor, 82 Mo. 341 45
Commonwealth v. Bakeman, 131 Mass. 577 225
v. Bowers, 121 Mass. 45 242
v. Caponi, 155 Mass. 534 132, 134, 268
v. Dill, 156 Mass. 226 135
v. Gamble, 36 Pa. Super. Ct. 146 705
v. Giles, 67 Mass. 466 467, 471
v. Graham, 157 Mass. 73 65, 96
v. Gray, 129 Mass. 474 242
v. Hayden, 163 Mass. 453 140, 143, 268
v. Henderschedt, 1 Kulp (Pa.) 42 640
v. Holt, 121 Mass. 61 705
v. Hurley, 14 Gray (Mass.) 411 136, 705
v. Hussey, 157 Mass. 415 225
v. Ingersoll, 145 Mass. 231 245
v. Jackson, 11 Bush (Ky.) 679 74, 136, 705
v. Johnson, 10 Allen (Mass.) 196 136
v. Kendall, 162 Mass. 221 447

[*References are to Sections.*]

Commonwealth v. Kenney, 120 Mass. 387 63, 136, 144, 267
v. Lane, 113 Mass. 458 63, 65, 631
v. Littlejohn, 15 Mass. 163 136, 138
v. Miller, 12 Phila. (Pa.) 569 686
v. Merriam, 31 Mass. 518 243
v. Munson, 127 Mass. 459 61, 63, 70
v. Murtagh, 1 Ashm. (Pa.) 272 268
v. Nichols, 114 Mass. 285 243
v. Norcross, 9 Mass. 492 138
v. Perryman, 2 Leigh (Va.) 717 110
v. Roosnell, 143 Mass. 32 225
v. Snelling, 32 Mass. 321 471
v. Squires, 97 Mass. 59 225
v. Steiger, 12 Pa. Co. Ct. 334 626
v. Stump, 53 Pa. St. 132 55, 71, 139, 705, 845
Compton v. Benham, 44 Ind. App. 51 705
v. Compton, 125 App. Div. (N. Y.) 859 794, 795
Comstock v. Adams, 23 Kans. 513 204, 420, 558
v. Commonwealth, 50 Mass. 205 225
Conant v. Conant, 10 Cal. 249, 256 228, 407, 427, 490
Conaway v. Shelton, 3 Ind. 334 38
Condon v. Condon, 8 Ohio App. 189 328
Cone v. Cone, 58 N. H. 152 302
Conley v. Conley, 152 Ga. 184 690
Conger v. Conger, 13 N. J. Eq. 286 329
v. Conger, 82 N. Y. 603 252
Conklin v. Conklin, 148 Ga. 640 549, 876
v. Conklin, 113 App. Div. (N. Y.) 743 704
v. Conklin, 186 N. Y. S. 191 708, 723
v. Conklin, 196 App. Div. (N. Y.) 607 716
Conlin v. Conlin, 163 Iowa 420 341
Conn v. Wilson, 2 Over. (Tenn.) 233 34, 44, 45
Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457 609
Connelley v. Connelley, 43 Okla. 294 903
Conner v. Pozo, 114 La. 562 436
Connolly v. Connolly, 33 S. Dak. 346 443, 911
v. Bollinger, 67 W. Va. 30 7, 14, 21, 31, 33
Connors v. Connors, 5 Wyo. 433 859
Conrad v. Bare, 29 Iowa Cir. Ct. 153 24, 32
v. Conrad, 124 App. Div. (N. Y.) 780 236
v. Everich, 50 Ohio St. 476 769
v. Williams, 6 Hill (N. Y.) 444 5
Continental Nat. Bank v. Thurber, 74 Hun (N. Y.) 632 678
Converse v. Converse, 81 Fla. 671 570
v. Converse, 9 Rich. Eq. (S. Car.) 535 537, 653
Cook v. Cook, 11 N. J. Eq. 195 276, 277
v. Cook, 32 N. J. Eq. 475 247, 280
v. Cook, 159 N. Car. 46 436, 465
v. Cook, 1 Barb. (N. Y.) 639 591
v. Cook, 56 Wis. 195 440, 441, 447, 449, 620, 678, 775
Cook, In re, 77 Cal. 220 60
Cooke v. Cooke, 164 N. Car. 272 196, 413, 900
v. Cooke, 2 Phil. Ecc. 40 690
v. Newell, 40 Conn. 596 720, 721, 722
Cooley v. State, 55 Ala. 162 261
Coolidge v. Neat, 129 Mass. 146 16, 29, 42
Coombs v. Coombs, 120 Maine 103 213, 214
Coon v. Coon, 163 Mich. 644 529, 565, 889
Coonce v. Coonce, 296 Ill. 585 577
Coons v. Coons (Mo. App.) 236 S. W. 358 427
Cooper v. Bower, 78 Kans. 156 11, 21
v. Cooper, 4 Ill. App. 285 644, 646
v. Cooper, 85 Ill. App. 575 694, 698, 708
v. Cooper, 160 Ill. App. 449 638, 653, 681, 708
v. Cooper, 185 Ill. 163 690
v. Cooper, 51 Ind. App. 374 285, 510, 881
v. Cooper, 102 Kans. 378 153
v. Cooper, 147 Mass. 370 188

[*References are to Sections.*]

Cooper v. Cooper, 17 Mich. 205 336, 425, 699, 720
v. Cooper, 82 N. J. Eq. 581 242
v. Mayhew, 40 Mich. 528 661
v. Olson, 170 Iowa 141 610
Cooper, Ex parte, 86 Kans. 573 585, 593
Coover v. Davenport, 1 Heisk. (Tenn.) 368 11, 12
Cope v. Cope, 103 Mo. App. 260 705
Copeland v. Boaz, 9 Baxt. (Tenn.) 223 218
v. Copeland, 73 Okla. ——, 175 Pac. 764 903
v. Copeland (Va.), 21 S. E. 241 16
Copping v. Termini, 135 La. 224 338
Corbett v. Corbett, 101 Kans. 1 607
Corbin v. Corbin, 16 Pa. Co. Ct. 448 702, 709
Corder v. Corder (Md.), 117 Atl. 119 168, 173
v. Speake, 37 Ore. 105 692, 721, 727
Corduan v. McCloud, 87 N. J. L. 143 8, 21, 37
Corey v. Corey, 81 Ind. 469 708
Corker v. Corker, 87 Cal. 643 62
Corley v. Corley, 8 Baxt. (Tenn.) 7 643
Cornelius v. Cornelius, 82 Okla. 195 158, 684
Corney v. Corney, 97 Ark. 117 554, 555
Cornish v. Cornish, 23 N. J. Eq. 208 334
Corvin v. Commonwealth, 131 Va. 649 620, 626
Corwin v. Walton, 18 Mo. 71 47
Cory v. Cory, 11 N. J. Eq. 400 641, 670
Coryell v. Colbaugh, 1 N. J. L. 77 44, 47
Coss v. Coss (Tex. Civ. App.) 207 S. W. 127 913
Cotter v. Cotter, 225 Fed. 471 195, 622
Cottle v. Johnson, 179 N. Car. 426 160, 162
Cottrell, Ex parte, 59 Cal. 417 794
Coulter v. Coulter, 124 Mo. App. 149 448
v. Coulter, 175 Mo. App. 1 646
v. Lumpkin, 94 Ga. 225 678
Countz v. Countz, 30 Ark. 73 609, 704
Coursey v. Coursey, 60 Ill. 186 277
Courtney v. Courtney, 4 Ind. App. 221 711, 716, 719, 727
Courtois v. Grand Lodge, A. O. U. W., 135 Cal. 552 609
Cover v. Davenport, 1 Heisk. (Tenn.) 368 43
Cowan v. Cowan, 10 Colo. 540 661, 665, 690
v. Cowan, 139 Mass. 377 181, 459
Coward v. Sutfin (Tex. Civ. App.), 185 S. W. 378 913
Cowden In re, 139 Cal. 244 794, 795
Cowdrey v. Cowdrey, 211 Mich. 305 427
Cowen v. Cowen (N. J.), 106 Atl. 366 327
Cowles v. Cowles, 112 Mass. 298 86, 177, 275, 281, 333
Cowls v. Cowls, 3 Gilman (Ill.) 435 585, 589
Cox v. Cox, 3 Add. Ecc. 276 710
v. Cox, 25 Ind. 303 594
v. Cox (N. J.), 110 Atl. 924 173
v. Cox, 19 Ohio St. 502 682, 767
v. Cox, 20 Ohio St. 439 661, 767
v. Cox, 98 Ore. 148 278, 350, 580
v. Edwards, 120 Minn. 512 30, 32, 35, 36
v. State, 117 Ala. 103 136
Coy v. Humphreys (Mo.), 125 S. W. 877 55
Cozard v. Cozard, 48 Wash. 124 425, 587
Cozza, In re, 13 Cal. 514 585, 587
Crabill v. Crabill, 22 Ore. 588 536
Crabtree v. Crabtree (Ark.), 242 S. W. 804 278, 587
Craig v. Craig, 90 Ark. 40 334
v. Craig, 163 Ill. 176 660, 709
v. Craig, 129 Iowa 192 290, 425
v. Craig, 110 Kans. 13 436
Crain v. Cavana, 62 Barb. (N. Y.) 109 663, 674, 676
Cralle v. Cralle, 81 Va. 773 677, 685
Cram v. Cram, 116 N. Car. 288 640, 653
v. Dudley, 28 N. H. (Frost) 537 662
Cramer v. Cramer, 106 Wash. 681 156, 159
v. Hurt, 154 Mo. 112 55

[*References are to Sections.*]

Crampton v. Crampton, 32 L. J. P. & M. 142 690
Crandall, In re, 196 N. Y. 127 436
Crane v. Crane, 128 Md. 214 244, 690
v. Crane, 62 N. J. Eq. 21 171, 173, 184, 247
v. Meginnis, 1 Gill & J. (Md.) 463 196, 277, 660
v. State, 94 Tenn. 86 268
Crane, Ex parte, 170 Mich. 651 631
Crapps v. Crapps, 148 Ga. 510 876, 790
v. Smith, 9 Ga. App. 400 876
Craufurd v. Blackburn, 17 Md. 49 132
Cravens v. Cravens, 4 Bush. (Ky.) 435 704
v. O'Shea, 75 Wash. 33 579
Crawford v. Crawford, 54 Pa. Super. Ct. 304 531
v. Russell, 62 Barb. (N. Y.) 92 123
v. Wilson, 4 Barb. (N. Y.) 520 444
Cray v. Cray, 32 N. J. Eq. 25 661
Creamer v. Creamer, 36 Ga. 618 462, 720, 724
Creasey v. Creasey, 168 Mo. App. 98 341, 639, 655
Creech v. Creech, 126 Mich. 267 580
Crehore v. Crehore, 97 Mass. 330 176, 356
Crenshaw v. Crenshaw, 276 Mo. 471 753
Crews v. Crews, 175 N. Car. 168 636, 644, 653, 655
v. Mooney, 74 Mo. 26 741
Crews, In re, 106 Kans. 438 587
Creyts v. Creyts, 133 Mich. 4 424
v. Creyts, 143 Mich. 375 709
Crim v. Crim, 176 N. Y. S. 68 215, 217
v. Crim, 66 Ore. 258 427
v. Crim, 80 Ore. 88 722
Cripe v .Cripe, 170 Cal. 91 153
Crites v. State, 74 Nebr. 687 794
Crittenden v. Schermerhorn, 39 Mich. 661 215, 681, 706
Croghan v. Croghan, 78 Fla. 455 284, 415
Crombie v. Crombie, 88 Wash. 520 795
Cronk v. Cronk, 19 Grant Ch. (U. C.) 283 655
Crook v. People, 16 Ill. 534 793
Crosier v. Craig (1888), 47 Hun (N. Y.) 83 48
Cross v. Cross, 55 Mich. 280 705
Crossett v. Brackett, 79 N. H. 102 26
Crouch v. Crouch, 193 App. Div. (N. Y.) 221 196, 427, 442, 465
v. Wartenberg, 86 W. Va. 664 55, 57, 172, 180
Crounse v. Crounse, 108 Va. 108 326, 334, 433
Crow v. Crow, 23 Ala. 583 336
v. Crow, 29 Ore. 392 275
v. Crow, 41 R. I. 258 909
Crowder v. Crowder, 125 Va. 80 791
Crowell v. Jeffries (Ind. App.), 134 N. E. 908 158
Crum v. Crum (Cal. App.), 207 Pac. 506 275, 518
Crumbley v. Crumbley, 94 Ore. 617 415, 746
Crump v. Morgan, 38 N. Car. 91 85, 385, 386, 458, 459
Crutcher v. Crutcher, 86 Miss. 231 294, 405
Csanyi v. Csanyi (N. J.), 115 Atl. 76 334, 335
Culbertson v. Board of Comrs., 52 Ind. 361 445
Cumming v. Cumming, 135 Mass. 386 225, 424, 427
v. Cumming, 127 Va. 16 211
Cummings v. Cummings, 133 Ky. 1 448
v. Cummings (Ky. App.), 117 S. W. 289 884
v. Cummings, 50 Mich. 305 580
Cummington v. Belchertown, 149 Mass. 223 180, 355
Cummins v. Cummins, 59 Mont. 225 684, 740
v. Cummins, 15 N. J. Eq. 138 426
Cuneo v. Cuneo, 40 Cal. App. 564 525
Cunningham v. Cunningham, 2 Dow, P. C. 482 705
v. Cunningham, 4 Dow. 482 705
v. Cunningham (Mo. App.), 206 S. W. 240 892
v. Cunningham, 206 N. Y. 341 65, 96
v. Cunningham, 48 Pa. Super. Ct. 442 644
v. Cunningham, 60 Pa. Sup. Ct. 622 281
v. Cunningham (Tex. Civ. App.), 210 S. W. 242 175
v. Irwin, 7 Serg. & Raw. (Pa.) 247 215
v. Reardon, 98 Mass. 538 344

[*References are to Sections.*]

Cupples v. Cupples, 31 Colo. 443 690
Cureton v. Cureton, 132 Ga. 745 585, 622, 876
v. Cureton, 117 Tenn. 103 636, 655
Curl v. Curl, 130 Cal. 638 575, 580
Curnen v. Curnen, 155 App. Div. (N. Y.) 536 621
Currier v. Gilman, 55 N. H. 364 678
v. Currier, 68 N. J. Eq. 797 336
Curry v. Curry, 1 Wils. (Ind.) 236 85, 386
Curtis v. Curtis, 29 Misc. 257 640
v. Curtis, 46 Wash. 664 594
v. Miller, 269 Pa. 509 151, 160
Cuchman v. Burritt, 14 Weekly. Dig. (N. Y.) 59 8
v. Cushman, 194 Mass. 38 427
v. Cushman, 80 Wash. 615 917
Cutter v. Cooper, 234 Mass. 307 157, 161
Cyr v. Walker, 29 Okla. 281 106
Czarra v. Czarra, 128 Ill. App. 433 721

D

Dabbs v. Dabbs, 196 Ala. 164 865
Dabelstein v. Dabelstein, 191 Iowa 808 278, 283, 350
Daboll v. Moon, 88 Conn. 387 116
Daggett v. Wallace, 75 Tex. 352 8, 33, 34, 41, 42, 43, 44, 45, 49
Dagnall v. Dagnall, 100 S. Car. 298 644
D'Aguilar v. D'Aguilar, 1 Hag. Ecc. 773 226, 281, 424, 711
Dahlquist v. Nevada Industrial Commission (Nev.), 206 Pac. 197 136
Dahne v, Superior Court, 31 Cal. App. 664 691
Dahnke v. Dahnke (Cal. App.), 202 Pac. 894 279
Daiger v. Daiger, 2 Md. Ch. 335 690, 701, 704, 711, 714
Dailey v. Dailey, 166 Mich. 170 594
Daily v. Daily, 64 Ill. 329 242, 246
Dakin v. Dakin, 1 Nebr. (Unof.) 457 292
Dale v. State, 88 Ga. 552 143, 268
Dallas v. Luster, 27 N. Dak. 450 559
Dallman v. Dallman, 159 Wis. 480 858
Dalrymple v. Dalrymple, 2 Hag. Con. 54 105 55, 70, 72, 75
v. Green, 88 Kans. 673 45, 47
Damon v. Damon, 28 Wis. 510 456, 680, 703
Damon's Case, 6 Greenl. (Maine) 148 268, 705
Danforth v. Danforth, 105 Ill. 603 553
v. Danforth, 88 Maine 120 329, 333, 342
Danielly v. Danielly (N. J. Eq.) 118 Atl. 335 280, 334
Daniels v. Benedict, 50 Fed. 347 553
v. Daniels, 9 Colo. 133 636, 690, 692, 695, 699, 703, 715
v. Daniels, 145 Iowa 422 594
v. Daniels, 56 N. H. 219 455, 502
v. Lindley, 44 Iowa 567 674, 676, 793, 797
Darcey v. Darcey, 29 R. I. 384 204
Dargies' Estate, In re, 162 Cal. 51 535
Darling v. Darling, 181 Mo. App. 211 280
v. Dent, 82 Ark. 76 705
Darman v. Darman, 38 Ind. App. 279 580
Darnell v. Darnell (Ill. App.), 67 Wash. L. Rep. 23 775
v. Darnell, 212 Ill. App. 601 622
Daroux v. Daroux (Cal. App.), 199 Pac. 1112 580
Darrow v. Darrow, 122 Ark. 346 277, 513
Darrow, In re, (Ind. App.), 83 N. E. 1026 30
Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 629 196
Daspit v. Ehringer, 32 La. Ann. 1174 200, 557
Dougherty v. Dougherty, 8 N. J. Eq. 540 701
D'Auvilliers v. De Livaudais, 32 La. Ann. 605 442, 456
Davenport v. Davenport, 106 Va. 736 288, 334
v. Holden, 95 N. J. L. 197 150, 159
David v. David, 27 Ala. 222 279
Davidson v. Davidson, 206 Ala. 493 130
v. Dingeldine, 295 Ill. 367 675, 991
Davie v. Padgett, 117 Ark. 544 3
Davis v. Commonwealth, 13 Bush. (Ky.) 318 261
v. Cox, 178 Ind. 486 8
v. Cummins (Mo.), 195 S. W. 752 187

[*References are to Sections.*]

Davis v. Davis, 29 App. (D. C.) 258 620
v. Davis, 48 App. D. C. 362 580
v. Davis (Cal. App.), 207 Pac. 923 580
v. Davis, 70 Colo. 37 622, 626
v. Davis, 134 Ga. 804 424, 425, 746, 876
v. Davis, 138 Ga. 8 795
v. Davis, 145 Ga. 56 644
v. Davis, 141 Ind. 367 713, 719, 727
v. Davis, 187 Iowa 407 791
v. Davis, 86 Ky. 32 283, 636
v. Davis, 102 Ky. 440 300
v. Davis, 140 Ky. 526 589, 592
v. Davis, 151 Ky. 116 644
v. Davis (Mo. App.), 206 S. W. 580 424, 580, 701, 708, 892
v. Davis, 19 N. J. Eq. 180 644
v. Davis, 90 N. J. Eq. 158 173, 180
v. Davis, 37 N. H. 191 399
v. Davis, 75 N. Y. 221 670, 701
v. Davis, 1 Abb. N. C. (N. Y.) 140 705
v. Davis, 78 App. Div. (N. Y.) 500 767
v. Davis, 150 N. Y. S. 636 594, 706, 707
v. Davis, 195 App. Div. (N. Y.) 430 211
v. Green, 91 N. J. Eq. 17 182
v. Hinman, 73 Nebr. 850 198, 204
v. Pryor, 112 Fed. 274 11
v. Pryor, 3 Ind. Ter. 396 45
v. Slagle, 27 Mo. 600 46, 47
v. Whitlock, 90 S. Car. 233 175, 910
Davis, Ex parte, 73 Ark. 358 794
Davol v. Howland, 14 Mass. 219 608, 663
Dawdy v. Dawdy, 154 N. Car. 556 900
Dawson v. Dawson, 18 Mich. 335 184
v. Dawson, 23 Mo. App. 169 310
v. Dawson, 37 Mo. App. 207 709, 711, 725
v. Dawson, 57 W. Va. 520 589
v. Dawson, 63 Tex. Civ. App. 168 283, 575
v. Della Torre, 116 S. Car. 338 620
Day v. Day, 5 Alaska 584 866
Day v. Day, 12 Idaho 556 714
v. Day, 15 Idaho 107 711, 716, 719
v. Day, 84 Iowa 221 685
v. Day, 71 Kans. 385 424, 427, 712, 720
v. Day, 168 Ky. 68 680
v. Day, 236 Mass. 362 168
v. Day, 4 Misc. (N. Y.) 235 588
Daywitt v. Daywitt, 63 Ind. App. 444, 158, 162
Dean v. Dean, 181 Mich. 398 293, 395
v. Dean, 48 Misc. (N. Y.) 149 721
v. Richmond, 5 Pick. (Mass.) 461 530, 605
v. Skiff, 128 Mass. 174 21, 37
v. Smith, 23 Wis. 483 790
Debenham v. Mellon, 5 Q. B. D. 394 665
De Bock v. De Bock, 43 Cal. App. 283, 160
DeCarriere v. DeColonein, 4 Vesey, Jr. 577 790
Decker v. Decker, 279 Ill. 300 644, 653
v. Decker, 56 Mont. 338 635, 642, 643, 653
v. Decker, 56 Ore. 381 904
De Cloedt v. De Cloedt, 24 Idaho 277 275, 283, 313, 518, 878
Deeds v. Deeds, 108 Kans. 770 723
Deeds v. Strode, 6 Idaho 317 188
Deemer v. Deemer, 7 Pa. Co. Ct. 554 696, 792
Deen v. Bloomer, 191 Ill. 416 686, 795
Deenis v. Deenis, 65 Ill. 167 647
De Ferrari v. De Ferrari, 220 Mass. 38 531
De Fierros v. Fierros (Tex. Civ. App.), 154 S. W. 1067 913
De Ford v. Johnson (Mo.), 177 S. W. 577 156, 162
v. Johnson, 152 Mo. App. 209 151, 161
v. Johnson, 251 Mo. 244 156, 614
De Graffenreid v. De Graffenreid, 147 App. Div. 825 622
DeGraw v. DeGraw, 7 Mo. App. 121 636, 670
De Haley v. Haley, 74 Cal. 489 427
Deke v. Huenkemeier, 289 Ill. 148 791
De la Montanya v. De la Montanya, 112 Cal. 101 678, 679, 682

[*References are to Sections.*]

Delaney v. Delaney, 71 N. J. Eq. 246 421
Delanoy v. Delanoy, 19 App. Div. N. Y. 295 795
De La Rama v. De La Rama, 201 U. S. 303 907
v. De La Rama, 241 U. S. 154 610
Delbridge v. Delbridge, 189 Iowa 1116 548
Delbridge v. Sears, 179 Iowa 526 882
DeLesdernier v. DeLesdernier, 45 La. Ann. 1364 312
Dell v. Superior Court of San Diego County (Cal. App.), 200 Pac. 85 530
De Llamosas v. De Llamosas, 62 N. Y. 618 723
Delle v. Delle, 112 Wash. 512 587, 592, 594
Delliber v. Delliber, 9 Conn. 235 424
Delor v. Delor, 159 Mich. 624 289, 889
v. Donovan, 157 Mich. 587 692, 889
Delpil v. Young, 51 La. Ann. 923 174
De Lukascevics v. Nagle, 89 N. J. Eq. 106 788
De Marco v. De Marco, 116 App. Div. (N. Y.) 304 427
De Meli v. De Meli, 67 How. Prac. (N. Y.) 20 445, 712
v. De Meli, 120 N. Y. 485 515, 678
Demelman v. Burton, 176 Mass. 363 512
Demrick v. Demrick, 214 Mich. 295 598
Denning v. Denning (Tex. Civ. App.), 99 S. W. 1029 496
Dennis v. Dennis, 68 Conn. 186 245, 253, 321
v. Harris, 179 Iowa 121 559
v. Perkins, 88 Kans. 428 218
Dennison v. Dennison, 52 Misc. (N. Y.) 37 699
Denny v. Denny, 90 Mass. 311 181, 466
v. Denny, 118 Va. 79 334, 587
Denslow v. Van Horn, 16 Iowa 476 30, 35, 44, 46
Densmore v. Densmore, 6 Mackey (D. C.) 544 276
v. Thurston, 114 Maine 554 42
Dent v. Pickens, 34 W. Va. 240 30, 34, 41, 43, 44, 45, 48
Denton v. Denton, 1 Johns. Ch. (N. Y.) 364 690, 708, 712, 715, 790
De Pass v. Winter, 23 La. Ann. 422 200
Derby v. Derby, 21 N. J. Eq. 57 426
v. Phelps, 2 N. H. 515 8
Derham v. Derham, 125 Mich. 109 159, 160
De Roche v. De Roche, 12 N. Dak. 17 285
Derritt v. Derritt, 66 Okla. 124 743
De Ruiter v. De Ruiter, 28 Ind. App. 9 791
Desbrough v. Desbrough, 29 Hun (N. Y.) 592 644, 704, 712, 715
Desch v. Desch, 55 Colo. 79 596
Desmare v. United States, 93 U. S. 605 445
De Souza v. De Souza (R. I.), 92 Atl. 983 528
Deusenberry v. Deusenberry, 82 W. Va. 135 425
De Vall v. De Vall, 57 Ore. 128 196
Devall v. Devall, 4 Desaus. (S. Car.) 79 636, 643, 751
Devanbagh v. Devanbagh, 5 Paige (N. Y.) 554 171, 195, 365, 369, 374, 376
v. Devanbagh, 6 Paige (N. Y.) 175 372
Develin v. Riggsbee, 4 Ind. 464 3, 32
Devers v. Devers, 115 Va. 517 341, 916
De Vide v. De Vide, 186 App. Div. (N. Y.) 814 414, 680
Devine v. Devine, 89 N. J. Eq. 51 215
De Vry v. De Vry, 46 Okla. 254 338, 341, 755
Dewees v. Dewees, 55 Miss. 315 660
Dewey v. Merrill (R. I.), 36 Atl. 835 27, 33
Dey v. Dey, 94 N. J. L. 342 156
Deyette v. Deyette, 92 Vt. 305 624
Deyoe v. Superior Court, 140 Cal. 476 198
Dicken v. Dicken, 38 Ga. 663 723
Dickerman v. Graves, 6 Cush. (Mass.) 308 614
Dickerson v. Brown, 49 Mass. 357 70, 73, 76
v. Dickerson (Tex. Civ. App.), 207 S. W. 941 329, 580, 913

[*References are to Sections.*]

Dickinson v. Dickinson, 54 Ind. App. 53 288, 881
v. Dickinson (Tex. Civ. App.), 138 S. W. 205 913
Dickson v. Dickson, 1 Yerg. (Tenn.) 110 96, 559
Dicus v. Dicus, 131 Md. 87 513, 698, 704, 887
Dietrich v. Davies (Pa.), 117 Atl. 915 24
v. Dietrich, 128 App. Div. (N. Y.) 564 705
Dietrick v. Dietrick, 88 N. J. Eq. 560 807
Dietz v. Dietz, 136 N. Y. S. 341 795
Diggs v. Diggs, 187 App. Div. (N. Y.) 859 424
Dilatush v. Dilatush, 86 N. J. Eq. 346 242
Dillon v. Dillon, 45 Cal. App. 191 492, 500, 580
v. Dillon, 60 Ga. 204 637
v. Dillon, 32 La. Ann. 643 278
v. Dillon, 103 Nebr. 322 218
v. Starin, 44 Nebr. 881 678
Dills v. Dills (Iowa), 181 N. W. 388 765
Di Lorenzo v. Di Lorenzo, 174 N. Y. 467 55, 173, 355, 356
v. Di Lorenzo, 78 App. Div. (N. Y.) 577 693
Dimmitt v. Dimmitt 167 Mo. App. 94 425, 589, 592
Dimond v. Dimond, 124 N. Y. S. 493 704
Dimpfel v. Wilson, 107 Md. 329 535, 539, 631
Dings v. Dings, 123 Ill. App. 318 448
Dinsmore v. Dinsmore, 128 Va. 403 420
Dinet v. Eigenmann, 80 Ill. 274 709
v. Pfirshing, 86 Ill. 83 685, 720, 722
Dion v. Dion, 92 Minn. 278 303
Directors of Poor of Delaware v. Mercer, 2 Clark (Pa.) 75 646, 649
Disborough v. Disborough (N. J. Eq.), 26 Atl. 852 281
v. Disborough, 48 N. J. Eq. 646 692
v. Disborough, 51 N. J. Eq. 306 685, 720, 730
Dishey v. Lishey, 2 Tenn. Ch. 1 701
Dismukes v. Dismukes, 1 Tenn. Ch. 266 511
Dithmar v. Dithmar, 68 N. J. Eq. 533 790
Ditmar v. Ditmar, 27 Wash. 13 595
Ditson v. Ditson, 4 R. I. 87 56, 442, 446, 447, 449, 480, 560
Dixon v. Dixon, 107 Misc. (N. Y.) 666 180, 605
v. Dixon, 76 N. J. Eq. 364 593, 795
Doan v. Doan, 3 Clark (Pa.) 7 411
Dodge v. Dodge, 98 App. Div. (N. Y.) 85 420
v. Rush, 28 App. D. C. 149 153
Doe v. Doe, 48 Utah 200 275, 285, 647, 914
v. Fleming, 4 Bing. 266 705
v. Horn, 1 Ind. 363 188
Doerr v. Forsythe, 50 Ohio St. 726 678
Doggett v. Doggett (Okla), 203 Pac. 223 639
Dole v. Gear, 14 Hawaiian Rep. 554 636
Dollock v. Sullivan, 53 Vt. 507 188
Domb v. Domb, 195 App. Div. (N. Y.), 526 326, 338, 704
Domschke v. Domschke, 138 App. Div. (N. Y.) 454 173, 899
Donahue v. Donahue, 159 Mo. App. 610 61, 124, 229, 420, 421, 892
Donald v. Donald, 21 Fla. 571 276
Donaldson v. Donaldson, 31 Idaho 180 275, 518, 585, 668, 878
v. Donaldson (Mo. App.), 215 S. W. 904 684, 730
v. Eaton, 136 Iowa 650 204
Donallen v. Lennox, 36 Ky. (6 Dana.) 89 7
Donato v. Frillot, 116 La. 199 200
Donley v. Donley, 150 Mo. App. 660 319, 395, 892
Donnelly v. Donnelly, 8 B. Mon. Ky.) 113 705
v. Donnelly, 25 Ky. L. 1543 721
v. Donnelly, 76 Pa. Super. Ct. 92 289, 411
v. Strong, 175 Mass. 157 173
v. West, 66 How. Prac. (N. Y.) 428 449
Donohue v. Donohue, 63 Misc. (N. Y.) 111 899
Donovan v. Donovan, 91 Mass. 140 176, 356
Dooley v. Dooley (N. J.), 115 Atl. 268 173, 181
Doolittle v. Doolittle, 166 Iowa 625 242

[*References are to Sections.*]

Doolittle v. Doolittle, 78 Iowa 691 283, 335, 730
Doose v. Doose, 198 Ill. App. 387 420
v. Doose, 300 Ill. 134 534
Doran v. Doran (Del.), 117 Atl. 24 329, 441
Dorgeloh v. Murtha, 92 Misc. (N. Y.) 279 57
Dorian v. Dorian, 298 Ill. 24 310, 404, 421, 580
Dorrance v. Dorrance, 257 Mo. 317 545
Dorsey v. Dorsey, 142 Minn. 279 653
v. Dorsey, 7 Watts (Pa.) 349 441
v. Dorsey, 52 Utah 73 590
v. Goodenow, Wright (Ohio) 120 711, 712, 720, 722
Doswell v. Doswell, 30 Del. 98 873
Doty v. Doty, 92 N. J. L. 660 334
v. Rensselaer County Mut. Fire Ins. Co., 194 App. Div. N. Y. 841 346
Dougherty v. Dougherty, 126 Ga. 33 652
v. Dougherty, 153 Ga. 487 275, 284
v. Dougherty, 8 N. J. Eq. 540 704
Doughty v. Doughty, 27 N. J. Eq. 315 449
v. Doughty, 28 N. J. Eq. 581 447, 483, 620, 626
Douglas v. Douglas, 13 Abb. Pr. N. S. (N. Y.) 291 704
v. Gausman, 68 Ill. 170 48, 49
v. State, 58 Tex. Cr. 122 534
Douglass v. Douglass, 81 Iowa 258 425
Dow v. Blake, 148 Ill. 76 553, 776
v. Dow (Conn.), 117 Atl. 507 334
v. Eyster, 79 Ill. 254 720, 722, 726
Dowdle v. U. S. Fidelity & Guaranty Co. (Tex. Civ. App.), 242 S. W. 771 131
Dowdy v. Dowdy, 154 N. Car. 556 334, 496
Dowie v. Becker, 149 La. 160 413, 463
Dowling v. Dowling, 183 Mo. App. 454 345, 411
Downing v. Downing, 7 Kulp. (Pa.) 138 690, 692
v. Downing, 108 Wash. 12 585
Downs v. Downs, 123 Ky. 405 622
v. Flanders, 150 Mass. 92 796
Doyle v. Doyle, 26 Mo. 545 636
v. Rolwing, 165 Mo. 231 606
Dracovich v. Dracovich (Cal. App.), 200 Pac. 44 525, 577, 580
Drake v. Drake, 76 N. H. 32 436
v. Drake, 21 S. Dak. 182 685, 720
Draper v. Draper, 68 Ill. 17 522, 789
Draughn v. State, 12 Okla. Crim. 479 55, 70
Drawdy v. Hesters, 130 Ga. 161 71, 136, 137, 705, 815
Dred Scott v. Sandford, 19 How. (U. S.) 393 105
Dreibelbiss v. Banner, 196 Mo. App. 236 20, 45, 49
Drennan v. Douglas, 102 Ill. 341 11, 20
Driver v. Driver, 94 Ga. 449 706
Droege v. Droege, 52 Mo. App. 84 644
Drollinger v. Drollinger, 57 Ind. App. 115 668
Drury v. Merrill, 20 R. I. 2 41, 42
Dubet v. Kirkland, 13 Ill. App. 622 28
Dudley v. Dudley, 151 Iowa 142 539, 631
v. Dudley, 86 N. J. Eq. 245 681
Duenser v. Supreme Council of Royal Arcanum, 262 Ill. 475 879
Duff v. Judson, 160 Mich. 386 42
Dufrene v. Johnson, 60 Nebr. 18 678
Dugan v. Dugan, 1 Duv. (Ky.) 289 690, 723, 729
Duke v. Duke, 72 N. J. Eq. 942 897
v. Fulmer, 5 Rich. Eq. (S. Car.) 121 56
Dulso v. Dulso, 170 App. Div. 67 467
Dumas v. State, 13 Tex. App. 464 74, 156, 268
Dummer v. Dummer (N. J.), 41 Atl. 149 641, 644, 646
Dunbar v. Dunbar, 190 U. S. 340 686
Dunbarton v. Franklin, 19 N. H. 257 835
Duncan v. Duncan, 119 Miss. 271 587, 589
v. Duncan, 10 Ohio St. 181 76
Dunham v. Dunham (Conn.), 117 Atl. 504 440
v. Dunham, 57 Ill. App. 475 449

[*References are to Sections.*]

Dunham v. Dunham, 57 Ill. App. 478 777
v. Dunham, 162 Ill. 589 198, 441, 447
v. Dunham, 82 N. J. Eq. 395 554
v. Jackson, 1 Paige (N. Y.) 629 790
Dunlap v. Clark, 25 Ill. App. 573 6, 41, 42
v. Dunlap, 49 La. Ann. 1696 287
Dunn v. Dunn, 114 Ark. 516 496
v. Dunn, 183 Ky. 841 675
v. Dunn, 150 Mich. 476, 14 Detroit Leg. N. 767 291
Dunnington v. Dunnington, 45 App. D. C. 277 708
Dunphy v. Dunphy, 161 Cal. 87 185, 869
v. Dunphy, 161 Cal. 380 85, 167, 386
Dunson v. State, 25 Ga. App. 172 169
Duntze v. Levett, Fac. Dec., 1816, p. 139 56
Dupes v. Dupes, 43 Cal. App. 67 184 Pac. 425 275, 580
Dupont v. Dupont, 10 Iowa 112 228
v. M'Adow, 6 Mont. 226, 9 Pac. 925 6, 34, 43, 47
Durand v. Her Husband, 4 Mart. (La.) 174 284, 433
Durham v. Durham (Ohio St.), 135 N. E. 280 635, 636
v. Durham, 10 Prob. Div. 80, 82 4, 5
Durland v. Durland, 67 Kans. 734 607
Durrell v. Durrell, 211 Ill. App. 281 766, 768
Dusbiber v. Melville, 178 Mich. 601 116
Duvall v. Duvall, 147 Ky. 426 594
v. Fuhrman, 3 Ohio Cir. Ct. 305 47
v. Thurman, 2 Ohio Cir. D. C. 171 30
v. Wellman, 124 N. Y. 156 123
Duxstad v. Duxstad, 16 Wyo. 396 685
v. Duxstad, 17 Wyo. 411 442, 448, 920
Dwelly v. Dwelly, 46 Maine 377 792, 793
Dwyer v. Nolan, 40 Wash. 459 436
Dye v. Dye, 9 Colo. App. 320 636
v. Dye, 140 App. Div. (N. Y.) 309 695, 899
Dyer v. Brannock, 66 Mo. 391 70, 831
v. Dyer, 5 N. H. 271 410
v. Dyer, 65 Wash. 535 585, 594
v. Lalor, 94 Vt. 103 1, 15, 21, 26, 33, 37, 42, 49
Dyott v. Henderson, 85 N. J. Eq. 338 424

E

Eames v. Eames, 133 Ill. App. 665 229, 421, 424, 427
v. Sweetser, 101 Mass. 78 344
Earl v. Earl, 79 N. J. Eq. 517 704
v. Earl, 81 N. J. Eq. 444 251, 465, 518
v. Earl, 83 N. J. Eq. 341 243
v. Godley, 42 Minn. 361 106
Earle v. Earle, 158 App. Div. 552 595, 596, 598
v. Earle, 60 Ill. App. 360 638, 681, 711, 719
v. Earle, 75 Ill. App. 351 685, 719, 730
v. Earle, 91 Ind. 27 545
v. Earle, 27 Nebr. 277 635, 636
Earling v. Earling, 117 Wash. 584 594
Early v. Early, 261 Fed. 1003 585, 588
Easley v. Easley, 173 N. Car. 530 900
East v. East, 148 Ark. 143 790, 795
Easter v. Easter, 75 N. H. 270 896
Eastes v. Eastes, 79 Ind. 363 792
Easton v. State, 39 Ala. 551 794
Eaton v. Eaton (Mo. App.), 237 S. W. 896 592, 594
v. Eaton, 66 Nebr. 676 59, 136, 137
v. Eaton, 2 P. & M. 51 700
Eberhart v. Eberhart (Minn.), 189 N. W. 592 592
v. Eberhart, 149 Minn. 192, 183 N. W. 140 589, 685
Ecker v. Ecker, 22 Okla. 873 677, 746
Edelman, In re, 148 Cal. 233 216
Edgar v. Edgar, 23 Pa. Super. Ct. 220 576
v. Richardson, 33 Ohio St. 581 607
Edge v. Griffin (Tex. Civ. App.), 63 S. W. 148 35
Edgerly v. Edgerly, 112 Mass. 53 566

[*References are to Sections.*]

Edgerton v. Edgerton, 12 Mont. 122 636, 643
Edison v. Edison, 56 Mich. 185 794
Edleson v. Edleson, 179 Ky. 300 124, 212, 213, 420
Edmonds v. Edmonds, 193 Iowa 87 433
v. Her Husband, 4 La. 489 790
v. Hughes, 115 Ky. 561 29, 30
Edmondson v. Johnson (Tex. Civ. App.), 207 S. W. 586 71
Edson v. Edson, 108 Mass. 590 60, 545, 550
Edwards v. Edson, 104 N. Y. S. 292 678
v. Edwards, 20 Grant Ch. (U. C.) 392 644
v. Edwards, 155 App. Div. (N. Y.) 904 644
v. Edwards, Wright (Ohio), 308 704
v. Ricks, 30 La. Ann. 926 47
v. State, 73 Tex. Cr. 380 268
Edwards, Ex parte, 183 Ala. 659 534, 865
Egbers v. Egbers, 79 Wash. 72 424
Egbert v. Greenwalt, 44 Mich. 245 234
Eggerth v. Eggerth, 15 Ore. 626 425, 462
Egidi v. Egidi, 37 R. I. 481 424, 425
Eichler, In re, 84 Misc. (N. Y.) 667 705
Eickhoff v. Eickhoff, 29 Colo. 295 260, 685, 695
Eichhoff's Case, 101 Cal. 600 180
Eidenmuller v. Eidenmuller, 37 Cal. 364 433, 653, 740, 743
Eigenmann v. Backof, 56 Ind. 594 33
Eikenbury v. Eikenbury, 33 Ind. App. 69 574
Eisenbach v. Eisenbach, 176 Mich. 354 565
Eisenbrock v. Eisenbrock, 187 App. Div. (N. Y.) 85 725
Eisenger v. Eisenger (N. J. Eq.), 100 Atl. 840 646
Eistedt v. Eistedt, 187 Mich. 371 425, 496
Eklund v. Hackett, 106 Wash. 287 151, 159
Elder v. Elder (Mo. App.), 186 S. W. 530 411, 425
Eldred v. Eldred, 62 Nebr. 613 636
v. Eldred, 97 Va. 606 705
Eldridge v. State, 126 Ala. 63 268
Eliason v. Draper, 2 Boyce (Del.) 1 152
Eliot v. Eliot, 77 Wis. 634 453, 666, 693, 712, 714
Elkhart County Lodge v. Crary, 98 Ind. 238 7
Elkins v. Hamilton, 20 Vt. 625 6
Ellebrecht v. Ellebrecht (Mo. App.), 243 S. W. 209 241, 242, 427, 580
Ellerbusch v. Kogel, 108 La. 51 200
Ellerd, Ex parte, 71 Tex. Cr. 285 585, 587, 592
Ellett v. Ellett, 157 N. Car. 161 210, 228, 241, 427, 900
Elliott v. Elliott, 34 Colo. 298 645
v. Elliott, 48 N. J. Eq. 231 642, 646
v. Northern Trust Co., 178 Ill. App. 439 608
Elliott's Estate, In re, 165 Cal. 339 631, 869
Ellis v. Ellis, 52 L. J. P. 99 692
v. Guggenheim, 20 Pa. St. 287 5, 36
v. Hearn, 132 App. Div. (N. Y.) 207 579
v. Kelsey, 195 N. Y. S. 126 136
Ellis, In re, 55 Minn. 401 198
Ellison v. Martin, 53 Mo. 575 667, 678
v. Mobile, 53 Ala. 558 199, 531
Ellsworth v. Shimer, 71 Misc. (N. Y.) 576 151
Elmendorf v. Elmendorf, 58 N. J. Eq. 113 678, 790
Elzas v. Elzas, 183 Ill. 160 713
Elzey v. Elzey, 1 Houst. (Del.) 308 167, 178
Emett v. Norton, 8 C. & P. 506 681
Emerson v. Emerson, 120 Md. 584 195, 197, 611, 681, 766, 772, 887
v. Emerson, 26 N. Y. S. 2912 700, 716
v. Shaw, 56 N. H. 418 705
Emery v. Emery, 104 Kans. 679 601
Emery v. Emery, 181 Mich. 146 217, 276, 433, 889
v. Neighbour, 7 N. J. L. 142 210, 215
Emery, In re, 81 Maine 275 62
Emmans' Estate, In re, 117 Wash. 182 139
Emory v. Emory (Del. Super.), 111 Atl. 540 242

[*References are to Sections.*]

Employer's Mut. Ins. Co. v. Morgulski, 69 Colo. 223 136
Enders v. Enders, 34 Idaho 381 685
Engelman v. Engelman, 213 Mich. 86 600
Engle v. Engle, 153 Iowa 285 229, 421
Englehardt v. Englehardt, 73 N. J. Eq. 744 334
Engleman v. Engleman, 97 Va. 487 730
English v. English, 27 N. J. Eq. 71 282
v. English, 32 N. J. Eq. 738 590
Ennis v. Ennis, 92 Iowa 107 411
Ensign v. Ensign, 54 Misc. (N. Y.) 289 446, 698, 704
Ensign, In re, 103 N. Y. 284 607
Enslin v. Enslin (N. J. Eq.), 37 Atl. 442 646, 655
Entsminger v. Entsminger, 99 Kans. 362 883
Erickson v. Erickson, 98 Kans. 244 160
Ericson v. Ericson, 114 Wash. 485 589, 594
Erkenbrach v. Erkenbrach, 96 N. Y. 456 677
Ervay v. Ervay, 120 Mich. 525 794
Erwin v. Erwin, 57 N. Car. (4 Jones' Eq.) 82 704
v. Erwin (Tex. Civ. App.), 40 S. W. 53 420
v. Erwin (Tex. Civ. App.), 231 S. W. 834 283, 288, 289, 493, 519
v. Jones (Mo.), 180 S. W. 428 7
v. Jones, 192 Mo. App. 326 5, 23, 32
v. Nolan, 280 Mo. 401 107
Espy v. Jones, 1 Ala. Sel. Cas. 454 45
v. Jones, 37 Ala. 379 5, 30, 34, 43
Estee v. Estee, 34 Okla. 305 425
Estes v. Merrill, 121 Ark. 361 808
Etheridge v. Etheridge, 149 Ga. 44 684
Etheridge v. Etheridge, 120 Md. 11 199, 329, 490, 887
Eubank, Ex parte, 206 Ala. 8 792, 796
Evans v. Evans, 154 Cal. 644 596, 600
v. Evans, 1 Hag. Con. 35, 4 Eng. Eccl. 310, 311 275, 276
Evans v. Evans, 93 Ky. 510 248, 337, 420
v. Evans, 43 Minn. 31 310, 605, 701
v. Evans, 125 Tenn. 112 596, 598
v. Steward, 18 Ky. L. 941 727, 793
Evatt v. Miller, 114 Ark. 84 808
Everson v. Everson, 101 Nebr. 705 548
Everett v. Everett, 119 Miss. 627 730
Eward v. Eward (Ind. App.), 125 N. E. 468 285, 433, 580
v. Eward, 72 Ind. App. 638 225, 685
Eysel's Estate, In re, 65 Misc. (N. Y.) 432 187

F

Fagan v. Fagan, 186 Iowa 1279 328, 336
v. Fagan, 82 Nebr. 388 496
Fahey v. Fahey, 43 Colo. 354 636, 653
Fairchild v. Fairchild, 43 N. J. Eq. 473 356, 645
v. Fairchild (N. J.), 13 Atl. 599 794
Falk v. Burke, 93 Kans. 93 13, 14, 20, 21, 31
Fall v. Fall, 75 Nebr. 104 778
v. Eastin, 215 U. S. 1 777
Faller v. Faller, 146 Mich. 84 644
v. Faller, 10 Nebr. 144 293, 399
Farber v. Farber, 64 Iowa 362 636, 646
Faris v. Faris (Nebr.), 185 N. W. 347 283, 289
Farley v. Farley, 94 Ala. 501 71, 173, 490
Farmers' Exch. Nat. Bank v. Drew, 48 Cal. App. 442 675
Farmers' Loan & Trust Co. v. Wagstaff, 194 App. Div. (N. Y.) 757 133
Farneman v. Farneman, 46 Ind. App. 453 153
Farnham v. Farnham, 73 Ill. 497 425
v. Farnham, 9 How. Pr. (N. Y.) 231 792
Farnsworth v. Farnsworth, 58 Vt. 555 399
Farr v. Farr, 190 Iowa 1005 131, 528, 534
v. Farr, 34 Miss. 597 493

[*References are to Sections.*]

Farrar v. Farrar, 41 Cal. App. 452 722, 740
Farrell v. Betts, 16 Ala. App. 668 724, 731
v. Farrell, 190 Iowa 919 594, 631
v. Farrell, 118 Maine 441 152
Farrell, In re, 196 Ala. 434 684
Farwell v. Farwell, 31 Maine 591 690
v. Farwell, 47 Mont. 574 79, 334, 421, 803
Faulk v. Faulk, 23 Tex. 653 456
Faulkner v. Faulkner, 90 Wash. 74 554, 555
Fauls v. Fauls, 153 App. Div. (N. Y.) 367 795
Fearnow v. Jones, 34 Okla. 694 842, 903
Fehl v. Fehl, 34 Pa. Co. Ct. 82 709
Fehr v. Fehr, 92 N. J. Eq. 316 171
Feigley v. Feigley, 7 Md. 537 467, 787, 790
Felger v. Etzell, 75 Ind. 417 6, 33, 34
Felix v. State, 18 Ala. 720 105
Fellers v. Howe, 106 Nebr. 495 48, 49
Fellows v. Allen, 60 N. H. 439, 49 Am. Rep. 328 62
v. Fellows, 8 N. H. 160 399
Felts v. Foster, 1 N. Car. 164 705
v. Foster, 3 N. Car. 102 705
Fensterwald v. Burk, 129 Md. 131 63, 112, 826
Fenton v. Reed, 4 Johns. (N. Y.) 52 136, 175
Fera v. Fera, 98 Mass. 155 334, 565
Ferdinandez v. Casey, 77 Tex. 452 678
Ferguson v. Ferguson, 145 Mich. 290 676
v. Ferguson, 1 Barb. Ch. (N. Y.) 604 247
v. Moore, 98 Tenn. 342 46
Ferlat v. Gojon, 1 Hopk. (N. Y.) 478 358
Fernald v. Fernald, 5 Pa. Super. Ct. 629 716
Ferrall v. Ferrall, 153 N. Car. 174 105
Ferrier v. Ferrier, 4 Edw. Ch. (N. Y.) 296 703
Ferris v. Ferris, 8 Conn. 166 369, 375
Ferry v. Troy Laundry Co., 238 Fed. 867 626
Fible v. Caplinger, 13 B. Mon. (Ky.) 464 14, 23, 33
Fickel v. Granger, 83 Ohio St. 101 610, 674, 902
Fidelity Ins. Co.'s Appeal, 93 Pa. St. 242 559
Fidelity Insurance Co.'s Appeal, In re, 121 Pa. St. 1 62
Fidler v. McKinley, 21 Ill. 308 16, 23, 30, 34, 42, 46, 47, 49
Field v. Field 15 Abb. N. C. (N. Y.) 434 660
Fielding v. Fielding, 67 Fla. 143 341, 494
Finch v. Finch, 160 Ill. App. 639 644
v. Finch, 89 N. J. Eq. 563 681
Finkelstein v. Barnett, 17 Misc. (N. Y.) 564 34
v. Finkelstein, 14 Mont. 1 705
Finkelstein, In re, 13 Mont. 425 685
Finlay v. Chirney, 20 Q. B. Div. 494 25
Finley v. Finley, 9 Dana (Ky.) 52 644, 680, 733
Finn v. Finn, 62 Iowa 482 636, 643, 703, 711, 712, 751
v. Finn, 62 How. Prac. (N. Y.) 83 435
v. Finn, 12 Hun (N. Y.) 339 136
Firman v. Firman, 109 Ill. 63 724
Firth v. Firth, 50 N. J. Eq. 137 447
Fischer v. Fischer, 18 N. J. Eq. 300 511
v. Fischer (N. J.), 114 Atl. 400 338
v. Hayes, 6 Fed. 63 794
Fischli v. Fischli, 1 Blackf. (Ind.) 360 636
Fisher v. Barber, 62 Tex. Civ. App. 34 42, 49
v. Bernard, 65 Vt. 663 95, 854
v. Fisher, 32 Iowa 20 765, 767
v. Fisher, 93 Md. 298 424
v. Fisher, 95 Md. 314 198
v. Fisher (Mo. App.), 207 S. W. 261 598, 675, 723, 740
v. Fisher, 74 Pa. Super. Ct. 538 229, 546
v. Fisher, 19 R. I. 53 798
v. Fisher, 54 W. Va. 146 330, 430
v. Kenyon, 56 Wash. 8 41, 48, 49
v. Oliver, 172 Mo. App. 18 42, 48, 61, 62
v. Parr, 92 Md. 245 679

[*References are to Sections.*]

Fisk v. Fisk, 22 La. Ann. 401 695
v. Fisk, 6 App. Div. (N. Y.) 432 173
Fisler v. Fisler, 85 N. J. Eq. 194 328
Fitts v. Fitts, 46 N. H. 184 410
v. Fitts, 14 Tex. 443 673
Fitzgerald v. Fitzgerald (Tex. Civ. App.), 168 S. W. 452 504
v. Fitzgerald, 1 Lee Ecc. 649 660, 690, 711
v. Gray, 59 Ind. 254 700
Fitzgerald, In re, 161 Cal. 319 120
Fitzgibbon's Estate, In re, 162 Mich. 416 70, 136, 137
Fitzpatrick v. Fitzpatrick, 127 Minn. 96 743
v. Fitzpatrick, 131 Tenn. 54 448
v. Fitzpatrick, 105 Wash. 394 675, 723
Fizette v. Fizette, 146 Ill. 328 270
Flack v. Flack, 180 N. Car. 594 585
Flaxel v. Flaxel, 101 Nebr. 799 436
Fleegle v. Fleegle, 136 Md. 630 327, 333
Fleetford v. Barnett, 11 Colo. App. 77 43, 45, 46
Fleischman v. Furgueson, 174 App. Div. (N. Y.) 310 211, 214, 216
Fleming v. Fleming, 95 Cal. 430 275, 283, 407
v. Fleming, 36 Nev. 135 895
v. Fleming, 4 Bing. 266 705
v. People, 27 N. Y. 329 138
v. West, 99 Ga. 778 678
Fletcher v. Henly, 13 La. Ann. 150 702
v. Ketcham, 160 Iowa 364 6, 40, 45
v. Osborn, 282 Ill. 143 118, 119
Flower v. Flower, 42 N. J. Eq. 152 447, 620
Floyd v. Calvert, 53 Miss. 37 76, 705, 830
Flynn v .Flynn, 171 Cal. 746 492, 511, 534
Fodor v. Kunie, 92 N. J. Eq. 301 95, 96, 160
Foley v. Foley, 120 Cal. 33 792
Folkenberg v. Folkenberg, 58 Ore. 267 587, 904
Follweiler v. Lutz, 112 Pa. St. 107 444
Folz v. Wagner, 24 Ind. App. 694 21, 23, 32, 33, 36
Fontana v. Fontana, 77 Misc. (N. Y.) 28 176
Foot v. Card, 58 Conn. 1 152
Foote v. Foote, 22 Ill. 425 653, 696, 767, 677
v. Foote (N. J. Eq.), 61 Atl. 90 310
v. Foote, 71 N. J. Eq. 273 327, 674
v. Foote (N. J. Ch.), 68 Atl. 467 767
v. Nickerson, 70 N. H. 496 210
Forbes v. Burgess, 158 N. Car. 131 187
Ford v. Ford, 4 Ala. 142 705
v. Ford, 201 Ala. 519 796
v. Ford, 104 Mass. 198 275, 276, 277, 467
v. Ford, 10 Abb. Pr. N. S. (N. Y.) 78 692
v. Ford, 43 N. Dak. 43 277
v. Ford, 25 Okla. 785 536
v. Stier, L. R. (1896) Prob. 1 57
Fordham v. Marrero, 273 Fed. 61 631
Foreman v. Foreman (Ind. App.), 131 N. E. 419 490
Forman v. Forman, 24 N. Y. S. 917 167
Forney v. Hallacher, 8 Serg. & R. (Pa.) 159 705
Fornshill v. Murray, 1 Bland (Md.) 479 195, 196, 440, 636
Forrest v. Forrest, 214 Mich. 297 425
v. Forrest, 10 Barb. (N. Y.) 46 790
v. Forrest, 2 Edm. Sel. Cas.. (N. Y.) 171 700
v. Forrest, 3 Abb. Pr. 144 708
v. Forrest, 16 N. Y. Super. Ct. 661 767
v. Forrest, 18 N. Y. Super. Ct. 672 685, 708, 709, 710
v. Forrest, 25 N. Y. 501 767
Forrester v. Forrester, 101 Miss. 155 424
Forsland v. Forsland, 46 Cal. App. 405 214
Fort Worth Ry. v. Robertson, 55 Tex. Civ. App. 309 136
Foss v. Foss, 100 Ill. 576 588, 694
v. Foss, 2 Ill. App. 411 660
v. Foss, 94 Mass. 26 173, 176, 356
v. Foss, 58 N. H. 283 442
v. Hartwell, 168 Mass. 66 595
Foster v. Foster, 130 Mass. 180 800
v. Foster (N. J.), 114 Atl. 333 328, 518

[*References are to Sections.*]

Foster v. Hanchett, 68 Vt. 319 30, 35, 36
v. Hawley, 8 Hun (N. Y.) 68 705
v. Means, Speers Eq. (S. Car.) 569 85, 355, 385
Foulkes v. Selway, 3 Esp. 236 28, 30
Fountain v. Fountain, 80 Ark. 481, 97 S. W. 656 695
v. Fountain, 150 Ga. 742 653
Fournier v. Clutton, 146 Mich. 298 676
Fowler v. Fowler, 138 Ky. 326 395, 884
v. Fowler, 131 La. 1088 885
v. Fowler, 4 Abb. Pr. (N. Y.) 411 704, 710
v. Fowler, 131 N. Car. 169, 173 64
v. Fowler, 61 Okla. 280 696, 684, 795
v. Fowler, 31 Ore. 65 644
Fox v. Davis, 113 Mass. 255 211, 530
v. Fox, 143 App. Div. (N. Y.) 483 528
v. Fox (Tex. Civ. App.), 179 S. W. 883 448
Foxwell v. Foxwell, 118 Md. 471 536, 887
Foy v. Foy, 35 N. Car. 90 434
Frakes v. Brown, 2 Blackf. (Ind.) 295 678
Francis v. Francis, 108 Kans. 220 598, 684, 740
v. Francis, 31 Grat. (Va.) 283 636, 660, 668
v. Outlaw, 127 Md. 315 151, 158
Frank v. Berry, 128 Iowa 223 156, 159
v. Frank, 178 Ill. App. 557 334
Franke v. Franke, 96 Cal. xvii 176, 356
Frankenberg v. Frankenberg, 190 Ill. App. 444 565
Franklin v. Franklin, 154 Mass. 515 57, 217, 228, 343
v. Franklin, 190 Mass. 349 338, 340
v. Franklin, 40 Mont. 348 198, 300, 803
v. Lee, 30 Ind. App. 31 820
Frantz v. Frantz, 11 Pa. Co. Ct. 467 301
Frary v. Frary, 10 N. H. 61 441
Fraser v. Fraser, 87 N. J. Eq. 633 334
Frasher v. State, 3 Tex. App. 263 59, 196
Fratello v. Fratello, 118 Misc. (N. Y.) 584 168
Fratini v. Caslini, 66 Vt. 273 151, 159
Frazer v. Frazer, 71 Pa. Super. Ct. 382 492
Fred v. Fred, 67 N. J. Eq. 495 646
Freda v. Bergman, 77 N. J. Eq. 46 175, 897
Frederick v. Culler (S. Car.), 109 S. E. 889 143
v. Morse, 88 Vt. 126 162
Freeburn v. Freeburn, 107 Wash. 646 352, 675
Freeland v. Freeland, 92 Wash. 482 587
Freeman v. Belfer, 173 N. Car. 581 199, 531
v. Bennett (Tex. Civ. App.), 195 S. W. 238 35, 45
v. Freeman, 136 Ark. 288 242
v. Freeman, 238 Mass. 150 232, 577, 580
v. Freeman, 49 N. J. Eq. 102 693, 695, 720
v. Freeman, 82 N. J. Eq. 360 228, 336
v. Freeman, 8 Abb. N. C. (N. Y.) 174 727
v. Freeman, 126 App. Div. (N. Y.) 601 476, 487
v. Freeman, 31 Wis. 235 714
Freemont v. Freemont, 26 Ont. L. R. 6 640
Freidrich v. Freidrich, 230 Mass. 59 888
French v. French, 302 Ill. 152 640, 642, 650, 651
v. French, 74 Misc. (N. Y.) 626 175, 621
Freund v. Freund, 71 N. J. Eq. 524 639
v. Freund, 72 N. J. Eq. 943 620
Frey v. Frey, 61 Colo. 581 792
Freyer v. Freyer, Richardson's Equity Cases, 92 849
Fricke v. Fricke, 124 Ill. App. 39 525
Frickel v. Frickel, 4 Misc. (N. Y.) 382 704
Friebe v. Elder, 181 Ind. 597 553
Friedmeyer v. Friedmeyer (Mo. App.), 194 S. W. 746 276
Friend v. Friend, 53 Mich. 543 553
v. Friend, 65 Wis. 412 685, 704, 713, 715

[*References are to Sections.*]

Frisby, Petition of (Del. Orph.), 110 Atl. 673 136
Frith v. Frith, 18 Ga. 273 356, 661, 669, 692, 693, 704
v. Frith, 189 Iowa 201 290
Fritts v. Fritts, 36 Ill. 31 411
Fritz v. Fritz, 138 Ill. 436 276, 281, 333
Fritzinger v. Ahrens, 151 Ill. App. 396 49
Fronk v. Fronk, 159 Mo. App. 543 153
Frost v. Brisbin, 19 Wend. (N. Y.) 11 444
v. Frost, 17 N. H. 251 339
v. Frost, 85 N. J. Eq. 571 242, 424
v. Knight, L. R. 7 Ex. 111 9, 14, 21
v. Vought, 37 Mich. 65 3, 20
Fry v. Fry (N. J.), 100 Atl. 839 328
Fuller v. Dame, 18 Pick. (Mass.) 472 123
v. Fuller, 40 Ala. 301 64, 96, 179, 353, 630
v. Fuller, 33 Kans. 582 175
v. Robinson, 230 Mo. 22 160
Fuller's Estate, In re, 250 Pa. 78 705
Fullhart v. Fullhart, 109 Mo. App. 705 708, 727
Fullington v. Fullington, 106 Wash. 239 594
Fulmer v. Fulmer, 13 Phila. (Pa.) 166 368
Funk v. Funk (Mo. App.), 223 S. W. 780 610
Furth v. Furth, 97 Ark. 272 70, 808
v. Furth (N. J.), 39 Atl. 128 653
Furthmann v. Furthmann, 155 App. Div. (N. Y.) 202 471

G

G——, v. G——, 67 N. J. Eq. 30 750
Gabisso, Succession of, 119 La. 704 65
Gadsby v. Gadsby, 65 Ore. 309 600
Gagush v. Hoeft, 198 Mich. 263 7
Gaillard v. Gaillard, 23 Miss. 152 329
Gaines v. Gaines, 9 B. Mon. (Ky.) 295 196, 660, 709
v. Green Pond Iron Mining Co., 32 N. J. Eq. 86 139
v. Poor, 3 Metc. (Ky.) 503 210, 211, 640
Gaines v. Relf, 12 How. (U. S.) 472 140, 268
Gall v. Gall, 114 N. Y. 109 136
Gallaher v. Gallaher (Tex. Civ. App.), 214 S. W. 516 442, 444, 448
v. Gallagher, 89 Wis. 461 673
v. Gallagher, 174 Wis. 32 587
Galland v. Galland, 38 Cal. 265 636, 643, 670, 673, 751
Galusha v. Galusha, 108 N. Y. 114 798
v. Galusha, 116 N. Y. 635, 6 L. R. A. 487 212, 217, 218, 228
Gamble v. Gamble, 57 Ill. App. 183 712, 715
v. Rucker, 124 Tenn. (16 Cates) 415 912
Gamblin v. Gamblin, 52 Tex. Civ. App. 479 448, 492, 496
Gane v. Gane, 45 N. Y. Super Ct. 355 796
Gant v. Gant, 10 Humphrey (Tenn.) 464, 53 Am. Dec. 736 792
Gans v. Gans, 157 Ky. 775 641, 653
Gansz v. Gansz, 59 N. Y. S. 955 685, 720, 730
Garard v. Garard, 2 Barb. Ch. (N. Y.) 73 708
Garcia v. Garcia, 60 Misc. (N. Y.) 198 335
v. Garcia, 25 S. Dak. 645 180, 911
Gard v. Gard, 204 Mich. 255 176
v. Mason, 169 N. Car. 507 121
Gardenhire v. Gardenhire, 2 Okla. 484 798
Gardner v. Arnett, 21 Ky. L. 1 29, 49
v. Gardner, 142 Ark. 292 520, 528
v. Gardner, 232 Mass. 253 63, 175, 631
v. Gardner, 68 Mass. 434 471, 467
v. Gardner, 2 Gray (Mass.) 434 424
v. Gardner, 23 Nev. 207 276
Garland v. Garland, 50 Miss. 694 636, 665, 670
v. Garland, 66 Wash. 226 396
Garmong v. Henderson, 112 Maine 383 21, 33, 37
v. Henderson, 114 Maine 75 21, 30

[*References are to Sections.*]

Garmong v. Henderson, 115 Maine 422 30, 36, 37
Garner v. Garner, 56 Md. 127 446, 480, 667, 678, 679
v. State, 9 Ala. App. 60 261
Garnett v. Garnett, 114 Mass. 347 673
v. Garnett, 114 Mass. 379 181, 430
Garrett v. Garrett, 252 Ill. 318 312, 427, 433, 879
Garrett, In re, 2 Hughes (U. S.) 235 686
Garrison v. Garrison, 31 Ky. L. 1209 338, 643, 644
Garsed v. Garsed, 170 N. Car. 672 496, 746
Garver v. Garver, 52 Colo. 227 198
v. Garver, 145 Mo. App. 353 492, 503
v. Graham, 6 Kans. App. 344 787
Gaskill v. Dixon, 3 N. Car. 350 30
Gaskin v. Gaskin, 150 Ga. 756 723
Gass v. Gass (Tex. Civ. App.), 182 S. W. 1195 168
Gastauer v. Gastauer, 132 La. 941 412, 885
Gaster v. Gaster, 90 Nebr. 529 218
Gaston v. Gaston, 114 Cal. 542 197, 680
Gately Outfitting Co. v. Vinson (Mo.), 182 S. W. 133 681
Gates v. Gates, 192 Ky. 253 329
v. Gates, 87 W. Va. 603 594
Gathings v. Williams, 27 N. Car. 487 85, 385
Gato v. Christian, 112 Maine 427 546, 559, 561
Gatto v. Gatto, 79 N. H. 177 55, 57, 173, 180
Gauerke v. Kiley, 171 Wis. 543 45, 48
Gavin v. Burton, 8 Ind. 69 32
Gay v. Gay, 84 Ala. 38, 4 So. 42 62
v. Gay, 146 Cal. 237 684, 685, 698, 720, 730
Gaylord v. Gaylord, 57 N. Car. 74 696, 703
Geary v. Geary, 102 Nebr. 511 595
Gebhard v. Gebhard, 25 Misc. (N. Y.) 1 625
Gechter v. Gechter, 51 Md. 187 789
Gehlbach v. Gehlbach, 219 Ill. App. 503 767
Geiger v. Payne, 102 Iowa 581 34, 38, 45, 49
Geise v. Schultz, 65 Wis. 487 45
Geiselman v. Geisselman, 134 Md. 453 427, 500
Geisinger v. Conners, 130 La. 922 335, 338
Geisler v. Geisler, 30 Ky. L. 430 731
Geisseman v. Geisseman, 34 Colo. 481 580
Gelbman v. Gelbman, 194 App. Div. (N. Y.) 137 242
Gelwicks v. Gelwicks, 160 Iowa 675 551
Gellatly v. Gellatly, 185 Mich. 382 395, 399
Gemundt v. Shipley, 98 Md. 657 679
George v. George, 130 Ga. 608 698
v. George, 190 Ky. 706 446, 448, 494, 636, 648, 651
v. George, 143 La. 1032 446, 885
v. George, 1 P. & M. 554 700, 708
Gerard v. Gerard, 2 Barb. Ch. (N. Y.) 73 794
Gercke v. Gercke, 100 Mo. 237 663
Gerlinger v. Frank, 74 Ore. 517 41
Germaine v. Germaine, 204 Mich. 640 277, 889
German v. German, 57 Mich. 256 433, 511
v. German, 137 Md. 424 225, 335, 242, 245
German Savings and Loan Soc. v. Dormitzer, 192 U. S. 125 626
Germon v. Hickey, 18 La. Ann. 454 200
Germond v. Germond, 6 Johns. Ch. (N. Y.) 347 240
v. Germond, 4 Paige (N. Y.) 643 708, 709, 719, 727, 743
Gernerd v. Gernerd, 185 Pa. St. 233 152
Gerrein v. Michie, 122 Ky. 250 709
Gerzeback, Ex parte, (Cal. App.), 208 Pac. 318 795
Gethin v. Gethin, 31 L. J. P. & M. 43 420
Getzelson v. Bernstein, 15 Misc. (N. Y.) 627 45
Gewirtz v. Gewirtz, 189 App. Div. (N. Y.) 483 545, 765
Ghisalberti v. Calamari, 143 La. 507 885
Gholston v. Gholston, 31 Ga. 625 411
Gibbons v. Gibbons, 75 Ore. 500 596

[References are to Sections.]

Gibson v. Gibson, 203 Ala. 466 580, 701, 740
v. Gibson, 81 Misc. (N. Y.) 508 625
v. Gibson, 24 Nebr. 394 135
v. Gibson, 67 Wash. 474 281
v. Gibson, 46 Wis. 449 456, 789, 790
v. Patterson, 75 Ga. 549 709
Giese v. Giese, 107 Ill. App. 659 644
v. Schultz, 53 Wis. 462 34, 36, 45
v. Schultz, 65 Wis. 487 42, 45
v. Schultz, 69 Wis. 521 45, 49
v. Shooks, 65 Wis. 487 45
Gilbert v. Gilbert, 48 Hun N. Y. 618 708
v. Gilbert, 151 Ga. 520 600, 765
v. Gilbert, 83 Ohio St. 265 624, 776, 902
v. Hayward, 37 R. I. 303 196, 660, 690
v. Randazzo, 112 La. 1055 580
Gildersleeve v. Gildersleeve, 88 Conn. 689 445, 620, 625, 626
Giles v. Little, 104 U. S. 291 120
Gill v. Gill, 213 Mich. 384 427
Gilley v. Gilley, 79 Maine 292 595, 606
Gilmore v. Gilmore, 5 Jones Eq. (N. Car.) 284 787
v. Mathews, 67 Maine 517 33
Gilpin v. Gilpin, 12 Colo. 504 465, 588
Gilsey v. Gilsey, 198 Mo. App. 505 218
Ginther v. Ginther, 56 N. Y. L. J. 132 204
Girdner v. Girdner (Mo. App.), 230 S. W. 382 643
Gittings v. Gittings, 197 Mich. 446 889
Giusto v. Giusto, 80 N. J. Eq. 355 244
Given v. Given, 25 Pa. Super. Ct. 467 580
v. Marr, 27 Maine 212 606, 663
Givernaud v. Givernaud, 81 N. J. Eq. 66 559
Glass v. Bennett, 89 Tenn. 478 153
v. Glass, 114 Mass. 563 60, 265
v. Glass, 116 Wash. 638 746
v. Johnson, 297 Ill. 149 120
Glasscock v. Glasscock, 94 Ind. 163 465
v. Shell, 57 Tex. 215 33, 36
Glaude v. Peat, 43 La. Ann. 161 475
Gleason v. Gleason, 12 Wkly. Notes Cas. (Pa.) 408 665
v. Gleason, 4 Wis. 64 511
Glenn v. Glenn, 44 Ark. 46 690, 696, 703
v. Glenn, 84 Wash. 215 290
v. Hill, 50 Ga. 94 720, 722
Gloster v. Gloster, 23 App. Div. (N. Y.) 336 642
Glover v. Glover, 16 Ala. 440 636, 642, 749
v. Glover, 18 Ala. 367 636
v. Glover, 151 Ga. 574 651
v. Glover, 193 Mo. App. 648 313
Gloyd v. Superior Court in and for Los Angeles County, 44 Cal. App. 39, 185 Pac. 995 436, 530, 580
Glusker v. Glusker, 177 N. Y. S. 582 215
Glynn v. Glynn, 139 Ill. App. 185 653, 723
v. Glynn, 8 N. Dak. 233, 77 N. W. 594 673, 693
Gobble v. Orrell, 163 N. Car. 489 607
Goddard v. Wescott, 82 Mich. 180 16, 28, 30, 35, 43 47
Goeldner v. Goeldner, 158 Iowa 415 427, 882
Goerner v. Goerner (Wis.), 187 N. W. 976 399
Goff v. Goff, 54 W. Va. 364 788
v. Goff, 60 W. Va. 9 677
Going v. Going, 144 Tenn. 303 765
Goings v. Goings, 90 Nebr. 148 427
Goldbeck v. Goldbeck, 18 N. J. Eq. 42 336
Goldberg v. Goldberg, 72 Ind. App. 477 741
v. Goldberg, 237 Mass. 279 641
Golden v. Golden, 102 Ala. 353 692
v. Golden, 36 Pa. Super Ct. 648 334
Goldfish v. Goldfish, 193 App. Div. (N. Y.) 686 753
Goldie v. Goldie, 123 Iowa 175 655
Golding v. Golding, 6 Mo. App. 602 313
v. Golding, 74 Mo. 123 685
Goldsmith v. Goldsmith, 6 Mich. 285 685, 692, 710, 711
Goldstein v. Sachs, 138 Md. 503 14
Gollehon v. Gollehon, 123 Va. 504 916
Gonduin v. Gonduin, 14 Cal. App. 285 176, 869
Gooch v. Gooch, 108 Kans. 416 157
v. Gooch, 38 Okla. 300 626

[*References are to Sections.*]

Good v. Good, 122 Va. 30 916
Goodall v. Thurman, 1 Head. (Tenn.) 209 30, 34, 47, 49
Goode v. Goode, 2 Swab. & T. 253 427
Goode's Estate, In re, 188 N. Y. S. 188 55, 131
Goodheart v. Ransley, 11 Ohio Dec. 655 167
Goodheim v. Goodheim, 2 Swab. & Tr. 250 677
Goodman v. Goodman, 26 Mich. 417 411
v. Goodman (Tex. Civ. App.), 224 S. W. 207 588
Goodsell's Appeal, In re, 55 Conn. 171 62
Goodspeed v. Goodspeed, 204 Mich. 44 587, 725, 889
Goodwin v. Goodwin, 158 App. Div. (N. Y.) 171 536, 631
v. Thompson, 2 Greene (Iowa) 329 95, 821
Goolsby v. State, 24 Ga. App. 330 624
Gorbrandt v. Gorbrandt, 131 Ky. 395 644
Gorden v. Gorden, 283 Ill. 182 705
Gordon v. Gordon, 111 Ga. 845 710
v. Gordon, 141 Ill. 160 175, 266, 428, 792
v. Gordon, 128 Mo. App. 710, 107 S. W. 410 492
v. Gordon, 88 N. Car. 45 425
v. Gordon, 77 N. H. 597 427
v. Gordon, 89 N. J. Eq. 535 330, 511, 897
v. Gordon, 208 Pa. 186 575
v. Gordon, 91 S. Car. 245 910
v. Munn, 87 Kans. 624 480
Gorham v. Gorham, 40 App. Div. 564 576
Gorman v. State, 23 Tex. 646 263
Goset v. Goset, 112 Ark. 47 868
Goshen v. Richmond, 86 Mass. 458 387
Goss v. Goss, 29 Ga. 109 636, 670, 702, 793, 797
Gossett v. Patten, 23 Kans. 340 727
Gouch v. Gouch, 69 Misc. (N. Y.) 436 626
Gough v. Farr, 3 C. & P. 631 21
Gould v. Gibson, 180 Mo. App. 477 623
v. Superior Court, 47 Cal. App. 197 530, 675
v. Gould, 78 Conn. 242 59, 85, 87, 356
v. Gould, 42 Mass. 382 237, 502
Gould v. Gould, 1 Metc. (Mass.) 382 455
v. Gould, 61 Misc. (N. Y.) 120 722, 723
v. Gould, 192 N. Y. S. 572 628
v. Gould, 194 N. Y. S. 745 445, 625, 628
v. Gould, 63 Wash. 484 917
Goulette v. Goulette, 114 Wash. 689 791
Gourlay v. Gourlay, 16 R. I. 705 319
Govane's Case, 2 Bland's Ch. (Md.) 570 636
Governor v. Rector, 10 Humph. (Tenn.) 57 95, 851
Grace, Ex parte, 12 Iowa 208 793
Graft v. Graft, 76 Ind. 136 283
Graham v. Graham, 38 Colo. 453 596
v. Graham, 140 Tenn. 328 596
v. Graham, 54 Wash. 70, 102 Pac. 891 545, 558
v. Graham, 149 Wis. 602 525, 533, 546
v. McRae, 147 Ga. 49 121
v. Martin, 64 Ind. 567 5, 6, 14, 33
Graly v. Graly, 31 How. Pr. 475 796
Grand Lodge K. of P. v. Barnard, 9 Ga. App. 71 876
Grannis v. Superior Court, 146 Cal. 245 198
Grant v. Grant, 53 Minn. 181 282
v. Grant, 171 Mo. App. 317 643, 644
v. Grant, 84 N. J. Eq. 81 198, 528, 530
v. Grant, 5 S. Dak. 17 685
v. Willey, 101 Mass. 356, 41, 42
Graves v. Cole, 19 Pa. St. 171 711, 716
v. Graves, 36 Iowa 310 636, 641, 643, 644, 670, 721
v. Graves, 132 Iowa 199 551
v. Graves, 108 Mass. 314 668, 672, 744, 765, 767
v. Graves, 2 Paige (N. Y.) 62 711, 722, 723
v. Graves, 174 N. Y. S. 615 218
v. Graves, 50 Ohio St. 196 751
v. Graves, 48 Wash. 664 610
v. Rivers, 123 Ga. 224 33
Graw v. Graw (Ky. App.), 121 S. W. 654 884
Gray v. Gray, 15 Ala. 779 334, 336
v. Gray (Ark.), 98 S. W. 975 424, 531
v. Gray, 65 Ga. 193 203, 747
v. Gray, 127 Ga. 345 793
v. Gray, 74 Ill. App. 509 708

[*References are to Sections.*]

Gray v. Gray, 31 L. J. P. & M. 83 420
v. Gray, 44 N. Dak. 89 765
v. Gray, 85 Misc. (N. Y.) 584 433
v. Gray, 143 N. Y. 354 692
Grbic, Ex parte, 170 Wis. 201, 196, 790
Great Northern Ry. Co. v. Johnson, 254 Fed. 683 70, 71, 80
Green v. Green, 77 Fla. 101 95, 167, 814
v. Green, 52 Iowa 403 587
v. Green, 147 Ky. 608 609
v. Green (Ky. App.), 153 S. W. 775 884
v. Green, 125 Md. 141 427
v. McDowell (Mo. App.), 242 S. W. 168 63
v. Spencer, 3 Mo. 318 5, 6, 23, 30, 45
v. State, 58 Ala. 190 55, 59, 196, 198, 705
Greenawalt v. McEnelley, 85 Pa. St. 352 513
Greenberg v. Ergang, 179 N. Y. S. 647 42, 49
Greenburg v. Greenburg, 134 App. Div. (N. Y.) 419 701, 704
v. Greenburg, 134 App. Div. (N. Y.) 419 685
Greene v. Greene, 2 Gray (Mass.) 361 551, 553
v. Greene, 49 Nebr. 546 660, 673
Greenleaf v. Greenleaf, 6 S. Dak. 348 765
Greenhow v. James, 80 Va. 636 59, 105
Greenup v. Stoker, 2 Gillman (7 Ill.) 608 41
v. Stoker, 8 Ill. 202 23
Greenwood v. Curtis, 6 Mass. 358 64
v. Greenwood, 96 Kans. 591 610
Gregg v. Gregg, 37 Ind. App. 210 153, 158, 162
Grego v. Schneider (Tex. Civ. App.), 154 S. W. 361 600
Gregorson, In re, 160 Cal. 21 55, 59, 85, 96, 173, 385
Gregory v. Gregory, 78 Maine 187 59, 447
Gregory, Ex parte, 85 Tex. Cr. 115 789
Greims v. Greims, 80 N. J. Eq. 233 424, 511
Greinstein v. Greinstein, 44 Nev. 174 675
Gresham v. Peterson, 25 Ark. 377 790
Gridley v. Wood, 215 Ill. App. 423 798
Grierson v. Grierson, 156 Cal. 434 275, 334, 494, 504, 869
Griffin v. Griffin, 130 Ga. 527 16, 358, 490
v. Griffin, 173 Ky. 636 596
v. Griffin, 8 B. Mon. (Ky.) 120 639, 642, 643, 644, 746
v. Griffin, 177 Mich. 623 424, 594
v. Griffin, 47 N. Y. 134 185, 636, 660, 661, 692, 693, 712, 721
v. Griffin, 23 How. Pr. (N. Y.) 189 700
v. Griffin, 95 Ore. 78 623, 594
v. Griffin, 54 Tex. Civ. App. 619 480, 913
Griffith v. Griffith, 162 Ill. 368 372, 580
v. Griffith, 151 Ga. 411 690
v. Griffith, 77 Nebr. 180 424
v. Griffith, 89 N. Car. 113 706
Grigsby v. Reib, 105 Tex. 597 55, 59, 70, 71, 852
Grillo v. Sherman-Stalter Co., 195 App. Div. (N. Y.) 362 140
Grim v. Grim, 126 Va. 245 519
Grimm's Estate, 131 Pa. St. 199 136
Grimstad v. Johnson, 61 Mont. 18 732
Gring v. Lerch, 112 Pa. St. 244 2, 16, 29, 34, 36
Griswold v. Griswold, 23 Colo. App. 365 631, 810
Grobe's Estate, In re, 127 Iowa 121 123
Gross v. Gross, 110 Misc. (N. Y.) 278 601
v. Gross, 70 W. Va. 317 152, 153, 158
v. Hochstim, 72 Misc. (N. Y.) 343 28, 35, 43
Grossman's Estate, In re, 263 Pa. 139, 143 620
Groth v. Groth, 69 Ill. App. 68 673
Grove, Ex parte, 83 Kans. 238 598
Grover v. Zook, 44 Wash. 489 16, 28, 29
Groves v. Barto, 109 Wash. 112 594
Groves' Appeal, 68 Pa. 143 796, 797
Groves' Appeal, In re, 37 Pa. St. 443 643
Grubbs v. Pence, 24 Ky. L. 2183 14, 23, 33

[*References are to Sections.*]

Grubbs v. Sult, 32 Gratt. (Va.) 203 25
Grube v. Grube, 65 App. Div. (N. Y.) 239 714
Gruhl v. Gruhl, 123 Ind. 86 704, 712, 715, 721
Grundy v. Grundy, 92 N. J. Eq. 687 244, 252
Gruner v. Gruner, 183 Mo. App. 157 333, 457, 510, 518
Guardians of the Poor v. Nathans, 2 Brewst. (Pa.) 149 705
Guenther v. Jacobs, 44 Wis. 354 674, 676
Guerin v. Guerin, 45 Wash. 486 587
Guess v. Smith, 100 Miss. 457 891
Guggenheim v. Guggenheim, 189 Ill. App. 151 548, 558
v. Wahl, 138 App. Div. 269 624
v. Wahl, 203 N. Y. 390 624
Guillot v. Guillot, 42 R. I. 230 351, 565
Gulick v. Gulick, 41 N. J. L. 13 2, 20, 29
Gulland v. Gulland, 62 W. Va. 671 572
Gully v. Gully (Tex.), 231 S. W. 97 596
Gummison v. Johnson, 149 Minn. 329 620
Gunder v. Tibbetts, 153 Ind. 591 34, 45
Gundry v. Gundry, 11 Okla. 423 690, 702
Gunn v. Gunn, 205 Mich. 198 534, 536, 889
Guptill v. Verback, 58 Iowa 98 30
Gust v. Gust, 70 Wash. 695 242, 244, 467
v. Gust, 78 Wash. 414 755, 788, 798
Gustin v. Gustin, 59 Ore. 226 580
Guthery v. Ball, 206 Mo. App. 570 167, 181
Guthrey's Estate, In re, 205 Mo. App. 664 165
Gutmann v. Gutmann, 178 N. Y. S. 833 212, 725

H

Haddock v. Haddock, 75 App. Div. 565 685, 730
v. Haddock, 109 App. Div. (N. Y.) 502 684, 720
v. Haddock, 201 U. S. 562 197, 447, 775
Haddon v. Haddon, 36 Fla. 413 694
Haden v. Ivey, 51 Ala. 381 107
Hagenson v. Hagenson, 258 Ill. 197 4, 879
Hagert v. Hagert, 22 N. D. 290 636, 673, 697
Hagle v. Hagle, 68 Cal. 588 636
Hague v. Hague, 85 N. J. Eq. 537 518
Hagy v. Hagy, 76 Pa. Super. Ct. 288 242
Hahn v. Bettingen, 81 Minn. 91 41, 42, 44, 49
v. Hahn, 136 Ill. App. 301 497
v. Hahn (N. J. Eq.), 115 Atl. 652 328, 336, 344
Haines v. Haines, 35 Mich. 138 690, 793, 796
Hair v. Hair, 10 Rich. Eq. (S. Car.) 163 338, 636, 643, 644, 645, 646, 655
Hairston v. Hairston, 27 Miss. 704 444
Hakes v. Brown, 213 Mich. 278 528
Halbrook v. State, 34 Ark. 511 136, 142, 175, 268
Hale v. Hale (Ky. App.), 127 S. W. 475 884
v. Hale, 47 Tex. 336, 342, 26 Am. Rep. 294 427
v. Hale, 137 Ky. 831 327
v. Hale, 40 Okla. 101 218
v. Ruthven, 20 L. T. R. N. S. 404 1
Haley v. Haley, 44 Ark. 429 592
Hall v. Hall, 174 Cal. 718 158
v. Hall, 141 Ga. 361 596, 757
v. Hall, 86 Mass. 39 427
v. Hall, 172 Mich. 210 467, 767
v. Hall, 77 Miss. 741 685
v. Hall, 131 N. Car. 185 579
v. Hall, 139 App. Div. (N. Y.) 120, 123 N. Y. S. 1056 621
v. Hall, 117 Wash. 615, 201 791
v. Hall, 69 W. Va. 175 326, 328, 335, 338, 427
v. Industrial Comm., 165 Wis. 364 64
v. Potter, 3 Lev. 411 123
v. Whipple (Tex. Civ. App.), 145 S. W. 308 594
v. Wright, 96 Eng. C. L. Rep. 746 15, 29
Hall, Ex parte, 125 Ark. 309 795
Halleman v. Halleman, 69 Ga. 476 709
Hallett v. Collins, 10 How. (U. S.) 174 5, 70
Hallock v. Hallock, 4 How. Pr. (N. Y.) 160 696, 704

[References are to Sections.]

Halls v. Cartwright, 18 La. Ann. 414 312
Halness v. Anderson, 110 Minn. 204 49
Halpine v. Halpine, 52 Pa. Super. Ct. 80 444
Halstead v. Halstead, 74 N. J. Eq. 596 211, 217
Halsted v. Halsted, 21 App. Div. (N. Y.) 466 685, 721, 796
v. Halsted, 11 Misc. (N. Y.) 592 720, 730
Haltenhof v. Haltenhof, 25 Ill. App. 236 525
Halter v. Van Camp, 64 Misc. (N. Y.) 366 626
Ham v. Twombly, 181 Mass. 170 420
Hamill v. Talbot, 72 Mo. App. 22 678
Hamilton v. Hamilton, 1 Bell, App. Cas. 736, 9 Clark & F. 327 705
v. Hamilton, 89 Ill. 349 420
v. Hamilton, 100 Ore. 404 283, 580, 592
v. Hamilton, 87 W. Va. 534 335, 511
v. McNeil, 150 Iowa 470 536, 614
v. United States, 41 App. D. C. 359 9
Hamlin v. Grogan, 257 Fed. 59 131, 136
Hammick v. Bronson, 5 Day (Conn.) 290 705
Hammond v. Hammond, Clarke Ch. (N. Y.) 151 690, 701
v. Hammond (Mass.), 132 N. E. 724 310, 424, 519, 580
v. Hammond, 103 Nebr. 860 589, 594
v. Hammond, 15 R. I. 40 399, 424
Hampton v. Hampton, 87 Va. 148 426, 511
Hancock v. Hancock, 55 Fla. 680 198, 276, 411, 490, 528, 575, 576
Hancock's Estate, In re, 156 Cal. 804 621
Hand v. Hand, 11 Ohio Dec. 202 25 Wkly. L. B. 214 793
Handlan v. Handlan, 37 W. Va. 486 790
Handy v. Handy, 124 Mass. 394 304, 427
Hanks v. Naglee, 54 Cal. 51 7
Hann v. De Freest, 178 N. Y. S. 414 211
Hanover v. Turner, 14 Mass. 227 560
Hanrahan v. Hanrahan, 170 Mich. 79 755
Hanscom v. Hanscom, 6 Colo. App. 97 636, 655
Hansell v. Hansell, 15 Pa. Co. Ct. 514 430
Hansen v. Hansen, 27 Cal. App. 401 397
v. Hansen, 103 Ore. 17 277, 600
v. Hansen (Ore.), 203 Pac. 613 198
Hansing v. Hansing, 76 Okla. 34 685
Hansley v. Hansley, 32 (N. Car.) 506 225
Hanson v. Hanson, 111 Mass. 158 475
v. Hanson, 78 N. H. 560 896
v. Hanson (Ore.), 142 Pac. 348 904
v. Johnson, 141 Wis. 550 48, 49
Hantz v. Sealy, 6 Bin. (Pa.) 405 705
Harbeck v. Harbeck, 103 N. Y. 714 705
Hard v. Splain, 45 App. D. C. 1 210
Hardin v. Hardin, 17 Ala. 250 325, 335
v. Hardin, 168 Ind. 352, 81 N. E. 60 620, 623
Harding v. Alden, 9 Maine 140 55, 196, 441, 442, 475, 626, 663, 678
v. Harding, 40 Ill. App. 202 700, 704
v. Harding, 79 Ill. App. 621 653, 690, 720
v. Harding, 144 Ill. 588 704, 708, 721, 723
v. Harding, 180 Ill. 592 653, 685
v. Harding, 205 Ill. 105 685
v. Harding, 22 Md. 337 334
v. Harding, 16 S. Dak. 406 678
v. Harding, 198 U. S. 317 620, 776
Hardwich v. Hardwich, 130 Iowa 230 160
Hardy v. Collins, 136 La. 467 596
v. Hardy, 97 Cal. 125 639, 641, 642
Hare v. Gibson, 32 Ohio St. 33 681
v. Hare, 10 Tex. 355 447, 490
v. McGue, 178 Cal. 740 204
Harkins v. Harkins (Iowa), 99 N. W. 154 573
Harkness v. Hyde, 98 U. S. 476 679
Harl v. Harl, 24 Ky. L. 2163 285

[*References are to Sections.*]

Harlan v. Harlan, 154 Cal. 341 598, 600
v. Harlan (Tex. Civ. App.), 125 S. W. 950 852
Harlow v. Harlow, 150 Iowa 173 642
Harman v. Harman, 16 Ill. 85 130, 136, 705
Harmer v. Harmer, 3 Jur. N. S. 168, 5 Week. Rep. 413 674
Harmon v. Harmon, 152 Ark. 129 636, 653
v. Harmon, 21 Del. 152 665
v. Harmon, 5 Penn. (Del.) 152 714, 771
v. Harmon, 111 Kans. 786 229, 587
Harnett v. Harnett, 55 Iowa 45 647
Harper v. Harper, 29 Mo. 301 433
Harrell v. Harrell, 39 Ind. 185 690, 709, 712, 713
Harrigan v. Harrigan, 135 Cal. 397 330, 430
Harringer v. Keenan (Wash.), 201 Pac. 306 159, 160
Harrington v. Harrington, 107 Mass. 329 467, 471, 511, 517
v. Harrington, 10 Vt. 505 636, 670
Harrington, In re, 140 Cal. 244 144
Harris v. Hardy, 3 Hill (N. Y.) 393 790
v. Harris, 65 Fla. 50, 61 600
v. Harris, 8 Ill. App. 57 605
v. Harris, 109 Ill. App. 148 644, 724
v. Harris (Mo. App.), 223 S. W. 771 427
v. Harris, 83 App. Div. (N. Y.) 123 424
v. Harris, 115 N. Car. 587 620
v. Harris (Tex. Civ. App.), 230 S. W. 224 528
v. Harris, 71 Wash. 307 600
v. Tison, 63 Ga. 629 25
Harrison v. Carlson, 45 Colo. 55 44
v. Gage, 1 Ld. Raymond 386 24
v. Harrison, 20 Ala. 629 424, 425, 450, 647, 776
v. Harrison, 115 La. 817, 40 So. 232 345
v. Harrison, 117 Md. 607 475
v. Harrison, 49 Mich. 240 694, 711, 719
v. Harrison, 94 Mich. 559 176, 356
v. Harrison, 201 Mo. App. 465 211, 213, 218
Harrison v. Harrison, 46 N. J. Eq. 75 465
v. Harrison, 13 P. E. 180 676
v. State, 22 Md. 468 63, 110, 826
Harry v. Dodge, 66 Misc. (N. Y.) 302 624
Harryman v. Roberts, 52 Md. 64 678
Hart v. Hart, 31 Colo. 333 685, 711, 719
v. Hart, 11 Ind. 384 712
v. Hart, 68 N. H. 478 283
v. Knapp, 76 Conn. 135 156
Harteau v. Harteau, 31 Mass. 181 442, 514, 515
Hartigan v. Hartigan, 142 Minn. 274 772
v. Hartigan, 145 Minn. 27 772
Hartman, In re, 157 Cal. 206 76, 136
Hartner v. Hartner, 75 Pa. Super. Ct. 342 328, 510
Hartpence v. Rogers, 143 Mo. 623 151, 162
Hartshorn v. Hartshorn, 67 (Okla.) 168 Pac. 822 244, 903
Hartl v. Hartl, 155 Iowa 329 218, 425
Hartwell v. Hartwell, 234 Mass. 250 430
Hartwig v. Hartwig, 160 Mo. App. 284 357, 892
Harvey v. Harvey, 75 Nebr. 557 159
v. Harvey, 175 N. Y. S. 177 296, 899
v. Harvey (N. J.) 7 Atl. 871 278
Haskell v. Haskell, 152 Mass. 16 587
v. Haskell, 119 Minn. 484 720
v. Hassett, 189 Ill. App. 342 644
v. Hassett, 5 Pa. Dist. Ct. 604 530
Hastings v. Douglass, 249 Fed. 378 918
Hatfield v. Hatfield, 213 Mich. 368 427
v. Hatfield, 59 Okla. 132, 158 Pac. 942 766
Hatch v. Hatch, 187 N. Y. S. 568 620
v. Hatch, 58 Misc. (N. Y.) 54 86
Hatcher v. Hatcher, 183 Ky. 270 545
Hattin v. Chapman, 46 Conn. 607 49

[*References are to Sections.*]

Hauber v. Hauber, 170 Mo. App. 71 587
Haus v. Moeller, 170 Mo. 471 7
Hava v. Chavigny, 143 La. 365 885
v. Chavigny, 146 La. 84 701
Haven v. Trammell, 79 Okla. 309 680
Hawes v. Hawes, 66 Ga. 142 747, 754
v. State, 88 Ala. 37 140
Hawkins v. Hawkins, 142 Ala. 571 168, 173
v. Hawkins, 65 Md. 104 275
v. Hawkins, 193 N. Y. 409 195, 427, 645
Hawley v. Hawley (Ore.), 199 Pac. 589 196
Hay v. State, 178 Ind. 478 6
Hayden v. Hayden, 74 Kans. 725 587
v. Vreeland, 37 N. J. L. 372 25, 29, 71
Hayes v. Hayes, 192 Ala. 280 594
v. Hayes, 74 Misc. (N. Y.) 533 795
v. People, 25 N. Y. 390 74
v. Rollins, 68 N. H. 191 855
Haymond v. Saucer, 84 Ind. 3 5, 30, 34, 37, 42, 45, 46
Haynes v. Nowlin 129 Ind. 581 153
Haynor v. Haynor, 112 Va. 123 644
Hays v. Hays, 40 Ind. App. 471 490
v. Ledman, 28 Misc. (N. Y.) 575 727
Hazard v. Hazard, 197 Ill. App. 612 709, 757
Hazelton v. Hazelton, 162 Mich. 192 587
Head v. Head, 3 Atk. 295 790
Healey v. O'Sullivan, 6 Allen (Mass.) 114 43
Heasley v. Nichols, 38 Wash. 485 43
Heath v. Heath, 44 Pa. Super. Ct. 118 448, 511
Heatherwick v. Heatherwick, 32 Ill. 73 440
Heaton v. Heaton, 102 Ga. 578 708
Heavrin v. Spicer, 265 Fed. 977 594
Hebden v. Hebden, 111 Wash. 699 587
Hecht v. Hecht, 28 Ark. 92 685, 690, 694, 729
v. Hecht, 14 Misc. (N. Y.) 597 680
Heck v. Bailey, 204 Mich. 54 436, 440
Hector v. Hector, 51 Wash. 434 596
Hedden v. Hedden, 21 N. J. Eq. 61 229, 421
Heggie v. Hayes, 141 Tenn. 219 33
Heilbron v. Heilbron, 158 Pa. St. 297 704, 709
Heinmuller v. Heinmuller, 133 Md. 491 328, 518, 641, 642, 887
Heinle v. Heinle, 115 Misc. N. Y. 469 185
Heinze v. Heinze, 107 Minn. 43 531, 577, 890
Heinzman v. Heinzman, 15 Pa. Co. Ct. 669 429
Heisler v. Heisler, 151 Iowa 503 153, 154, 158
Hekking v. Pfaff, 91 Fed. 60 667, 678
Helden v. Helden, 7 Wis. 296 744
v. Helden, 11 Wis. 554 712, 721
Hellen v. Anderson, 83 Ill. App. 506 123
Hellenthal v. Bleuhm, 13 Ohio Dec. 514 23
Heller v. Heller, 6 How. Prac. (N. Y.) 194 460
Helmert, Ex parte, 103 Ark. 571 868
Helms v. Franciscus, 2 Bland (Md.) 544 198, 210, 211, 643, 646, 662
Helpling v. Helpling (Cal. App.), 195 Pac. 715 536
Helton v. Helton, 146 Ga. 48 708
Hemmenway v. Towner, 83 Mass. 209 234, 235
Hempel v. Hempel, 174 Wis. 332, 181 N. W. 749 167
Henderson v. Cargill, 31 Miss. 367 705
v. Henderson, 88 Ill. 248 277
v. Henderson, 64 Maine 419 670
v. Henderson, 32 N. Dak. 520 554
v. Henderson, 37 Ore. 141 204, 210, 660, 690, 673, 766
v. Ressor, 265 Mo. 718 165
v. Ressor, 141 Mo. App. 540 126 S. W. 203 167, 882
v. Staniford, 105 Mass. 504 678
Hendrick v. Biggar, 209 N. Y. 440 476
Hendry v. Ellis, 61 Fla. 277 34, 47
Hengen v. Hengen, 85 Ore. 155 284, 741, 904
Henneger v. Lomas, 145 Ind. 287 169, 173, 820
Hennessy v. Nicol, 105 Cal. 138 792

[*References are to Sections.*]

Hennis v. Hennis, 180 N. Car. 606 684, 694
Henrie v. Henrie, 71 W. Va. 131 770
Henry v. Henry, 192 Iowa 1346 152
v. Henry, 81 N. J. Eq. 512 897
v. Henry, 74 W. Va. 563 622, 706, 776
v. Taylor, 16 S. Dak. 424 106, 705
Henshaw, Ex parte, 73 Cal. 486 794
Hensley v. Hensley, 179 Cal. 284 210, 218
Herberger v. Herberger, 16 Ore. 327 249
Herd v. Herd, 194 Ala. 613 71
Herforth v. Herforth, 2 Abb. Pr. N. S. (N. Y.) 483 695
Hermann v. Charlesworth (1905), 2 K. B. 123 123
Hernandez v. Thomas, 50 Fla. 522 589
Hernandez, Succession of, 46 La. Ann. 962 179
Herrett v. Herrett, 60 Wash. 607 636, 644, 681
v. Herrett, 80 Wash. 474 558, 743
Herrick v. Herrick, 31 Mich. 298 248
Herriford v. Herriford, 169 Mo. App. 641 229, 411, 421, 424
Herrimann v. Layman, 118 Iowa 590 6, 34, 35, 49
Herrmann v. Herrmann, 88 App. Div. (N. Y.) 76 716
Herron v. Herron, 28 Misc. (N. Y.) 323 721
Herschback v. Herschback, 81 Ore. 151 904
Hertz v. Hertz, 126 Minn. 65 285, 518, 890
Hertzen v. Hertzen (Ore.), 208 Pac. 580 585, 594
Hervey v. Hervey, 56 N. J. Eq. 424 678
v. Hervey, 2 W. Bl. 877 705
Heskamp v. Heskamp (Ky.), 242 S. W. 857 685
Hesler v. Hesler, Wright 210 902
Hess v. Kimble, 79 N. J. Eq. 454 897
v. Zimmer, 152 Wis. 193 49
Hesseltine v. McLaughlin, 4 Wash. 570 136
Hewett v. Hewett (R. I.), 116 Atl. 883 622
Hewitt v. Hewitt, 1 Bland (Md.) 101 655
Hewitt v. Hewitt (N. J.), 37 Atl. 1011 276, 289
Heyman v. Heyman, 119 App. Div. (N. Y.) 182 326, 698, 704
Heyob v. Her Husband, 18 La. Ann. 41 636
Heytrnun v. Heytnun, 195 N. Y. S. 335 283
Hibbert v. Hibbert, 72 N. J. Eq. 778 446
Hick v. Hick, 5 Bush. (Ky.) 670 442
Hickey v. Kimball, 109 Maine 433 34, 49
Hickey, In re, 85 Kans. 556 587, 589
Hickman v. Hickman (Iowa), 176 N. W. 698 278
v. Hickman, 126 Miss. 469 131
v. Hickman, 1 Wash. 257 196, 386
Hicks v. Hicks, 69 Wash. 627 626, 777
v. Stewart, 53 Tex. Civ. App. 401 467
Hickson v. Hickson, 54 Fla. 556 496
Hiecke v. Hiecke, 163 Wis. 171 279, 427
Higbee v. Higbee, 4 Utah 19 196
Higgins v. Doty (Nebr.), 186 N. W. 315 48
v. Sharp, 164 N. Y. 4 693, 712, 721
Higham v. Vanosdol, 101 Ind. 160 157
Higgs v. Higgs, 3 Hogg. 472 677
Hilbish v. Hattle, 145 Ind. 59 777
Hiler v. People, 156 Ill. 511 71, 136, 140
Hilker v. Hilker, 153 Ind. 425 711, 713, 719
Hill v. Hill, 70 Colo. 47 699
v. Hill, 62 Fla. 493 328
v. Hill, 190 Ill. App. 541 40, 653
v. Hill, 112 La. 770 200
v. Hill, 49 Md. 450 585, 589, 592
v. Hill, 196 Mass. 509 598
v. Hill, 74 N. H. 288 210, 211
v. Hill, 27 N. J. Eq. 214 430
v. Hill, 2 Ont. L. Rep. 289-541 644
v. Hill, 32 Pa. St. 511 139
v. Jones, 109 Minn. 370 23
v. Maupin, 3 Mo. 323 45
v. Victora, 180 Iowa 417 436, 559

[*References are to Sections.*]

Hildebrand v. Hildebrand, 41 Okla. 306 279, 282, 285
Hillenbrand v. Hillenbrand, 211 Ill. App. 624 427, 592
Hillers v. Taylor, 116 Md. 165 160
Hilleware v. Hilleware, 92 Wash. 99 284, 352
v. Hilleware, 104 Wash. 361 596
Hilliard v. Baldwin, 76 N. H. 142 896
v. Beattie, 67 N. H. 571 25
Hillman v. Gallant, 148 La. 82 767
v. Hillman, 42 Wash. 595 727
Hills v. State, 61 Nebr. 589 63
Hilton v. Hilton (Cal. App.), 201 Pac. 337 218, 235
v. Hilton, 88 Miss. 529 643, 644, 646
v. Roylance, 25 Utah 129 55, 73, 136, 166, 198
v. Second Judicial District Court, 43 Nev. 128 636, 641, 648, 651
v. Stewart, 15 Idaho 150 144
Hilton's Estate, In re, 263 Pa. 16 131, 136, 175, 182
Hinckley v. Jewett, 86 Nebr. 464, 125 N. W. 1086 37
Hinds v. Hinds, 80 Ala. 225 636, 642
v. Hinds, Iowa (1 Clarke) 36 444
Hines v. Hines, 192 Iowa 569 282, 518, 587
Hinkle v. Lovelace, 204 Mo. 208 480, 490, 534
Hinton v. Hinton, 117 Ga. 547 720, 722
Hiram v. Pierce, 45 Maine 367 175, 825
Hires v. Hires, 91 N. J. Eq. 366 217
Hirsch v. Hirsch, 70 Pa. Super. Ct. 583 436
Hitchins v. Hitchins, 41 Ill. App. 82 277
Hite v. Hite, 124 Cal. 389 695, 698
v. Hite (Cal.), 55 Pac. 900 720
v. Hite, 136 Ky. 529 643
v. Trust Co., 156 Cal. 765 559
Hively v. Golnick, 123 Minn. 498 34, 42, 44, 46, 47, 49
Hoadley v. Watson, 45 Vt. 289 47
Hoagland v. Hoagland (N. J.), 114 Atl. 744 643
v. Hoagland, 27 Wyo. 178 631
v. Hoagland, 19 Utah 103 673
Hobbs v. Hobbs, 10 Cal. App. 97 495, 516, 869
Hobbs, In re, 1 Woods (U. S.) 537 105
Hochreiter v. Hochreiter, 138 Ill. App. 373 695
Hockaday v. Jones, 8 Okla. 156 678
Hockerston v. Hockerston, 41 Cal. App. 195 277, 580
Hodge v. Brooks (Ark.), 240 S. W. 2 151
Hodgen v. Hodgen, 160 Ky. 267 644
Hodges v. Boggs, 90 W. Va. 404 594
v. Hodges, 22 N. Mex. 192 869
Hodgins v. Hodgins, 75 Pa. Super. Ct. 187 335
Hodgkinson v. Hodgkinson, 43 Nebr. 269 152
v. Fletcher, 4 Camp. 70 681
Hoellinger v. Hoellinger, 38 N. Dak. 636 901
Hoernig v. Hoernig, 109 Wis. 229 498
Hoffman v. Hoffman, 67 Ind. App. 230 881
v. Hoffman, 190 Ky. 13 587, 598, 675, 684, 723, 745
v. Hoffman, 43 Mo. 547 427, 455, 465
v. Hoffman, 30 N. Y. Super. Ct. 474 701
v. Hoffman, 46 N. Y. 30, 7 Am. Rep. 299 445
v. Hoffman, 195 App. Div. (N. Y.) 596 290
v. Hoffman, 15 Ohio St. 427 594
v. Hoffman, 28 Ohio Cir. Ct. 658 795
v. Hoffman, 30 Pa. St. 417 356, 503
v. Hoffman, 26 S. Dak. 34 794
Hoffman's Estate, In re, 108 Misc. (N. Y.) 612 211, 214
Hoffstaedter v. Hoffstaedter, 188 N. Y. S. 251 212
Hofman v. Hofman, 40 Ind. App. 476 284, 288
v. Hofman, 232 N. Y. 215 285, 538
Hogan v. Cregan, 29 N. Y. Super. Ct. 138 45
Hogg v. Lindridge, 151 App. Div. (N. Y.) 513 218
v. Maxwell, 233 Fed. 290 214, 653
Hogsett v. Hogsett (Mo. App.), 186 S. W. 1171 427, 511

[*References are to Sections.*]

Hohn v. Hohn, 44 Utah 242 242, 319
Hoitt v. Hoitt, 63 N. H. 475 62
v. Moulton, 21 N. H. 586 5, 8, 21, 37
Holbrook v. Holbrook, 18 La. Ann. 643 646, 655, 770
v. Holbrook, 32 La. Ann. 13 636, 661
v. Holbrook, 114 Mass. 568 555
Holcomb v. Holcomb, 49 Wash. 498 685, 716, 719, 720, 730, 790
Holcomb v. Holcomb, 53 Wash. 611 794, 795
Holcroft v. Dickenson, Carter 233 24
Holden v. Matteson, 38 App. D. C. 128 249
Hollan v. Kepner, 297 Ill. 332 653
Holland v. Riggs, 53 Tex. Civ. App. 367 913
Holleman v. Holleman, 69 Ga. 676 685
Hollenbeck v. Glover, 128 Ga. 52 593
Hollerman v. Hollerman, 1 Barb. (N. Y.) 64 701, 704
Hollinghausen v. Ade (Mo.), 233 S. W. 39 70, 153, 156, 158, 162
Hollingshead v. Hollingshead, 91 N. J. Eq. 261 640
Hollopeter, In re, 52 Wash. 41 458, 917
Hollopeter, In re, 51 Wash. 41 856
Holloway v. Griffith, 32 Iowa 409 14, 21, 23, 43, 48
v. Holloway (Cal. App.), 196 Pac. 926 225, 335
v. Holloway, 126 Ga. 459 300, 304
Holly v. Holly, 81 Fla. 881 652
Holm v. Holm, 44 Utah 242 589, 914
Holmberg v. Holmberg, 106 Nebr. 717 436, 769
Holmes v. Hamburger, 67 Ill. App. 121 703, 724
Holmes v. Holmes, 186 Iowa 336 280, 444, 882
Holmes v. Holmes, 2 Lee Ecc. 90 711
v. Holmes, 6 La. 463 55, 290, 705
v. Holmes, 63 Maine 420 550, 558
v. Holmes, 44 Mich. 555 320
v. Holmes, 29 N. J. Eq. 9 786, 788
v. Holmes, 57 Barb. (N. Y.) 305 626, 765
Holmes v. Holmes, 1 Abb. (U. S.) 525 705, 843
Holschbach v. Holschbach, 134 Mo. App. 247 411, 424
v. Holschbach (Mo. App.), 184 S. W. 155 336
Holston v. Holston, 23 Ala. 777 238, 329
Holt v. Holt, 204 Mass. 25 292, 888
v. Holt, 23 Okla. 639 767
v. Holt, 1 P. & M. 610 700
v. Ward Clarencieux, 2 Stra. 937 24
Holter v. Holter, 108 Wash. 519 767
Holtham v. Holtham, 6 Misc. (N. Y.) 266 795
Holthoefer v. Holthoefer, 47 Mich. 260 247, 280, 685, 730
Holtman v. Holtman (Ky.), 114 S. W. 1198 435
Holton v. Holton, 64 Ore. 290 448, 490, 492
Holtz v. Dick, 42 Ohio St. 23 95, 153
Holyoke v. Holyoke, 78 Maine 404 275, 279
Homan v. Earl, 53 N. Y. 267 5, 32, 37
v. Hall, 102 Nebr. 70 22
Homburger v. Homburger, 46 How. Pr. (N. Y.) 346 247
Homes v. Carrier, 16 La. Ann. 94 412
Homrich v. Homrich, 75 Pa. Super. Ct. 598 424
Homston v. Homston, 3 Mass. 159 480
Honnett v. Honnett, 33 Ark. 156 168, 358
Hood v. Hood, 130 Ga. 610 675, 678
v. Hood, 110 Mass. 463 446, 565, 606
v. Hood, 138 Md. 355 588, 641, 690, 701, 769
v. Roleson, 125 Ark. 30 210
v. State, 56 Ind. 263 225, 444, 560, 775
v. Sudderth, 111 N. Car. 215 27
v. Venable, 140 Ga. 363 767
Hooe v. Hooe, 122 Ky. 590 884
Hook v. George, 108 Mass. 324 33, 36, 43
Hooker v. Hooker, 65 Fla. 53 290, 875

[*References are to Sections.*]

Hooker v. Phillippe, 26 Ind. App. 501 49
Hooker, Ex parte, 49 Cal. 465 790
Hoon v. Hoon, 82 Nebr. 688 636
Hooper v. Hooper, 19 Mo. 355 642, 644
v. Hooper, 67 Ore. 187 631, 904
Hopkins v. Hopkins, 34 S. Dak. 637 433
Hopper v. Hopper, 92 Hun (N. Y.) 415, 36 N. Y. S. 610 700, 720, 721
Horn v. Horn, 80 Okla. 60 597, 598, 753
Hornbake v. Hornbake, 72 Pa. Super. Ct. 605 175
Horne v. Horne, 31 N. Car. 99 443, 444
v. Horne, 72 N. Car. 534 424
v. Horne, 1 Tenn. Ch. 259 490
Horning v. Horning, 107 Mich. 587 590
v. Horning, 162 Mich. 130 531
Horrigan v. Gibson (Okla.), 206 Pac. 219 71
Horton v. Horton, 22 Ariz. 490 59, 63, 585, 631
v. Stegmyer, 175 Fed. 756 555
Hostetter v. Green, 150 Ky. 551 151
v. Green, 159 Ky. 611 156, 536
Hosto v. Hosto, 183 Ill. App. 463 644
Hotchkins v. Hodge, 38 Barb. (N. Y.) 117 7, 45
Houghton v. Rice, 174 Mass. 366 157
Houlton v. McGuirk, 122 La. 359 243, 510
House v. House, 25 Ga. 473 447
Houser v. Carmody, 173 Mich. 121 30, 34, 42, 43, 45
Housley v. Wagners, 25 Ga. App. 474 620
Houston v. Timmerman, 17 Ore. 499 197, 201, 677, 798
Houston Oil Co. of Texas v. Griggs (Tex. Civ. App.), 181 S. W. 833 111, 852
Houseworth's Admr. v. Hindrickson, 27 N. J. Eq. 60 790
Houts v. Houts, 17 Ill. App. 439 644
Hovey v. Elliott, 167 U. S. 409 792
v. Page, 55 Maine 142 25
Howard v. Howard (Maine), 115 Atl. 259 152
v. Howard, 188 Mo. App. 564 424
Howard v. Howard, 77 N. J. Eq. 186 518, 897
v. Strode, 242 Mo. 210 607, 620, 621, 624
v. Kelly, 111 Miss. 285 705
Howatt v. Howatt, 158 App. Div. (N. Y.) 28 530
Howell v. Dunning, 109 Wash. 591 530
v. Herriff, 87 Kans. 389 448, 462, 883
v. Howell, 104 Cal. 45 680, 703
v. Howell, 89 Nebr. 243 546
v. Howell, 42 Okla. 286 211
Howey v. Howey, 77 N. J. Eq. 591 646
v. Howey (Mo.), 240 S. W. 450 492, 620
Hoyt v. Hoyt, 56 Mich. 50 289
Hubbard v. Hubbard, 127 Md. 617 225, 327, 887
v. Hubbard, 131 Md. 291 636, 644
v. Lee, L. R. Ex. 255 141
Hubbell v. Hubbell, 7 Cal. App. 661 490
v. Hubbell, 3 Wis. 662 441
Huber v. Culp, 46 Okla. 570 124
Hubner v. Hubner, 67 Ore. 557 475, 565, 904
Huchting v. Huchting (Cal.), 188 Pac. 1002 869
Hudson v. Hudson, 204 Ala. 75 496
v. Hudson, 59 Fla. 529 325, 326, 328, 334, 875
Huellmantel v. Huellmantel, 124 Cal. 583 788
Huff v. Huff, 73 W. Va. 330 242, 284, 334, 519, 918
Huffman v. Huffman, 47 Ore. 610 660, 673, 677, 690
Huggins v. Carey, 108 Tex. 358 8, 45, 49
Hugh v. Peake, 5 Conn. 475 3
Hughes v. Hughes, 19 Ala. 307 295, 425
v. Hughes, 133 Ill. App. 654 427
v. Leonard, 66 Colo. 500 211, 216
v. Nolte, 7 Ind. App. 526 6, 14, 30, 39, 44, 47
Hulett v. Carey, 66 Minn. 327 55, 62, 73
v. Hulett, 80 Ky. 364 636, 642, 655, 683
Hulett's Estate, In re, 66 Minn. 327 80

[*References are to Sections.*]

Huling v. Huling, 32 Ill. App. 519 153
v. Huling, 38 Ill. App. 144 427
Hull v. Hull, 191 Ill. App. 307 173
v. Hull, 2 Strob. Eq. (S. Car.) 174 56
v. State, 7 Tex. App. 593 261, 263
Hullett v. Baker, 102 Tenn. 689 25
Hullinger v. Hullinger, 133 Iowa 269, 110 N. W. 470 283, 574
Humber v. Humber, 109 Miss. 216 283
Hummel v. State, 73 Ind. App. 12 74
Humphrey v. Brown, 89 Fed. 641 37, 48
v. Pope, 1 Cal. App. 374 159, 161
Humphreys v. Humphreys, 49 How. Pr. (N. Y.) 140 661
Hunt v. Hunt, 61 Fla. 630 326, 341
v. Hunt, 211 Ill. App. 410 282, 424
v. Hunt, 72 N. Y. 217 442, 626
v. Hunt, 29 N. J. Eq. 96 338
v. Hunt, 23 Okla. 490 903
v. Hunt (Tex. Civ. App.), 196 S. W. 967 467
v. Hunt (Tex. Civ. App.), 215 S. W. 228 203
v. Monroe, 32 Utah 428 596, 622
v. Peake, 5 Cow. (N. Y.) 475, 15 Am. Dec. 475 3, 28, 51
v. Thompson, 61 Mo. 148 179, 199, 539
Hunter v. Boucher, 20 Mass. 289 344
v. Hatfield, 68 Ind. 416 30, 33, 35, 46, 48
v. Hunter, 7 Ill. App. 253 643, 644
v. Hunter, 100 Ill. 477 685
v. Hunter, 121 Ill. App. 380 233, 424, 433, 644, 645, 723
v. Southern R. Co., 152 N. Car. 682 47
Huntley v. Baker, 33 Hun (N. Y.) 578 678
Hunt's App., 86 Pa. 294 705
Hurd v. Hurd, 63 Minn. 443 795
Hurlburt v. Hurlburt, 14 Vt. 561 400
Hurry v. Hurry, 141 La. 954 885
v. Hurry, 144 La. 877 55, 413, 885
Hurtzig v. Hurtzig, 44 N. J. Eq. 329 242
Huston v. Huston, 150 Ky. 353 388, 430, 460
Hutcheson v. Peck, 5 Johns. (N. Y.) 196 153
Hutchins v. Kimmell, 31 Mich. 126 61, 71, 136, 139, 144, 828
Hutchinson v. Hutchinson, 105 Ill. App. 349 723
Hutton v. Dodge, 58 Utah 228 660, 678
v. Mansell, 6 Mod. 172 6
Hyde v. Hyde, L. R. 1 P. & D. 133 65
v. Leisenring, 107 Mich. 490 706
Hyer v. Hyer, 91 N. J. Eq. 147 329, 335
Hynes v. McDermott, 82 N. Y. 41 71, 137
Hyser v. Hyser, 53 Colo. 199 198

I

Iba v. Chicago &c R. Co. 172 Mo. App. 141 579
Ibanez v. Ortiz, 5 Phil. 325 907
Ibbetson v. Ibbetson (Cal. App.), 199 Pac. 872 585
Ickes v. Ickes, 237 Pa. 582 160
Ijams v. Schapiro, 138 Md. 16 120
Illinois Steel Co. v. Industrial Commission, 290 Ill. 594 136, 137
Imboden's Estate, In re, 111 Mo. App. 220 61
Industrial Commission of Ohio v. Dell, (Ohio), 135 N. E. 669 131
v. Drake (Ohio St.), 134 N. E. 465 596
Ingersoll v. Coal Creek Coal Co., 117 Tenn. 263 204
v. Ingersoll, 49 Pa. St. 249 326, 336
Ingle v. Ingle (N. J. Eq.), 38 Atl. 953 168
Ingraham v. Ingraham, 40 Cal. App. 511, 577
v. Ingraham, 80 Fla. 75, 85 So. 666 580
Ingram v. Ingram, 143 Ala. 129 477, 534
v. Ingram, 58 Pa. Super. Ct. 522 511
Inskeep v. Inskeep, 5 Iowa 204 741
Ireland v. Emerson, 93 Ind. 1 28

[*References are to Sections.*]

Ireland v. Ward, 51 Ore. 102 151
Irvine v. Irvine, 81 N. J. Eq. 20 646
Irving v. Greenwood, 1 R. & P. 350 30
v. Irving, 152 Ga. 174 175
Irwin v. Irwin, 96 Ky. 318 589
v. Irwin, 88 N. J. Eq. 139 641, 644
v. Irwin, 179 App. Div. (N. Y.) 871 120
Isaacs v. Isaacs, 61 How. Pr. (N. Y.) 369 793, 794
Isenberg v. Isenberg, 75 Pa. Super. Ct. 551 338
Isherwood v. H. L. Jenkins Lumber Co., 87 Minn. 388 39
Israel v. Arthur, 18 Colo. 158 810
v. Israel, 185 Ala. 39 327, 334
v. Israel, 148 Fed. 576 776
v. Israel, 28 Misc. (N. Y.) 57 704
Istincheyou v. Clark, 84 Okla. 125 143
Itzkowitz v. Itzkowitz, 33 App. Div. (N. Y.) 244 703
Ivanhoe v. Ivanhoe, 68 Ore. 297 644

J

Jack v. Jack (Mo.), 243 S. W. 314 594
Jackman v. Jackman, 213 Ill. App. 329 643, 644
Jackson v. Jackson, 151 Ark. 9 594
v. Jackson, 149 Ga. 803 217
v. Jackson, (N. J. Ch.), 113 Atl. 495 61, 71, 74, 135, 136, 137
v. Jackson (N. J.), 115 Atl. 1 335
v. Jackson, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773 136
v. Jackson, 8 Ore. 402 587
v. Jackson, 49 Pa. Super. Ct. 18 511
v. Ruby, 120 Maine 391 176
v. State, 8 Tex. App. 60 705
v. Winne, 7 Wend. (N. Y.) 47 358
Jacobs v. Jacobs, 146 Ark. 45 168
v. Jacobs, 136 Minn. 190 586, 595, 596, 636
v. Sire, 4 Misc. (N. Y.), 398 47
Jacob's Adm'r v. Canine, 7 Ohio App. 268 37
Jacoby v. Stark, 205 Ill. 34 34, 44, 47
Jaffe v. Jaffe (Iowa), 182 N. W. 784 597, 600
Jakar v. Jakar, 113 S. Car. 295 173, 184
James v. Biddington, 6 C. & P. 589 42
v. James, 29 Nebr. 533 247
v. James, 103 Nebr. 278 425, 740, 894
v. James, 58 N. H. 266 344
v. Jellison, 94 Ind. 292, 48 Am. Rep. 151 7, 123
Jameson v. Board of Education, 74 W. Va. 389 122
Jamieson v. Jamieson, 11 Hun (N. Y.), 38 487
Jamison v. Jamison, 4 Md. Ch. 289 636, 642, 644, 749
Jangraw v. Perkins, 76 Vt. 127 11, 123
Jansa's Estate, In re, 169 Wis. 220 87
Janvrin v. Janvrin, 57 N. H. 146 576
Jaques v. Jaques, 58 Utah 265 587, 594
Jarrard v. Jarrard, 116 Wash. 70 420, 580
Jarvis v. Johnson, 2 Ohio Dec. 312 45
Jastrzembski v. Marxhausen, 120 Mich. 677 46
Jeannot's Estate, In re, 212 Mich. 442 211
Jefferies v. Alexander, 188 Ill. App. 310 534
Jefferson v. Jefferson, 168 Mass. 456 425
Jelineau v. Jelineau, 2 DeSaus. (S. Car.) 45 636, 646
Jellison v. Jellison, 70 N. H. 633 703
Jenkins v. Bisbee, 1 Edw. Ch. (N. Y.) 377 705
v. Clusm, 25 Ky. L. 736 156, 157
v. Jenkins, 265 Fed. 1015 580
v. Jenkins, 69 Ga. 483 704
v. Jenkins, 83 Ga. 283 136
v. Jenkins, 3 Ill. App. 641 644
v. Jenkins, 91 Ill. 167 641, 685, 690, 704, 720, 729, 730
v. Jenkins, 104 Ill. 134 644, 646
v. Jenkins, 2 Dana (Ky.) 102 85, 385

[*References are to Sections.*]

Jenkins v. Jenkins, 103 Ore. 208 241, 242, 424
v. Jenkins, 173 Wis. 592 585, 587, 589
v. Maier, 118 La. 130 497
Jenne v. Jenne, 7 Mass. 94 486, 487
Jenness v. Jenness, 24 Ind. 355 452
v. Simpson, 84 Vt. 127 150
Jennette v. Sullivan, 63 Hun (N. Y.) 361 34, 45, 49
Jennings v. Cooper (Mo. App.), 230 S. W. 325 153, 158
v. Jennings, 13 N. J. Eq. 38 327
v. McDougle, 83 W. Va. 186 475, 493, 918
Jennison v. Jennison, 136 Ga. 202 710
Jenny v. Jenny, 178 Cal. 604 644
Jensen v. Jensen, 168 Wis. 502 587
Jessop v. Jessop, 30 L. J. P. & M. 193 420
Jeter v. Jeter, 36 Ala. 391 242, 249, 708, 723
Jewel v. Jewel, 71 Colo. 470 710, 767
Jewell v. Jewell, 1 How. 219 (U. S.) 132, 134, 705
J. G. v. H. G., 33 Md. 401 195, 367, 369, 373
Jimenez v. Jimenez (N. J.), 116 Atl. 788 169, 180
Jobb v. Jobb, 199 Mich. 555 277
Johanson v. Johanson, 12 Cal. App. 635 246, 516
Johannessen v. Johannessen, 70 Misc. (N. Y.) 361 197, 437
Johns v. Johns, 204 Mo. App. 412 218
v. Johns, 44 Tex. 40 168
Johnsen v. Johnsen, 78 Wash. 423 288, 424, 427
Johnson v. Alexander, 39 Cal. App. 177 169
v. Blomdahl, 90 Wash. 625 21, 23
v. Caulkins, 1 Johns. Cas. (N. Y.) 116 6, 43
v. Coleman, 23 Wis. 452 550, 559
v. Grand Lodge, 91 Kans. 314 535
v. Hunt, 81 Ky. 321 123
v. Iss, 114 Tenn. 114 11
v. Jenkins, 24 N. Y. 252 41, 43, 44, 47
v. Johnson, 176 Ala. 449 173, 865
Johnson v. Johnson, 182 Ala. 376 555
v. Johnson, 107 Ark. 262 336, 511
v. Johnson, 122 Ark. 276 510, 511
v. Johnson, 14 Cal. 459 433
v. Johnson, 1 Colo. 631 851
v. Johnson, 22 Colo. 20 327
v. Johnson, 13 Fed. 193 440
v. Johnson, 131 Ga. 606 585, 598
v. Johnson, 20 Ill. App. 495 704
v. Johnson, 125 Ill. 510 641, 643, 644, 646
v. Johnson, 57 Kans. 343 713
v. Johnson, 122 Ky. 13 204
v. Johnson, 145 Ky. 488 334
v. Johnson, 183 Ky. 421 285, 288, 684, 723, 749, 884
v. Johnson, 49 Mich. 639 411
v. Johnson, 30 Mo. 72 71
v. Johnson, 142 N. Car. 462 385, 503
v. Johnson (N. H.), 112 Atl. 399 277, 284
v. Johnson, 4 N. J. L. 241 701
v. Johnson, 78 N. J. Eq. 507 225, 226, 424, 897
v. Johnson, 14 Wend. (N. Y.) 637 247
v. Johnson, 150 App. Div. (N. Y.) 306 218
v. Johnson, 206 N. Y. 561 636
v. Johnson, 72 Okla. ———, 179 Pac. 595 580
v. Johnson, 102 Ore. 407 589, 594
v. Johnson, 31 Pa. Super. Ct. 53 411
v. Johnson, 35 Leg. Int. (Pa.) 70 315
v. Johnson (Tenn.), 49 S. W. 305 660, 600
v. Johnson (Tex.), 23 S. W. 1022 427
v. Johnson (Tex. Civ. App.), 102 S. W. 943 590
v. Johnson (Tex.), 152 S. W. 661 356
v. Johnson, 57 Wash. 89 64, 65, 917
v. Johnson, 4 Wis. 135 399
v. Latty, 210 Fed. 961 596
v. Levy, 122 La. 118 6, 14, 23, 25, 31, 37, 41, 42, 45, 47, 49
v. Matthews 124 Iowa 225 678, 679

[*References are to Sections.*]

Johnson v. Milling, L. R. 16 G. B. 460 21
v. Raphael, 117 La. 967 824
v. Smith, 3 Pittsb. 184 30
v. State, 60 Ark. 308 268
v. Superior Court, 63 Cal. 578 792, 794
v. Terry, 34 Conn. 259 591
v. Travis, 33 Minn. 231 36, 44, 47, 48, 49
v. Williams, 3 Green (Iowa) 97 726, 732
Johnston v. Johnston, 17 Cal. App. 241 395
v. Johnston, 32 La. Ann. 1139 200
v. Johnston, 37 R. I. 362 545
v. Johnston, 116 Va. 678 233, 424
v. Johnston, 116 Wash. 322 594
Jokela v. Jokela, 11 Minn. 403 890
Jonas v. Hirschberg, 18 Ind. App. 581 157
Jones v. Bartlett (Tex.), 189 S. W. 1107 624
v. Brinsmade, 183 N. Y. 258 613, 693
v. Brownlee, 161 Mo. 258 505
v. Clifton, 101 U. S. 225 213
v. Fuller, 19 S. Car. 66 30
v. Hunter, 2 La. Ann. 254 705
v. James, 18 L. T. N. S. 243 30
v. Jones, 95 Ala. 443 196, 334
v. Jones, 174 Ala. 461 636, 640
v. Jones, 189 Ala. 286 277, 284, 433
v. Jones, 48 Cal. App. 771 284, 588
v. Jones, 1 Colo. App. 28 120
v. Jones, 71 Colo. 420 427, 525
v. Jones, 111 Ill. App. 396 702
v. Jones, 124 Ill. App. 201 242, 644
v. Jones, 18 Maine 308 139, 461, 677, 692
v. Jones, 45 Md. 144 705
v. Jones, 48 Md. 391 136
v. Jones, 67 Miss. 195 442
v. Jones, 55 Mo. App. 523 434
v. Jones, 208 Mo. App. 632 424, 536
v. Jones, 173 N. Car. 279 275, 425, 490, 900
v. Jones, 62 N. H. 463 285
v. Jones, 18 N. J. Eq. 33 247, 328, 424, 427, 528
Jones v. Jones, 2 Barb. Ch. (N. Y.) 146 690, 704
v. Jones, 108 N. Y. 415 450
v. Jones, 59 Ore. 308 195, 424, 425, 565, 722
v. Jones, 12 Pa. St. 350 196
v. Jones, 66 Pa. St. 494 275, 277, 278
v. Jones, L. R. 2 P. & M. 333 685
v. Jones, 1 Q. B. D. 279 116
v. Jones, 96 Wash. 172 159, 160
v. Jones, 78 Wis. 446 535
v. Jones, Wright, 155 902
v. Kennicott, 83 Ill. 434 790
v. Lamont, 118 Cal. 499 216
v. Layman, 123 Ind. 569 6, 21, 23, 30, 33
v. Monson, 137 Wis. 478 153
v. Reddick, 79 N. Car. 290 705
Jones, Ex parte, 168 Ala. 183 865
Jones, Ex parte, 172 Ala. 186, 55 So. 491 695
Jordan v. Gillon, 44 N. H. 424 25
v. Greene (R. I.), 99 Atl. 82 158
v. Holkham, 1 Ambl. 209 120
v. Jordan, 184 Ala. 408 565
v. Jordan, 149 La. 428 229
v. Missouri & Kansas Tel. Co., 136 Mo. App. 192 29, 171, 180, 535, 892
v. Westerman, 62 Mich. 170 204, 674, 676, 727, 728
Joseph v. Naylor, 257 Pa. 561 156, 162
Joutsen, Ex parte, 154 Cal. 540 702, 793
Joyner v. Harris, 157 N. Car. 295 900
v. Joyner, 131 Ga. 217 620, 775
v. Joyner, 59 N. Car. 322 493, 496
v. Joyner, 157 N. Car. 181 900
Judd v. Judd, 169 Ill. App. 21 644
Judson v. Judson, 171 Mich. 185 440, 649
Judy v. Sterrett, 52 Ill. App. 565 11, 38
Julian v. Julian, 60 Ind. App. 520 475, 536, 594, 600
Julier v. Julier, 62 Ohio St. 90 663, 766
Jung v. Jung, 85 N. J. Eq. 372 626
J. W. B. v. F. D. B., 11 N. Y. Leg. Obs. 350 712

[*References are to Sections.*]

K

Kadlowsky v. Kadlowsky, 63 Ill. App. 292 795
Kahlbon v. People, 101 Ill. App. 567 795
Kahn v. Kahn, 62 Misc. (N. Y.) 550 838
Kaker v. Parrish (Tex. Civ. App.), 187 S. W. 517 20
Kalmanowitz v. Kalmanowitz, 108 App. Div. (N. Y.) 296 794
Kalyton v. Kalyton, 45 Ore. 116 106
Kamman v. Kamman, 167 App. Div. (N. Y.) 423 644
Kamp v. Kamp, 59 N. Y. 212 709
Kanaly v. Bronson, 97 Nebr. 322 184, 894
Kansas Pac. R. Co. v. Miller, 2 Colo. 442 705
Kantzler v. Grant, 2 Ill. App. 236 30, 35
Kapigian v. Minassian, 212 Mass. 412 59, 442
Kapitola v. Kapitola, 189 App. Div. (N. Y.) 459 427, 579
Kaplun v. Kaplun (Mo. App.), 227 S. W. 894 514, 589, 594, 685
Kapp v. District Court, 31 Nev. 444 496, 710, 895
v. Seventh Dist. Ct. 32 Nev. 264 731, 796
Karger v. Karger, 19 Misc. (N. Y.) 236 239
Karmany v. Karmany, 71 Pa. Super. Ct. 308 740, 767
Karnes v. Karnes, 140 Wis. 280 919
Karr v. Rust, 217 Ill. App. 555 585, 594, 767, 785
Karren v. Karren, 25 Utah 87 553, 558
Kashaw v. Kashaw, 3 Cal. 312 450
Kauffman v. Kauffman, 24 Pa. Sup. St. 437 306
Kaufman v. Fye, 99 Tenn. 145 46
v. Kaufman, 146 La. 488 395
v. Kaufman, 86 N. J. Eq. 132 171
v. Kaufman, 160 N. Y. S. 19 627
Kawabata v. Kawabata (N. Dak.), 189 N. W. 237 183
Keane v. Keane, 3 P. & M. 52 792
Keat v. Allen, 2 Vern. 588 123
Keath v. Shiffer, 37 Pa. Super. 573 151
Keefer v. Keefer, 140 Ga. 18 694, 727
Keeler v. Russum, 68 Colo. 196 159
Keen v. Keen, 184 Mo. 358 105, 705
v. Keen, 49 Ore. 362 156, 614
Keenan v. Keenan, 219 Mass. 107 511, 743
Keene v. Keene, 189 N. Y. S. 284 565
Keerl v. Keerl, 34 Md. 21 660, 670
Keesey v. Keesey, 160 Cal. 727 336
Keesling v. Keesling, 42 Ind. App. 361 587, 589, 594
Kehr v. Smith, 20 Wall. (U. S.) 31 218
Keil v. Keil, 80 Nebr. 496 448
Kell v. Kell, 179 Iowa 647 599
Keller v. Keller (Mo. App.), 129 S. W. 492 892
v. Keller, 144 Mo. App. 98 492
v. Keller, 58 W. Va. 325 702, 746
Kellett v. Robie, 99 Wis. 303 32, 49
Kelley v. Bausman, 98 Wash. 686 633, 636, 640, 648, 650
v. Brennan, 18 R. I. 41 21, 23
v. Highfield, 15 Ore. 277 30, 36, 41, 43, 44, 46, 47
v. Kelley, 206 Ala. 334 168
v. Kelley, 161 Mass. 111 175, 180, 260, 440, 677, 692
v. Riley, 106 Mass. 339 5, 11, 12, 21, 25, 34, 37, 42, 45
Kellogg v. Donovan, 167 Mich. 95 695, 889
v. Kellogg, 171 Mich. 518 427
v. Stoddard, 89 App. Div. (N. Y.) 137 709, 726
Kelly v. Kelly, 89 Kans. 889 610
v. Kelly, 105 Kans. 72 598, 785
v. Kelly, 183 Ky. 576 414, 636, 740, 745, 884
v. Kelly, 194 Mich. 94 772
v. Kelly, 61 Misc. (N. Y.) 480 640
v. Kelly, 18 Nev. 49 275, 283, 285, 503
v. Renfro, 9 Ala. 325 14, 20, 21, 31, 43
v. Scott, 5 Grat. (Va.) 479 110
v. Stevenson, 85 Minn. 247 62
Kelsey v. Kelsey, 190 N. Y. S. 52 630
Kelso v. Lovejoy, 76 Ohio St. 596 674
Kemmelick v. Kemmelick, 114 Misc. (N. Y.) 198 167
Kemp v. Kemp, 144 La. 671 519
v. Kemp, 146 La. 361 795
Kempf v. Kempf, 34 Mo. 211 371

[*References are to Sections.*]

Kempster v. Evans, 81 Wis. 247 676, 767
Kendall v. Dunn, 71 W. Va. 262 31, 42, 43, 49
v. Kendall, 1 Barb. Ch. (N. Y.) 610 711, 719
Kendrick v. Kendrick, 105 Ga. 38 690, 694, 708, 721
Kenemer v. Kenemer, 26 Ind. 330 653, 700, 701, 714
Kenley v. Kenley, 2 How. (Miss.) 751 655
Kennedy v. Doyle, 10 Allen (Mass.) 161 141
v. Kennedy, 87 Ill. 250 338
v. Kennedy (Mo. App.), 182 S. W. 100 425, 587
v. Kennedy, 27 Nev. 152 579
v. Kennedy (N. J.), 112 Atl. 492 334
v. Kennedy, 73 N. Y. 369 276, 285, 704
v. Rodgers, 2 Kans. App. 764 21, 24, 48, 204
Kenner v. Kenner, 139 Tenn. 211 585, 589, 626
Kentz v. Kentz (Tex. Civ. App.), 209 S. W. 200 585, 594, 913
Kentzler v. Kentzler, 3 Wash. 166 589
Kenworthy v. Richmond, 95 Wash. 407 158
Kenyon v. Kenyon, 3 Utah 431 673
v. People, 26 N. Y. 203 6
Keohane v. Keohane, 38 Cal. App. 405 791
Kerby v. Kerby (Ky.), 112 S. W. 927 225
Kerfoot v. Marsden, 2 Fost. & F. 160 48
Kern v. Field, 68 Minn. 317 203, 620
Kern v. Kern, 51 N. J. Ch. 574 4
Kerns v. Hagenbuchle, 42 N. Y. S. 210 49
Kerr v. Kerr, 236 Mass. 353 211, 217, 597, 685, 753
v. Kerr, 41 N. Y. 272 560
Kershner v. Kershner, 202 Mo. App. 238 596, 600
Ketcham v. Ketcham, 32 App. Div. (N. Y.) 26 498
Keup v. Keup, 98 Nebr. 321 644, 655
Keyes v. Keyes, 6 Misc. (N. Y.) 355 173
Keys v. Keys, 211 Mich. 279 594
Kiddle v. Kiddle, 90 Nebr. 248 721, 727
Kiefer v. Kiefer, 4 Colo. App. 506 695
Kientz v. Kientz, 104 Ark. 381 249, 275, 639
Kilburn v. Kilburn, 89 Cal. 46 136
Killackey v. Killackey, 156 Mich. 127 268
Killiam v. Killiam, 25 Ga. 186 701, 708
Killingsworth v. Killingsworth, 198 Ga. 590 876
Killion v. Hulen, 8 Ind. App. 494 23, 33
Kimball v. Kimball, 44 N. H. 122 436
Kimble v. Kimble, 17 Wash. 75 636, 642, 649, 685
Kincheloe v. Merriman, 54 Ark. 557 732
Kindorf v. Kindorf, 178 Mo. App. 635 643, 681
King v. Hanson, 13 N. Dak. 85 152
v. Kersey, 2 Ind. 402 5, 6, 33, 34, 45
v. King, 28 Ala. 315 433
v. King, 65 Fla. 303 643
v. King, 128 Ga. 54 703
v. King, 122 La. 582 338, 885
v. King, 84 N. Car. 32 480
v. King, 74 N. J. Eq. 824 444, 897
v. King, 38 Ohio St. 370 685, 710
v. King, 75 Pa. Super. Ct. 19 242, 490
v. Mollohan (Kans.), 198 Pac. 969 218
King, Ex parte, 27 Ala. 387 685, 692
Kingman v. Carter, 8 Kans. App. 46 674
Kingman v. Kingman, 150 Ill. App. 456 644
Kinkaid v. Kinkaid, 256 Ill. 548 369, 511, 879
Kinney v. Commonwealth, 30 Grat. (Va.) 858 59, 63, 105
v. Kinney, 150 Iowa 225 594, 596, 600
v. Kinney (Mo. App.), 231 S. W. 267 740, 767
v. Telephone Co. (Tex. Civ. App.) 201 S. W. 1180 559
v. Tri-State Telephone Co. (Tex. Com. App.), 222 S. W. 227 131
v. Woodmen of the World, 110 Kans. 323 131

[*References are to Sections.*]

Kinnier v. Kinnier, 45 N. Y. 535 560
Kinser v. Kinser, 186 Ky. 173 500
Kinsey v. Kinsey, 37 Ala. 393 275, 334, 579, 636, 642, 643
Kinsey v. Kinsey, 7 Daly. (N. Y.) 463 692
Kiplinger v. Kiplinger, 172 Mich. 552 740
Kipp v. Kipp, 77 N. J. Eq. 585 328
Kirby v. Kirby, 1 Paige (N. Y.) 261 677, 788, 790
Kirkpatrick v. Kirkpatrick, 152 Cal. 316 528
v. Kirkpatrick, 81 Nebr. 627 329, 330
Kirrigan v. Kirrigan, 15 N. J. Eq. 146 698, 790
Kirsch v. Kirsch, 81 N. Y. S. 447 703
Kirschbaum v. Kirschbaum, 92 N. J. Eq. 7 86, 182, 422
Kiser v. Kiser, 108 Va. 730 690, 714, 754
Kistler v. Kistler, 141 Wis. 491 124
Kittle v. Kittle, 8 Daly (N. Y.) 72 696
Kitzman v. Kitzman, 167 Wis. 308 87, 919
Kjellander v. Kjellander, 90 Kans. 102 883
Klasner v. Klasner, 23 N. M. 627 898
Klein v. Klein, 31 Ky. L. 28 153, 157
Kleist v. Breitung, 232 Fed. 555 153
Klekamp v. Klekamp, 275 Ill. 98 424
Klemme v. Klemme, 37 Ill. App. 54 638, 665
Klemmer v. Klemmer (Cal. App.), 187 Pac. 85 334, 519, 577
Klepper v. Klepper, 199 Mo. App. 294 653
Kline v. Kline, 57 Iowa 386, 10 N. W. 825 580
v. Kline, 50 Mich. 438 270
Klipfel v. Klipfel, 41 Colo. 40 55, 136, 137
Klipfel's Estate v. Klipfel, 41 Colo. 40 705
Klitzke v. Davis, 172 Wis. 425 42, 45, 40
Klopfer v. Bromme, 26 Wis. 372 34, 35
Klutts v. Klutts, 5 Sneed (Tenn.) 423 301
Knapp v. Knapp, 134 Mass. 353 660, 769
v. Knapp (Mo.), 183 S. W. 576 158
v. Wing, 72 Vt. 334 157
Knaps v. Graugnard, 10 Rob. (La.) 21 182
Knauer v. Knauer, 121 App. Div. (N. Y.) 748 795
Kneale v. Kneale, 28 Mich. 344 522
Knepper v. Knepper, 139 Mo. App. 493 589
Kniffen v. McConnell, 30 N. Y. 285 30, 34, 35, 36, 45, 46, 48
Knight v. Knight, 31 Iowa 451 278, 433
v. Knight, 1 N. Car. 163 636
v. Mahoney, 152 Mass. 523 120
Knill v. Knill, 195 N. Y. S. 398 626
Knittel v. Knittel, 87 N. J. Eq. 701 242
Knol v. Knol, 171 Ill. App. 412 503
Knoll v. Knoll, 104 Wash. 110 628
Knost v. Knost, 229 Mo. 170 116, 120, 121, 892
Knott v. Knott (N. J.), 51 Atl. 15 695
v. Knott (N. J. Eq.), 54 Atl. 559 576
v. Knott, 6 App. Div. (N. Y.) 589 792
Knowles v. Knowles, 29 Del. 458 424
Knox v. Knox, 139 Ga. 480 644
v. Knox, 79 Misc. (N. Y.) 648 471
Kobogum v. Jackson Iron Co., 76 Mich. 498 106
Koehler v. Koehler, 137 Ark. 302 171, 173, 210, 289, 356, 500, 723, 868
Koenigstein v. Koenigstein (Cal. App.), 200 Pac. 730 242
Koffman v. Koffman, 193 Mass. 593 530
Kohl v. Kohl, 143 Wis. 214 910
Kolsch v. Jewell, 21 App. Div. (N. Y.) 581 40
Koonce v. Wallace, 52 N. Car. 194 95
Koontz v. Koontz, 83 Wash. 180 8
Kostachek v. Kostachek, 40 Okla. 747 424, 425
Kowalsky v. Kowalsky, 145 Cal. 374 608
Kraeger v. Kraeger (Ind. App.), 125 N. E. 484 100
Krause v. Krause, 23 Wis. 354 685, 715, 730

[*References are to Sections.*]

Krause v. Krause (Wis.), 187 N. W. 1019 336
Krauss v. Krauss, 127 App. Div. (N. Y.) 740 772
Krauter v. Krauter, 70 Okla. 30 170
Krauthoff, In re, 191 Mo. App. 149 585, 594
Kraxerger v. Roibter, 91 Mo. 404 32, 35
Kreighbaum v. Kreighbaum, 192 N. Y. S. 516 425
Kremelberg v. Kremelberg, 52 Md. 553 589
Kremer v. Schutz, 82 Kans. 175 201
Kretz v. Kretz, 73 N. J. Eq. 246 226, 421, 430
Krieger v. Krieger, 221 Ill. 479 792
Kriger v. Day, 2 Pick. (Mass.) 316 605
Krone v. Cooper, 43 Ark. 554 443
Krous v. Krous, 41 App. D. C. 200 242
Krug v. Krug, 81 Wash. 461 210
Kruger v. Kruger, 64 Misc. (N. Y.) 382 899
v. Kruger, 137 App. Div. (N. Y.) 289 169
Krusinski v. Krusinski, 170 Mich. 561 289
Krussman v. Krussman, 2 Boyce (Del.) 25 554
Krzepicki v. Krzepicki, 167 Cal. 449 494, 536
Kuck v. Johnson, 114 La. 781 49
Kuether v. Kuether (Wis.), 183 N. W. 695 765
Kuhl v. Knauer, 7 B. Mon. (Ky.) 130 705
Kuhn v. Marquart, 45 N. Dak. 482 21, 24, 32, 36
Kuhns, Ex parte, 36 Nev. 487 799
Kujek v. Goldman, 150 N. Y. 176 188, 356
Kuntz v. Kuntz, 80 N. J. Eq. 429 655
Kunze v. Kunze, 53 N. Y. S. 938 711
Kunzi v. Hickman, 243 Mo. 103 892
Kupfer v. Kupfer, 215 Ill. App. 170 767
Kupka v. Kupka, 132 Iowa 191 326
Kurtz v. Frank, 76 Ind. 594 6, 7, 14, 21, 23, 31, 43, 44, 47, 49
v. Kurtz, 38 Ark. 119 660, 710, 765
Kuster v. Kuster, 37 Misc. (N. Y.) 136 644
Kutch v. Kutch, 88 Nebr. 114 2, 4, 5, 167, 894
Kuykendall v. Kuykendall, 112 Misc. (N. Y.) 12 95, 169
Kwentsky v. Sirovy, 142 Iowa 385 534

L

Labbe v. Abat, 2 La. Ann. 553 215, 644
Labotiere v. Labotiere, 8 Mass. 383 477
Laboute v. Laboute, 210 Mass. 319 448
Lacey v. Lacey, 108 Cal. 45 722, 727
Lacock v. Lacock, 74 Pa. Super. Ct. 378 335, 424
Lacoste v. Guidroz, 47 La. Ann. 295 168, 169
Ladd v. Ladd, 188 Iowa 351 589, 594
La Flamme v. La Flamme, 210 Mass. 156 329, 425, 888
La Framboise v. Day, 136 Minn. 239 628
Lagerholm v. Lagerholm, 133 Mo. App. 306 492
Lagier v. Lagier, 58 Mont. 267 580
Lahey v. Knott, 8 Ore. 198 14
Lainfiesta v. Sturges, 107 Misc. (N. Y.) 458 33
Laing v. Rigney, 160 U. S. 531 678, 679
Laird v. Laird, 149 Minn. 104 545
Lake v. Houghton Circuit Judge, 172 Mich. 660 795
v. Lake, 16 Nev. 363 685, 711
v. Lake, 17 Nev. 230 685, 711, 730
v. Lake, 80 N. J. Eq. 350 432
v. Lake, 124 App. Div. (N. Y.) 89 554, 558
v. Lake, 136 App. Div. (N. Y.) 47 124
v. Lake, 194 N. Y. 179 692, 695, 720, 721
Lakin v. Lakin, 84 Mass. 45 606
Lamar v. Lamar, 123 Ga. 827 790
Lamb v. Lamb, 126 Va. 256 519
Lambert v. Lambert, 165 Iowa 367 229, 333, 421
v. Lambert, 16 Ore. 485 587
Lamont v. Lamont, 134 Ga. 523 446
Lampkin v. Travelers' Ins. Co., 11 Colo. App. 249 136
Lampson v. Lampson, 171 Cal. 332 596
Lamsback v. Lamsback (N. J. Eq.), 71 Atl. 387 655

[*References are to Sections.*]

Lamy v. Catron, 5 N. Mex. 373 690
Lance v. Mason, 151 Ark. 114 455
Lanctot v. State, 98 Wis. 136 144
Land v. Land, 206 Ill. 288 175
Landers v. Landers (Tex. Civ. App.), 220 S. W. 359 913
Landes v. Landes, 94 Misc. (N. Y.) 486 212, 640
Lando v. Lando, 112 Minn. 257, 63, 268
v. Lando, 177 N. Y. S. 396 498
Landry v. Ballanger, 120 La. 962 824
v. Landry (Maine), 115 Atl. 769 327, 344
Lane v. Bursha, 50 La. Ann. 275 292
v. Dunning, 186 Ky. 797 150, 151, 157
v. Lane, 26 App. (D. C.) 235 685, 720
v. Lane, 27 App. D. C. 171 795
v. Lane, 22 Ill. App. 529 653, 696
v. Spence, 70 Nebr. 204 162
Lang v. Lang, 70 W. Va. 205 636, 648
Langan v. Langan, 91 Cal. 654 680, 692, 698, 703, 709
Langdon v. Langdon, 25 Vt. 678 425
v. Templeton, 66 Vt. 173 356
Langewald v. Langewald, 234 Mass. 269 624, 626
Lanham v. Lanham, 136 Wis. 360 59, 64, 65, 137, 631
Lanigan v. Neely, 4 Cal. App. 760 34, 44, 49
Lanktree v. Lanktree, 42 Cal. App. 648 420, 548
Lannigan v. Lannigan, 222 Mass. 198 153
Lansing v. Lansing, 41 How. Pr. (N. Y.) 248 795
Lape v. Lape, 99 Ohio St. 143 740, 741
Laplace v. Briere (La.), 92 So. 881 448, 589, 593
La Porte v. Wallace, 89 Ill. App. 517 30
Lapp v. Lapp, 43 Mich. 287 695
Larkin v. Larkin, 71 Cal. 330 684, 685, 711, 730
Larson v. Larson, 147 Minn. 457 310, 684, 740
v. Larson (Minn.), 179 N. W. 723 723
v. Larson, 82 Miss. 116 678
v. Larson, 9 S. Dak. 1 792, 794
Larson v. Larson, 106 Wash. 305 917
v. McMillan, 99 Wash. 626 188
La Rue v. Kempf, 186 Mo. App. 57 596, 597
Latham v. Latham, 2 Sw. & Tr. 299 792
v. Latham, 30 Grat. (Va.) 307 246, 275, 636
Lathrop v. Lathrop, 78 Conn. 650 681
Lattimore v. Simmons, 13 Serg. & R. (Pa.) 183 25
Lau v. Lau, 156 App. Div. (N. Y.) 912 695
Lauber v. Mast, 15 La. Ann. 593 277
Lauderback's Estate, In re, 106 Nebr. 461 241
Lauderdale v. Lauderdale (Mo. App.), 224 S. W. 126 740, 741
Laudo v. Laudo, 177 N. Y. S. 396 226, 500
Lauer v. Banning, 140 Iowa 319 6
v. Banning, 152 Iowa 99 28, 34, 37
Laufer v. Laufer, 61 Ind. App. 508 211, 786
Laurie v. Laurie, 9 Paige (N. Y.) 234 696, 704
Lavery v. Hutchinson, 249 Ill. 86 73, 74
Law v. Woodruff, 48 Ill. 399 38
Lawlor v. Lawlor, 76 Mo. App. 293 684, 685
Lawrence v. Cooke, 56 Maine 187 6, 8, 37, 41, 42, 44, 48
v. Lawrence, 141 Ala. 356 677, 703, 708
v. Lawrence, 3 Paige (N. Y.) 267 434, 701, 708
v. Nelson, 113 Iowa 277 559
Lawson v. Shotwell, 27 Miss. 630 187
Lawton, In re, 12 R. I. 210 708
Lawton's Estate, In re, 266 Pa. 558 216
Laycock v. Laycock, 52 Ore. 610 424
Layton v. Layton, 166 Iowa 74 284
Lea v. Lea, 104 N. Car. 603 260, 693, 702
v. Lea, 99 Mass. 493 325, 334
Leach v. Leach, 122 Ill. App. 94 555
v. Leach, 46 Kans. 724 409
v. Leach (Maine), 8 Atl. 349 280
Leader v. Barry, 1 Esp. 353 705
Leaman v. Thompson, 43 Wash. 579 1, 11, 33

[*References are to Sections.*]

Leathers v. Stewart, 108 Maine 96 558, 559
Leavell v. Leavell, 114 Mo. App. 24 159, 162
Leavitt v. Cutler, 37 Wis. 46 35, 45, 46
v. Leavitt, 135 Mass. 191 478
v. Leavitt, 229 Mass. 196 229
v. Leavitt, 13 Mich. 452 173, 355
v. Leavitt, Wright (Ohio) 719 434
v. Tasker, 107 Maine 33 610
Le Barron v. Le Barron, 35 Vt. 365 180, 376
Le Beau v. Le Beau (N. H.), 114 Atl. 28 765, 766
Le Brun v. Le Brun, 55 Md. 496 180, 513
Lecker v. Lecker (Ariz.), 202 Pac. 397 545
Leckey v. Bloser, 24 Pa. St. 401 6, 30
Leckney v. Leckney, 26 R. I. 441 692, 695
LeClaire, In re, 124 Fed. 654 674
Ledbetter v. Ledbetter (Tex. Civ. App.), 229 S. W. 576 675
Lee v. Blewett, 116 Miss. 341 62
v. Cook, 4 S. P. 256 16
v. Lee (Ark.), 238 S. W. 525 284
v. Lee, 150 Iowa 611 631, 882
v. Lee, 55 Mont. 426 211, 699
v. Lee, 77 N. J. Eq. 91 897
v. Lee, 93 Misc. (N. Y.) 677 211
v. Lee, 66 How. Pr. (N. Y.) 207 693
v. Lee, 182 N. Car. 61 330, 388
v. Lee, 38 Okla. 388 409, 536, 903
Leech v. Leech, 82 N. J. Eq. 472 424
Leeds v. Joyce, 195 N. Y. S. 468 77
Leefield v. Leefield, 85 Ore. 287 65, 904
Leete, In re, 205 Mo. App. 225 623
Lefebvre v. Lefebvre, 48 Cal. App. 483 589, 594
Leffel v. Leffel, 35 Ind. 76 580
Lehman v. Lehman, 78 N. J. Eq. 316 421
Lehr v. Beaver, 8 Watts & Serg. (Pa.) 102 210
Leib v. Henderson, 73 Ind. App. 181 653
Leichtweiss v. Treskow, 21 Hun. (N. Y.) 487 3
Leininger Lumber Co. v. Dewey, 86 Nebr. 659 11, 894
Leith v. Leith, 39 N. H. 20 231, 442, 447, 560, 667
Le May v. Le May, 205 Ala. 694 242, 580
Lemberger v. Lemberger (Cal. App.), 203 Pac. 786 518
Lemert v. Lemert, 72 Ohio St. 364 686
Lemke v. Frazenburg, 159 Iowa 466 23, 29, 49
Lemon v. Lemon, 141 Ga. 448 218
Lemons v. Harris, 115 Va. 809 107
Lemp v. Lemp, 249 Mo. 295 892
Lennahan v. O'Keefe, 107 Ill. 620 660
Lenning v. Lenning, 176 Ill. 180 575, 580
Lenoir v. Lenoir, 24 App. D. C. 160 176
Lentz v. Lentz, 171 Mich. 509 312
Leonard v. Leonard (Ark.), 142 S. W. 1133 242
v. Leonard, 174 Iowa 734 334, 513, 644
v. Leonard, 151 Mass. 151 301
v. Whetstone, 34 Ind. App. 383 22
Leseuer v. Leseuer, 31 Barb. (N. Y.) 330 465
Lesh v. Lesh, 21 App. D. C. 475 721
Leshinsky v. Leshinsky, 5 Misc. (N. Y.) 495 629
Leslie v. Leslie, 6 Abb. Pr. N. S. (N. Y.) 193 690, 694, 701, 708, 709
Leslie v. Leslie, 11 Abb. Pr. N. S. (N. Y.) 311 710
Leslie v. Leslie (1908) Probate Div. 99 771
Lesser v. Lesser, 114 Misc. (N. Y.) 701 585
Lessig v. Lessig, 136 Wis. 403 528, 594
Lessley v. Phipps, 49 Miss. 790 216
Lester v. Lester, 63 Ga. 356 795
Le Suer v. Le Suer, 122 Minn. 407 829
Lettau v. Lettau, 89 N. J. Eq. 317 336
Letters v. Cady, 10 Cal. 533 1, 5
Letts v. Letts, 79 N. J. Eq. 630 248, 249
v. Letts, 85 N. J. Eq. 407 793
Leucht v. Leucht, 129 Ky. 700 159, 160
Leupert v. Shields, 14 Colo. App. 404 123

[*References are to Sections.*]

Leupold v. Leupold, 164 Iowa 595 242
Levering v. Levering, 16 Md. 213 334
Levesque v. Ouellet, 22 Quebec Super. Ct. 181 170
Levin v. Levin, 68 S. Car. 123 636, 642, 643, 644, 646, 647
Levine v. Levine, 95 Ore. 94 622, 623, 796
Levitt v. Cutler, 37 Wis. 46 34
Levy v. Downing, 213 Mass. 334 64, 65, 180, 896
Levy v. Goldsoll, 62 Tex. Civ. App. 257 211
v. Levy, 29 Misc. (N. Y.) 374 721
v. Levy, 149 App. Div. (N. Y.) 561 772
Lewis v. Lewis, 167 Cal. 732 336, 513, 525
v. Lewis, 80 Ga. 706 793
v. Lewis, 9 Ind. 105 248
v. Lewis, 106 Mass. 309 565
v. Lewis, 44 Minn. 124 85, 167, 173, 355, 386
v. Lewis, 20 Mo. App. 546 685
v. Lewis, 3 Johns. Ch. (N. Y.) 519 696, 704
v. Lewis, 39 Okla. 407 639
v. Lewis, 60 Okla. 60 430
v. Roby, 79 Vt. 487 161
v. Tapman, 90 Md. 294 6, 8, 9, 14, 21, 36
Libbe v. Libbe, 157 Mo. App. 701 427, 701
Liddell v. Easton [1907] S. C., 154 Ct. of Sess. 29
Lieb v. Dobriner, 60 Misc. (N. Y.) 66 123
Liebrandt v. Sorg, 133 Cal. 571 6, 42
Liese v. Meyer, 143 Mo. 547 36, 42, 45, 46, 49
Lightfoot v. Lightfoot, 149 Ga. 213 653
v. Lightfoot, 103 Kans. 188 883
Ligonia v. Buxton, 2 Greenl. (Me.) 102 825
Lilligren v. William J. Burns International Detective Agency, 135 Minn. 60 151
Lima v. Lima, 26 Cal. App. 1 436
Linck v. Vorhauer, 104 Mo. App. 368 162
Lincoln v. Riley, 217 Ill. App. 571 65, 196, 631
Linden v. Linden, 36 Barb. (N. Y.) 61 511
v. McClintock (Mo. App.), 187 S. W. 82 151, 153, 158, 159
Lindenschmidt v. Lindenschmidt, 29 Mo. App. 295 646
Lindquist v. Clayton, 54 Utah 79 798
v. Lindquist, 148 Iowa 259 594
Lindsay v. Lindsay, 226 Ill. 309 424
Lindsey v. Smith, 131 Ky. 176 435
v. Jefferson (Okla.) 172 Pac. 641 135
Linton v. Bank, 10 Fed. 894 537
v. Linton, 15 Q. B. D. 239 686
Linxwiler v. Linxwiler (Tex. Civ. App.), 175 S. W. 1128 579
Lisenbee v. Lisenbee, 42 Cal. App. 567 684, 788
Lishey v. Lishey, 2 Tenn. Ch. 1 704
v. Lishey, 6 Lea (Tenn.) 418 721
Liske v. Liske, 135 N. Y. S. 176 167
Lister v. Lister, 86 N. J. Eq. 30 442, 447, 639, 640, 897
Litowitch v. Litowitch, 19 Kans. 451 690, 695, 698, 703, 704
Little v. Little, 79 Mass. 264 466
Livingston v. Conant (Cal.), 51 Pac. 859 673
v. Livingston, 173 N. Y. 377 440
v. Livingston (Ind. App.), 121 N. E. 119 534
v. Sup. Ct. of Los Angeles, 117 Cal. 633 636, 673, 697
Lloyd v. Lloyd, 30 L. J. P. & M. 97 420
Lochnane v. Lochnane, 78 Ky. 467 685
Locke v. Locke, 71 Hun (N. Y.) 363 674
Lockhart v. Lockhart (Ark.), 220 S. W. 44 248
Lockridge v. Lockridge, 3 Dana (Ky.) 28 636, 655, 660, 733, 770, 795
Lockwood v. Krum, 34 Ohio St. 1 660
v. Lockwood, 19 Ariz. 215 550
v. Lockwood, 2 Curt. Ecc. 281 276
v. Lockwood, 67 Minn. 476 152
Loell's Estate, In re, 164 Cal. 540 218
Loeper v. Loeper, 81 Wash. 454 644
Loftus v. Loftus, 134 Ill. App. 360 310, 336

[*References are to Sections.*]

Lofvander v. Lofvander, 146 Mich. 370 755
Logan v. Logan, 90 Ind. 107 585
v. Logan, 2 B. Mon. (Ky.) 142 639, 642, 644, 646, 653, 655, 701, 714, 754
v. Morrison, 36 Ill. App. 495 34
Lohmuller v. Lohmuller (Tex. Civ. App.), 135 S. W. 751 281, 518
Lohmuller, Ex parte, 103 Tex. 474 685
Lohner v. Coldwell, 15 Tex. Civ. App. 444 14, 29, 43, 49
Loker v. Gerald, 157 Mass. 42 338, 449
Londonderry v. Chester, 2 N. H. 268 61, 70, 71
Long v. Barton, 142 Ill. App. 606 534
v. Long, 147 Ga. 771 876
v. Long, 217 Mich. 211 76, 427
v. Long, 135 Minn. 259 306, 890
v. Long, 78 Mo. App. 32 721
v. Long, 9 N. Car. 189 278
v. Long, 77 N. Car. 304 359
Longbotham v. Longbotham, 119 Minn. 139 430
Longfellow v. Longfellow, Clarke Ch. (N. Y.) 344 702, 704
Longhi v. Longhi, 193 Ill. App. 21 640, 653
v. Longhi, 202 Ill. App. 8 794
Lonstorf v. Lonstorf, 118 Wis. 159 152
Lopez v. Missouri, K. & T. R. Co. (Tex. Civ. App.), 222 S. W. 695 131, 138, 144, 158, 175
Lord v. Lord, 80 W. Va. 547 276
Lorenson v. Lorenson, 155 Ill. App. 35 248
Lorenz v. Lorenz, 93 Ill. 376 182, 374
Loring v. Loring, 17 Tex. Civ. App. 95 277
v. Thorndike, 5 Allen (Mass.) 257 65
Lorson v. Madere, 149 La. 95 596, 598
Loth v. Loth, 54 Colo. 200 631, 870
Louderback v. Rosengrant, 4 Ind. 563 790
Loughran v. Loughran (Iowa). 134 N. W. 1091 427
Love v. Love, 42 Okla. 478 842
v. Love, 185 Iowa 930 57, 73, 136, 326, 821, 882
Love v. Love, 98 Mo. App. 562 159
v. Love, 10 Phila. (Pa.) 453 626
Love, In re, 42 Okla. 478 55, 70, 71
Lovegrove v. Lovegrove, 128 Va. 449 675, 684, 740
Lovell v. Lovell, 11 Montreal L. R. 547 647
Loveren v. Loveren, 100 Cal. 493 694
v. Loveren, 100 Cal. 493 716, 722
Lowe v. Doremus, 84 N. J. L. 658 118, 119
v. Lowe, 213 Ill. App. 607 638
Lowell v. Lowell, 55 Cal. 316 721, 723
v. Vaughn, 85 Mo. App. 206 159, 162
Lowenthal v. Lowenthal, 68 Hun (N. Y.) 366 580, 707
Lowery v. People, 172 Ill. 466 268
Lowman v. Lowman, 165 Cal. 352 525
Lowry v. Coster, 91 Ill. 182 135, 705
Lubow v. Lubow, 195 N. Y. S. 31 705
Luciar v. Luciar, 6 Pa. Co. Ct. 406 665
Luderitz v. Luderitz, 88 N. J. Eq. 103 242, 519
Luettjohann v. Luettjohann, 147 Iowa 286 882
Luick v. Arends, 21 N. Dak. 614 153, 158, 536
Luitwieler v. Luitwieler (Cal. App.), 207 Pac. 931 196, 470
Lum Lin Ying, In re, 59 Fed. 682 80
Lum Yan v. United States, 193 Fed. 970 268
Lundy v. Lundy (Ariz.), 202 Pac. 809 327, 334, 424, 518
Luper v. Luper, 61 Ore. 418 302, 326, 329, 511
Lupton v. Underwood, 3 Boyce (Del.) 519 152, 156, 161, 162
Luther v. Luther, 25 Pa. Co. Ct. 16 794
v. Shaw, 157 Wis. 231 44, 47, 49
Luttner v. Luttner, 143 Ky. 844 211
Lutz v. District Court, 29 Nev. 152 794
v. Lutz, 52 N. J. Eq. 241 425
v. Lutz, 56 Hun (N. Y.) 649 279

[*References are to Sections.*]

Lyannes v. Lyannes, 171 Wis. 381 59, 131, 173, 180, 184
Lyen v. Lyen, 98 Wash. 498 158
Lyle v. Lyle, 86 Tenn. 372 587
Lyman v. Lyman, 90 Conn. 399 356, 871
Lynch v. Figge, 200 App. Div. (N. Y.) 92 30, 36, 45
v. Lynch, 99 Ill. App. 454 706, 717, 720, 724
v. Lynch, 138 La. 1094 283, 496
v. Lynch, 33 Md. 328 336
Lynde v. Lynde, 181 U. S. 183 776
v. Lynde, 54 N. J. Eq. 473 636, 678, 776
v. Lynde, 55 N. J. Eq. 591 776
v. Lynde, 64 N. J. Eq. 736 204, 636, 676, 728
v. Lynde, 4 Sanf. Ch. (N. Y.) 373 708
v. Lynde, 162 N. Y. S. 405 678, 679, 680, 775, 776
Lynn v. Lynn, 68 Pa. Super. Ct. 324 708
v. Lynn, 76 Pa. Super. Ct. 428 411, 492, 519, 696, 723, 798
v. Sentel, 183 Ill. 382 678
Lynthecumb's case (1738), 2 Bland's Ch. (Md.) 568 636
Lyon v. Lyon, 21 Conn. 185 790, 793
v. Lyon, 102 Ga. 453 203
v. Lyon, 230 Ill. 366 171, 355
v. Lyon, 2 Gray (Mass.) 367 560
v. Lyon, 39 Okla. 111 198, 283, 427
Lyons v. Lyons, 272 Ill. 329 500, 870
Lyster v. Lyster, 111 Mass. 327 427
Lytle v. Lytle, 48 Ind. 200 678

M

Maas v. Maas, 34 N. J. Eq. 113 643, 645
Mabin v. Webster, 129 Ind. 430 15, 32, 35, 43
McAllen v. Hodge, 92 Minn. 68 152
McAllister v. McAllister, 37 Nev. 92 496, 895
v. McAllister, 137 N. Y. S. 833 421
McAllum v. Spinks Miss.), 91 So. 694 534
McAlpin v. Baird, 40 S. Dak. 180 156, 157, 161
McAnnulty v. McAnnulty, 120 Ill. 26 62
McAuliffe v. McAuliffe (Cal. App.), 199 Pac. 1071 653
McBean v. McBean, 37 Ore. 195 705
McBee v. McBee, 22 Ore. 329 319
McBride v. McBride, 1 Bush. (Ky.) 15 587
v. McBride, 119 N. Y. 519 685, 730
McCabe v. Berge, 89 Ind. 225 56
McCaddin v. McCaddin, 116 Md. 567 644, 646
McCafferty v. McCafferty, 8 Blackf. (Ind.) 218 233
McCahan v. McCahan (Cal. App.), 190 Pac. 460 210
McCahill v. McCahill, 71 Hun (N. Y.) 224 433
McCaig v. State, 16 Ala. App. 581 175
McCanna v. McCanna, 28 N. Dak. 30 901
McCarthy v. Hinman, 35 Conn. 538 596
v. McCarthy, 219 Ill. App. 369 646
v. McCarthy, 137 N. Y. 500 685, 716, 727, 754
v. McCarthy, 143 N. Y. 235 250
v. McCarthy, 116 Wash. 360 580
McCarty v. Heryford, 125 Fed. 46 43
v. McCarty (Iowa), 169 N. W. 135 427
v. McCarty, 2 Strob. L. (S. Car.) 6, 440
v. Stelly, 145 La. 456 275, 279
McCarty, In re, 154 Cal. 534 794
McCauley v. McCauley, 88 N. J. Eq. 392 420
McCausland, In re, 213 Pa. St. 189 70
McClain v. McClain, 40 Pa. Super. Ct. 248 110, 845, 906
v. McClain, 115 Wash. 237 589, 592
McCleary v. McCleary, 140 Md. 659 245
McClelland v. McClelland (Texas), 37 S. W. 350 720
McClelland's Estate, In re, 181 Cal. 227 216
McClenahan v. McClenahan, 25 Del. 599 873
McClintock v. McClintock, 147 Ky. 409 199, 275, 884

[*References are to Sections.*]

McCloskey v. McCloskey, 68 Mo. App. 199 699, 723
McClung v. McClung, 40 Mich. 493 279, 290, 792
McClurg v. Terry, 21 N. J. Eq. 225 5, 57, 75, 180
McClurg, In re, 66 Pa. St. 366 327
MacClurken v. MacClurken, 77 L. T. N. S. 474 676
McClurkin v. McClurkin, 206 Ala. 513 71, 74
McCoin v. McCoin (Mo), 218 S. W. 949 312
McCombs v. State, 50 Tex. Cr. 490 261
McConahey v. Griffey, 82 Iowa 564 6, 8
McConkey v. McConkey (Tex. Civ. App.), 187 S. W. 1100 913
McConnell v. McConnell, 98 Ark. 193 204, 210, 211, 341
v. McConnell, 211 Mich. 483 73, 184
v. McConnell, 167 Mo. App. 680 448
McCord v. McCord, 13 Ariz. 377 867
v. McCord, 140 Ga. 170 575
McCormick v. McCormick, 82 Kans. 31 620, 622, 683
v. Robb, 24 Pa. St. 44 14, 23
McCoy v. Flinn, 169 Iowa 622 28, 119
v. McCoy, 3 Ind. 555 327
v. McCoy, 191 Iowa 973 622, 691
v. McCoy, 74 Pa. Super. Ct. 552 336
v. McCoy, 74 W. Va. 64 432
McCraney v. McCraney, 5 Iowa 232 325, 529
McCrary v. McCrary (Tex. Civ. App.), 230 S. W. 187 242, 247, 519
McCrea v. McCrea, 58 How. Pr. (N. Y.) 220 792
McCreery v. Davis, 44 S. Car. 195 55, 198, 199, 910
McCrocklin v. McCrocklin, 2 B. Mon. (Ky.) 370 653, 677
McCrum v. Hildebrand, 85 Ind. 204 16
McCue v. McCue, 149 Ind. 466 690, 708
v. McCue, 191 Mich. 1 276
McCulloch v. McCulloch, 69 Tex. 682 356, 511
McCullough v. McCullough, 203 Mich. 288 776
v. Murphy, 45 Ill. 256 727
McCune v. McCune, 31 Pa. Super Ct. 248 242
McCurley v. McCurley, 60 Md. 185 436, 690, 711, 712, 715, 726, 796
McDaniels v. McDaniels, 5 Alaska 107 806
McDermott v. McDermott, 92 N. J. Eq. 245 653
MacDonald v. MacDonald, 155 Cal. 665 283, 285, 518, 859
v. McDonald, 175 Mo. App. 513 124, 554
v. Short (Ind.), 130 N. E. 536 594
McDonald's Estate, In re, 268 Pa. 486 534
McDonough v. Gaynor, 18 N. J. Eq. 249 790
v. McDonough, 26 How. Pr. (N. Y.) 193 704, 753
McDuffee v. McDuffee, 169 Mich. 410 233, 289, 424, 889
Mace v. Mace, 7 Mass. 212 477
McElrath v. McElrath, 120 Minn. 380 555, 559
MacElree v. Wolfersburger, 59 Kans. 105 8, 42
McFadden v. McFadden, 22 Ariz. 246 587, 592, 675
McFarland v. McFarland, 51 Iowa 565 636, 661, 664, 692, 695, 698, 712 721, 821
McFarlane v. Cornelius, 43 Ore. 513 866
McFarlin v. McFarlin, 109 Kans. 431 580
McGaw v. O'Beirne, 126 La. 584 596
McGee v. McGee, 8 Ga. 295 790
v. McGee, 10 Ga. 477 636, 661, 665, 670, 671, 690, 691, 692, 695, 704, 710, 720
v. McGee, 161 Mo. App. 40 411, 490
v. McGee, 43 Okla. 396 395
McGiffert v. McGiffert, 31 Barb. (N. Y.) 69 560, 626
McGill v. McGill, 19 Fla. 341 310
McGinnis v. McGlothlan, 192 Mo. App. 141 160
McGoon v. Irvin, 1 Pin. (Wis.) 526 196
McGowen v. McGowen, 52 Tex. 657 336

[*References are to Sections.*]

McGrady v. McGrady, 48 Mo. App. 668 653
McGrath v. McGrath, 2 Chan. Chamb. (Ont.) 411 695
McGregor v. McGregor, 52 Colo. 292 622
McGrew v. McGrew, 87 Neb. 423 894
v. Mutual Life Ins. Co. 132 Cal. 85 626
McGuinness v. McGuinness, 72 N. J. Eq. 381 679
McIlroy v. McIlroy, 208 Mass. 458 638, 655
McIntyre v. McIntyre, 9 Misc. (N. Y.) 252 548, 551, 553, 670
Mack v. Mack, 87 Nebr. 819 204
v. Mack, 91 Ore. 514 594, 601
McKane v. Howard, 138 App. Div. (N. Y.) 680 30
v. Howard, 202 N. Y. 181 30, 41, 46
McKarracher v. McKarracher, 3 Yeates (Pa.) 56 767
McKay v. McKay, 57 Ky. 8 310, 313
v. McKay, 77 Ore. 14 589, 594
v. McKay, 6 Grant Ch. (U. C.) 380 644
McKee v. McKee, 191 Ky. 669 277, 284, 598, 723, 740
v. Mouser, 131 Iowa 203 6, 37, 48
v. Nelson, 4 Cow. (N. Y.) 355 30, 43, 50
McKenna v. McKenna, 70 Ill. App. 340 692, 695, 721
v. McKenna, 84 N. J. Eq. 190 242
McKennan v. Phillips, 6 Whart. (Pa.) 571 211
McKennon v. McKennon, 10 Okla. 400 722
McKenzie v. Gray, 143 Iowa 112 48, 49
v. Loutenschlager, 113 Mich. 171 160
v. McKenzie, 153 N. Car. 242 900
McKim v. McKim, 12 R. I. 462 589
Mackintosh v. Mackintosh, 44 App. Div. N. Y. 118 703
McKinney v. Clark, 2 Swan. (Tenn.) 321 55, 458
v. McKinney, 185 Ky. 315 684, 740
v. McKinney, 77 W. Va. 58 333, 341
McKinsey v. Squires, 32 W. Va. 41 24
McKissick v. McKissick, 93 Ore. 644 589, 594
McKitrick v. McKitrick, 49 App. D. C. 109 242
McKyring v. Bull, 16 N. Y. 297 35
McLane v. McLane, 88 Nebr. 833 496
McLarren v. McLarren, 45 App. D. C. 237 462
McLauchlin v. McLauchlin, 128 Ga. 653 503, 690, 721
McLaughlin v. McLaughlin, 202 Ala. 16 620
v. McLaughlin, 90 N. J. Eq. 322 331, 424, 491
McLaughlin, In re, 4 Wash. 570 55, 61, 70, 136
McLean v. Randell (Tex. Civ. App.), 135 S. W. 1116 442
McLeod v. McLeod, 144 Ga. 359 475, 534
McMahen v. McMahen, 186 Pa. St. 485 280
MacMahon v. MacMahon, 170 Ala. 338 310, 496, 865
McMakin v. McMakin, 68 Mo. App. 57 792
v. Wickliffe, 16 Ky. L. 240 727, 770
McMillan v. McMillan, 113 Wash. 250 427
McMullin v. McMullin, 123 Cal. 653 642, 646
v. McMullin, 10 Iowa 412 642, 643, 749
McMullen, In re, 19 Cal. App. 481 622
McMurray v. McMurray, 58 Mont. 229 185
McNabb v. McNabb, 182 Iowa 1143 312, 320
v. McNabb (Tex. Civ. App.), 207 S. W. 129 283, 284, 574, 913
McNamara v. Casserly, 61 Minn. 335 678
v. McAllister, 150 Iowa 243 162, 614
v. McNamara, 86 Nebr. 631 792
v. McNamara, 93 Nebr. 190 411, 425
MacNamara's Case, 2 Bland (Md.) 566 636, 655
McNeil v. McNeil, 170 Fed. 289 555
v. McNeil, 19 Pa. Co. Ct. 353 605
v. State, 117 Ark. 8 268

[*References are to Sections.*]

McNeill, In re, 155 Cal. 333 534, 536
McNeill v. McNeill, 125 Miss. 277 275, 283
McNeir v. McNeir, 76 Misc. (N. Y.) 661 500, 587
Macomber v. Macomber, 35 R. I. 372 519
McPheeters v. McPheeters, 207 Mo. App. 634 651
McPherson v. Commonwealth, 28 Grat. (Va.) 939 105
v. Ryan, 59 Mich. 33 6, 48, 49
McQuaid v. McQuaid, Wright (Ohio) 223 343
McQueen v. McQueen, 61 How. Pr. (N. Y.) 280 661, 712
McReynolds v. State, 5 Cold. (Tenn.) 23 85
McShane v. McShane, 45 N. J. Eq. 341 447
McSherry v. McSherry, 49 Ill. App. 90 795
v. McSherry, 113 Md. 395 678, 679, 887
McVickar v. McVickar, 46 N. J. Eq. 490 310, 334
Madden v. Fielding, 19 La. Ann. 505 667, 678, 702, 706
Maddox v. Maddox, 189 Ill. 152 275, 293
v. Patterson, 80 Ga. 719 595
Maddux v. Maddux, 143 La. 625 885
Madson, Ex parte, 25 Wyo. 338 589
Magahay v. Magahay, 35 Mich. 210 314, 321
Magee v. Nealon, 108 Misc. (N. Y.) 396 169, 180
v. Young, 40 Miss. 164 55
Maggett v. Roberts, 112 N. Car. 71 839
Magowan v. Magowan, 57 N. J. Eq. 322 447
Magrath v. Magrath, 103 Mass. 577 346
Maguire v. Maguire, 7 Dana. (Ky.) 181 59, 560
Maher v. Maher, 73 Pa. Super. Ct. 327 580
Mahiat v. Codde, 106 Mich. 387 49
Mahn v. Mahn, 70 Mo. App. 337 685, 691, 713, 714
Mahnken v. Mahnken, 9 N. Dak. 188 575
Mahoney v. Mahoney, 59 Minn. 347 798
Mahonna v. Mahonna, 174 Wis. 586 285
Mahurin v. Mahurin (Tex. Civ. App.), 208 S. W. 558 424, 913
Maier v. Brock, 222 Mo. 74 131
v. Lillibridge, 112 Mich. 491 180
Main v. Main, 168 Iowa 353 196, 694, 708
v. Main, 113 Miss. 165 891
v. Main (N. J.), 24 Atl. 1024 716
Mainz v. Lederer, 21 R. I. 370 34, 49
v. Lederer, 24 R. I. 23 27, 41, 42, 44, 48
Mainzer v. Avril, 108 Misc. (N. Y.) 230 534
Maisner v. Maisner, 62 App. Div. (N. Y.) 286 686
Maitlen v. Barley, 174 Ind. 620 610
Malden Hospital v. Murdock, 218 Mass. 73 681
Mallette v. Scheerer, 164 Wis. 415 479
Malone v. Malone, 76 Ark. 28 518
Malone v. Ryan, 14 R. I. 614 41
Maloney v. Maloney, 83 Wash. 656 326, 341, 352
Malvich v. Malvich (Cal. App.), 196 Pac. 784 600
Mamaux v. Mamaux, 64 Pa. Super. Ct. 131 275
Mangels v. Mangels, 6 Mo. App 481 696, 714
Mangue v. Mangue, 1 Mass. 240 130, 435, 520
Manikin v. Chandler, 2 Brac. 127 678
Mann v. Jackson, 84 Maine, 400 120
Mansfield v. Hill, 56 Ore. 400 598
Maran v. Maran, 137 App. Div. (N. Y.) 348 793
Mardt v. Scharmach, 65 Misc. (N. Y.) 124 610
Margarum v. Margarum, 57 N. J. Eq. 249 638, 642
Margulies v. Margulies, 92 N. J. Eq. 332 332
Marker v. Marker, 11 N. J. Eq. 256 701, 703, 708
Markey v. State, 47 Fla. 38 576
Markham v. Herrick, 82 Mo. App. 327 30
Marks v. Crume, 16 Ky. L. 707 168
v. Marks, 108 Ill. App. 371 705
v. Marks, 56 Minn. 264 275, 411
v. Marks, 22 S. Dak. 453 600
Marolf v. Marolf, 191 Mo. App. 239 493, 496, 525

[*References are to Sections.*]

Marone v. Marone, 105 Misc. (N. Y.) 371 131, 169
Marre v. Marre, 184 Mo. App. 198 105, 168, 831, 892
Marschalk v. Marschalk, 45 App. D. C. 455 641
Marselis v. People, 18 Colo. App. 258 790
Marsh v. Marsh, 162 Ind. 210 796
v. Marsh, 14 N. J. Eq. 315 334, 424, 665
v. Marsh, 10 N. J. L. 300 642
v. Whittington, 88 Miss. 400 168
Marshak v. Marshak, 115 Ark. 51 338
Marshall v. Carr, 271 Pa. 271 131
v. Marshall, 236 Mass. 248 650, 653
v. Marshall, 88 Mo. App. 325 525
v. Marshall (Mo. App.), 236 S. W. 378 594
Marsicano v. Marsicano, 79 Fla. 278 55, 71, 72, 650
Martensen v. Martensen (Mo. App.), 186 S. W. 581 277
Martin v. Burns, 80 Tex. 676 678
v. Martin, 173 Ala. 106 440, 492, 534, 865
v. Martin, 149 Ga. 682 684
v. Martin, 6 Blackf. (Ind.) 321 792
v. Martin, 150 Iowa 223 882
v. Martin, 133 La. 948 885
v. Martin, 151 La. 530 424, 511
v. Martin (Mo. App.), 238 S. W. 525 587
v. Martin, 47 N. H. 52 301
v. Martin, 78 N. J. Eq. 423 341
v. Martin, 54 W. Va. 301 170, 857
v. Otis, 233 Mass. 491 57, 86
v. Patton, 11 Ky. (1 Litt.) 233 23, 33
Martinez's Estate, In re, 181 N. Y. S. 907 165
Martinson v. Martinson, 116 Minn. 128 890
Marvin v. Marvin, 52 Ark. 425 168, 358
Maryland v. Baldwin, 112 U. S. 490 55, 71
Masey v. Masey, 58 App. Div. (N. Y.) 619 721, 725
Mason v. Mason, 151 Ga. 468 709
v. Mason (Mo. App.), 233 S. W. 263 580
Massey v. Massey, 40 Ind. App. 407 496
v. Stimmel, 15 Ohio Cir. Ct. 439 678
Massuco v. Tomassi, 80 Vt. 186 33, 42
Masten v. Masten, 15 N. H. 159 427
Masterson v. Ogden, 78 Wash. 644 436, 559
Masure v. Masure, 171 Ill. App. 438 440, 476
Matchin v. Matchin, 6 Pa. St. 332 249, 430
Matheny v. Matheny, 191 Iowa 337 310
Mathews v. Guellant, 130 La. 459 248
Mathews v. Mathews, 49 Cal. App. 497 766
v. Mathews (Iowa), 182 N. W. 390 283
Mathewson v. Mathewson, 18 R. I. 456 232
v. Mathewson, 81 Vt. 173 275, 283, 285, 425
Mathiot's Estate, In re, 243 Pa. 375 124
Mathy v. Mathy, 88 Ark. 56 424
Matlock v. Matlock, 72 Ore. 330 427
Matson v. Matson, 186 Iowa 607 622, 731, 767, 791
Matzke v. Matzke, 185 App. Div. (N. Y.) 533 794
Matter of Fitzgerald, 2 Caines (N. Y.) 318 444
Matter of Wrigley, 8 Wend. (N. Y.) 140 444
Matteote's Estate, In re, 59 Colo. 566 218
Mattes v. Mattes, 121 Ill. App. 400 424
Matteson v. Curtis, 11 Wis. 424 161
Matthes v. Matthes, 198 Ill. App. 515 818
v. Matthes, 80 Md. 89 826
Matthews v. Cribbett, 11 Ohio St. 330 45
v. Matthews, 139 Ga. 123 620, 623, 624, 626
v. Matthews, 112 Md. 582 326, 327
v. Matthews, 91 N. J. Eq. 149 334, 518
v. Matthews, 60 Ore. 451 594
Mattison v. Mattison, 60 Misc. (N. Y.) 573 421, 427
v. Mattison, 1 Strobh. Eq. (S. Car.) 387 636

[*References are to Sections.*]

Mattson v. Mattson, 181 Cal. 44 644, 650, 651
Maxwell v. Maxwell, 106 Nebr. 689 675
v. Maxwell, 28 Hun (N. Y.) 566 653, 701, 714
v. Maxwell, 67 W. Va. 119 685
v. Maxwell, 69 W. Va. 414 275, 918
v. Maxwell, 84 S. E. 251 424
v. Sawyer, 90 Wis. 352 660
May v. Hess, 11 Ohio App. 213 216
v. May, 108 Iowa 1 239, 641
Maybin v. Webster, 8 Ind. App. 547 49
Mayer v. Mayer, 154 Mich. 386 622, 765
v. Mayer, 5 Ohio Dec. (Reprint) 444 645, 653
Mayes v. Mayes (Ky. App.), 115 S. W. 717 884
Mayhew v. Mayhew, 61 Conn. 233 282
Maynard v. Hill, 125 U. S. 190 55, 59, 196, 198
Mayr v. Mayr, 161 Cal. 134 644
Mazzei v. Gruis, 128 La. 860 135
Mazerat v. Godefroy, 48 La. Ann. 824 557
Mead v. Randall, 111 Mich. 268 159
Meadows v. Meadows, 78 Fla. 576 594
Meagher v. Harjo, 72 Okla. 179 Pac. 757 106
Mecartney v. Smith, 10 Kans. App. 580 47
Medina v. Medina, 22 Colo. 146 447, 558
Medlin v. Medlin, 175 N. Car. 529 900
Medrano v. State, 32 Tex. Cr. 214 175
Medway v. Needham, 16 Mass. 157 64
Meehan v. Meehan, 2 Barb. (N. Y.) 377 199
Meek v. Fox, 118 Va. 774 116
v. Meek, 186 Mo. App. 703 425
v. Meek, 92 N. J. Eq. 23 518
Meeker v. Meeker, 74 Fla. 442 758, 875
v. Meeker (N. J.), 27 Atl. 78 642, 644, 646, 647
v. Meeker, 117 Wash. 410 545
Meekins v. Kinsella, 152 App. Div. (N. Y.) 32 167
Meffert v. Meffert, 118 Ark. 582 411, 587, 594
Megginson's Estate, 21 Ore. 387 131
Meisheimer v. Meisheimer, 55 Wash. 32 917
Meissner v. Bergman, 5 Ohio Cir. Dec. 225 676
Meister v. Moore, 96 U. S. 76 55, 61, 76, 813
Melcher v. Melcher, 102 Nebr. 790 61, 153, 158, 160, 169, 894
Melchers v. Bertolido, 118 Misc. (N. Y.) 196 610
Meldora v. Meldora (4 Sandf.), 721 704
Meldowney v. Meldowney, 27 N. J. Eq. 328 328
Meldrum v. Meldrum, 15 Colo. 478 673
Melizet v. Melizet, 1 Pars. Eq. Cas. (Pa.) 77 690, 711
Mellanson v. Mellanson, 113 Ill. App. 81 646
Mellor v. Mellor, 11 British Columbia 327 690
Melrose v. Besser (Ind. App.), 133 N. E. 27 211
Melton v. Hubbard, 135 Ga. 128 210, 211
Melvin v. Melvin, 58 N. H. 569 282
Mengel v. Mengel, 157 Iowa 630 710
Menzie v. Anderson, 65 Ind. 239 796
Meo v. Meo, 22 Abb. (N. C.) 58 185, 693
Mercein v. People, 25 Wend (N. Y.) 64 210
Mercer v. Mercer, 19 Colo. App. 51 685, 690, 713, 720
v. Mercer, 73 Hun (N. Y.) 192 724, 796
v. Mercer, 114 Ind. 558 278
v. Parsons, 95 N. J. L. 224 159
Meredith v. Meredith, 79 Mo. App. 636 180
Merges v. Merges, 94 Ore. 246 589, 594
Merriam v. Merriam, 75 Wash. 389 397, 917
Merrick v. Betts, 214 Mass. 223 107
Merritt v. Cravens, 168 Ky. 155 159
v. Merritt, 40 Nev. 385 895
Merrill v. Leisenring, 149 Mich. 423 159
v. Merrill, 126 Mass. 228 375, 377
v. Shattuck, 55 Maine 370 663
Messenger v. Messenger, 188 Iowa 367 444, 549

[*References are to Sections.*]

Messenger v. Messenger, 56 Mo. 329 434, 587
Messervy v. Messervy, 80 S. Car. 277 653, 704
v. Messervy, 82 S. Car. 559 152, 154
v. Messervy, 85 S. Car. 189 653, 795
v. Messervy, 86 S. Car. 90 653
Messervy, Ex parte, 80 S. Car. 285 696
Messick v. Messick (Ky. App.), 197 S. W. 792 884
v. Messick (N. J. Eq.), 115 Atl. 379 242
Methvin v. Methvin, 15 Ga. 97 644, 690, 694, 695, 698, 701, 704, 706, 708, 720, 721
Meton v. State Industrial Insurance Department, 104 Wash. 652 70, 856
Metzger v. Metzger, 118 Wash. 479 399
Metzler v. Metzler (N. J. Eq.), 69 Atl. 965 492
Meunier v. Thibodeaux, 138 La. 393 653
Meyar v. Meyar, 3 Metc. (Ky.) 298 690, 723
Meyer v. Mayo, 173 App. Div. (N. Y.) 199 48
v. Meyer, 184 Cal. 687 580, 708, 798
v. Meyer (Cal. App.), 195 Pac. 387 684
v. Meyer, 169 Iowa 204 275
v. Meyer, 187 Iowa 617 285, 578, 740
v. Meyer, 158 Mo. App. 299 108
Meyerl v. Meyerl, 125 Mich. 607 640
Meyers v. Pope, 110 Mass. 314 61
v. East End Loan & Savings Ass'n of Baltimore City (Md.), 110 Atl. 453 610
Michael v. Dunkle, 84 Ind. 544 614
v. Michael, 34 Tex. Civ. App. 630 575
Michaels v. Michaels (N. J. Ch.), 110 Atl. 573 131
v. Fennell, 15 N. Dak. 188 186
Michels v. Michels, 120 Maine 395 286
Michigan University v. McGuckin, 62 Nebr. 489 71
Mickle v. State (Ala.), 21 So. 66 77
Middleborough v. Rochester, 12 Mass. 363 85
Middleton v. Middleton, 18 Ill. App. 472 640
v. Middleton, 54 N. J. Eq. 692 196
v. Middleton, 187 Pa. 612 576
Middletown v. Middletown, 19 Pa. Co. Ct. 353 685
Middleworth v. McDowell, 49 Ind. 386 678
Milekovich v. Quinn, 40 Cal. App. 537 675, 767
Miles v. Chilton, 1 Rob. Ecc. 684 661
v. Miles, 149 Ga. 47 585, 684
v. Miles, 101 Ill. App. 406 424
v. Miles, 102 Ill. App. 130 685, 706, 724
v. Miles, 137 Mo. App. 38 427, 525
Milder v. Milder (Iowa), 180 N. W. 274 49
Milewski v. Kurtz, 77 N. J. L. 132 156
Milford v. Worcester, 7 Mass. 48 96, 827
Millady v. Stein, 19 Misc. (N. Y.) 652 709, 726
Millar v. Millar, 175 Cal. 797 166, 424, 869
v. Millar (Cal. App.), 197 Pac. 811 185
Miller v. Hayes, 34 Iowa 496 43
v. Miller, 33 Fla. 453 448, 692
v. Miller, 139 Ga. 282 276
v. Miller, 55 Ind. App. 644 490, 492
v. Miller, 43 Iowa 325 288, 685
v. Miller, 78 Iowa 177 218
v. Miller, 154 Iowa 344 158
v. Miller, 89 Kans. 151 534, 620, 624
v. Miller, 141 Ky. 681 475, 710
v. Miller, 64 Maine 484 595
v. Miller, 122 Mo. App. 693 158
v. Miller, 89 Nebr. 239 285, 894
v. Miller, 37 Nev. 257 477, 525, 558, 895
v. Miller, 1 N. J. Eq. 386 640, 641, 662, 670, 690
v. Miller, 2 N. J. Eq. 139 249
v. Miller, 20 N. J. Eq. 216 238
v. Miller, 194 App. Div. (N. Y.) 183 238, 740
v. Miller, 70 Misc. (N. Y.) 368 629
v. Miller, 43 How. Pr. (N. Y.) 125 699, 725

[*References are to Sections.*]

Miller v. Miller, 7 Hun (N. Y.) 208 796
v. Miller, 6 Johns Ch. (N. Y.) 91 677
v. Miller, 75 N. Car. 70 696, 701, 714
v. Miller, 78 N. Car. 102 290
v. Miller, 65 Ore. 551 512, 525
v. Miller, 67 Ore. 359 446, 514, 598
v. Miller, 2 Kulp. (Pa.) 309 700
v. Miller, 88 Vt. 134 443, 915
v. Miller, 38 Wash. 605 677
v. Miller, 19 B. C. 563 640
v. Pearce, 86 Vt. 322 156, 159
v. Rosier, 31 Mich. 475 42, 43, 48
v. White, 80 Ill. 580 705
v. Wiggins, 149 La. 720 175
Millet v. Millet, 144 La. 921 287, 424, 885
Milliman v. Milliman, 45 Colo. 291 565
Milliron v. Milliron, 9 S. Dak. 181 636, 721
Millis v. State, 106 Miss. 131 793
Millowitsch v. Millowitsch, 44 Ill. App. 357 690
Mills v. Mills, 150 Ga. 782 650
Milner v. Gatlin, 143 Ga. 816 593, 594, 623
v. Gatlin (Tex. Civ. App.), 211 S. W. 617 594
v. Milner, 4 Swab. & T. 240 277
v. Tutwiler, 124 La. 689 885
Milster v. Milster, 200 Mo. App. 603 197, 198, 251, 285, 462, 574, 580, 892
Miltmore v. Miltmore, 40 Pa. St. 151 663
Mims v. Mims, 33 Ala. 98 226, 636, 642
Miner v. Miner, 11 Ill. 43 589, 592
v. People, 58 Ill. 59 225
Mini v. Mini, 141 Cal. xvii 498
Minium v. Minium (Cal. App.), 199 Pac. 1104 610
Minor v. Young, 149 La. 583 105
Minshew v. State, 25 Ga. App. 240 61
Miskell v. Murray, 204 Ill. App. 567 11
Mitchell v. Bunch, 2 Paige (N. Y.) 606 790
Mitchell v. Mitchell, 193 Iowa 153 229, 338, 424, 723, 740, 746
Mitchell v. Mitchell, 263 Ill. 165 218
v. Mitchell, 61 N. Y. 398 238
v. Mitchell, 63 Misc. (N. Y.) 580 65, 899
v. Mitchell, 28 Nev. 110 585
v. Mitchell, 11 Vt. 134 135, 705
v. Mitchell, 39 Wash. 431 677
v. United States, 88 U. S. 350 444, 445, 447
Mitvalsky v. Mitvalsky, 191 Iowa 8 594, 600, 740
Mix v. Mix, 1 Johns. Ch. (N. Y.) 108 690, 692, 703, 711, 715
Mizen v. Peck, 3 M. & W. 411 681
Moayon v. Moayon, 114 Ky. 855 204
Mock v. Chaney, 36 Colo. 60 631
Modisett v. McPike, 74 Mo. 636 159
Modjeski v. Modjeski, 209 Ill. App. 213 644, 645
Moe v. Moe, 39 Wis. 308 691, 710, 711, 765
Moelleur v. Moelleur, 55 Mont. 30, 152, 156, 161, 162
Mogg v. Mogg, 2 Add. Ecc. 292 281
Mohler v. Shank, 93 Iowa 273 455
Mohr v. Mohr, 81 Nebr. 499 536, 570
Moir v. Moir, 181 Iowa 1005 153, 158, 160
v. Moir, 182 Iowa 370 289, 789
Moller v. Sommer, 86 Misc. N. Y. 110 705
Moncrief v. Moncrief, 15 Abb.. Pr. (N. Y.) 187 709
Monk v. Monk, 30 N. Y. Super. Ct. 153 704
Monnier v. Coutejean, 45 La. Ann. 419 175
Monroe v. Hartford St. R. Co., 76 Conn. 201 356
Monroe County Sav. Bank v. Yeoman, 195 N. Y. S. 531 606
Montague v. Montague, 25 S. Dak. 471 453, 911
Montgomery v. Montgomery, 170 N. Y. S. 867 211, 218
v. Montgomery, 41 Okla. 581 24, 218
Monypeny v. Monypeny, 171 App. Div. 134 249
Moody v. Moody, 118 Maine 454 326, 336
v. Moody, 118 N. Car. 926 706
v. Soper, 117 Misc. (N. Y.) 439 625
Moon v. Baum, 58 Ind. 194 670
v. Moon, 43 N. J. Eq. 403 696

[*References are to Sections.*]

Moor v. Moor (Tex. Civ. App.), 63 S. W. 347 534
Moore v. Greenville Banking & Trust Co,. 178 N. Car. 118 610
Moore v. Hegeman, 27 Hun (N. Y.) 69 11
v. Moore, 255 Fed. 497 211
v. Moore, 88 Ill. 98 580
v. Moore (Ind. App.), 129 N. E. 480 653
v. Moore, 192 Iowa 394 278, 587, 740
v. Moore, 18 La. Ann. 613 636
v. Moore (Mo. App.), 186 S. W. 541 225, 425
v. Moore, 56 N. H. 512 576
v. Moore, 130 N. Car. 333 702, 704, 708
v. Moore, 102 Tenn. 148 136
v. Moore (Tex. Civ. App.), 213 S. W. 949 585
v. Moore, 42 Utah 140 798
v. Nah-con-be, 72 Kans. 169 106
v. Rittenhouse, 15 Ohio St. 310 769
Moores v. Moores, 16 N. J. Eq. 275 434
Moorhouse v. Moorhouse, 90 Ill. App. 401 575
Moors v. Moors, 121 Mass. 232 60, 428
Moorsom v. Moorsom, 3 Hog. Ecc. 87 239
Morehouse v. Morehouse, 70 Conn. 420 279, 280, 580
Moreland v. Moreland, 108 Va. 93 210, 213
Morey, Ex parte, 28 R. I. 242 793
Morgan v. Ireland, 1 Idaho 786 62
v. Lowman, 80 Ill. App. 557 772
v. Martin, 92 Maine 190 152
v. McGhee, 5 Humph. (Tenn.) 13 106
v. Morgan (Del.), 111 Atl. 540 530
v. Morgan, 148 Ga. 625 95, 661, 815
v. Morgan, 134 Mo. App. 160 525
v. Morgan, 25 App. D. C. 389 685
v. Morgan, 2 Curt. Ecc. 679 455
v. Morgan, 22 Ont. Wk. Rep. 25 640
v. Muench, 181 Iowa 719 11, 37, 44, 45, 47, 48, 49
Morgan v. State, 11 Ala. 289 110
v. Yarborough, 5 La. Ann. 316 5, 8, 30
Morick v. Morick, (Mo. App.), 196 S. W. 1029 702
Morin v. Morin, 66 Wash. 312 594
Moritz v. Melhorn, 13 Pa. St. 331 6
Morrell v. Morrell, 2 Barb. (N. Y.) 480 690, 700, 704, 714
v. Morrell, 17 Hun (N. Y.) 324 376
Morrill v. Morrill, 83 Conn. 479 585, 594, 623, 624
v. Palmer, 68 Vt. 1 60, 61, 188, 854
Morris v. Graves, 2 Ind. 354 3
v. Morris, 20 Ala. 168 225, 344, 395, 504
v. Morris, 14 Cal. 76 275
v. Morris, 60 Mo. App. 86 548
v. Morris, 108 Misc. (N. Y.) 228 275, 283, 284, 288, 415
v. Morris, Wright (Ohio), 630 356
v. Morris, 81 Okla 222 589, 594
v. Patterson, 180 N. Car. 484 210, 420, 675
v. Warwick, 42 Wash. 480 156
Morrison v. Holt, 42 N. H. 478 726
v. Morrison, 165 Ala. 191 865
v. Morrison, 136 Mass. 310 421
v. Morrison, 142 Mass. 361 195, 229, 335, 427, 566
v. Morrison, 49 N. H. 69 801
v. Rogers, 115 Cal. 252 123
Morse v. Morse, 25 Ind. 156 701, 708
Morsh v. Morsh, 16 N. J. Eq. 391 497
Morton v. Morton, 33 Mo. 614 696
v. Onion, 45 Vt. 145 62
Moss v. Fitch, 212 Mo. 484 678
Moot v. Moot, 37 Hun (N. Y.) 288 173
Moses v. Autuono, 56 Fla. 499 34
Mosher v. Mosher, 16 N. Dak. 260 275, 425, 433, 685, 720
Mosier v. Mosier, 89 Ore. 477 427, 904
Moss v. Moss, 147 Ga. 311 791, 876
v. Moss, 24 N. Car. 55 431

[*References are to Sections.*]

Moss v. Moss (1897) P., 263, 274 356
v. Moss, 15 W. R. 532 696
Mosser v. Mosser, 29 Ala. 313 242
Motley v. Motley, 93 Mo. App. 473 414, 685, 690
v. Motley, 117 Wash. 234 642
Mott v. Mott, 82 Cal. 413 405
v. Mott, 134 App. Div. N. Y. 569 538
Mount v. Mount, 15 N. J. Eq. 162 247
Mountholly v. Andover, 11 Vt. 226 55, 70, 455
Mowry v. Bliss, 28 R. I. 114 793, 795
Moyer v. Koontz, 103 Wis. 22 559
v. Moyer, 75 N. J. Eq. 439 587
Moyler v. Moyler, 11 Ala. 620 278, 283
Muckenburg v. Holler, 29 Ind. 139 204, 420
Mudd v. Mudd, 98 Cal. 320 702, 722, 723
Muhr's Estate, In re, 59 Pa. Super. Ct. 393 217
Muir v. Muir, 133 Ky. 125 708
v. Muir, 27 Ky. L. 1162 670, 685
Mulhall v. Mulhall, 120 Md. 22 694, 708
Mulkins v. Mulkins, 215 Mich. 491 285
Muller v. Hilton, 13 La. Ann. 1 441, 442
v. Muller, 125 Md. 72 327
Multer v. Knibbs, 193 Mass. 556 153
v. Multer, 107 Misc. (N. Y.) 58 589
Mundell v. Coster, 80 Misc. (N. Y.) 337 169
Munson v. Hastings, 12 Vt. 346 1, 6, 37
Murchison v. Murchison (Tex. Civ. App.), 171 S. W. 790 424
v. Green, 128 Ga. 339 137, 187, 268
Murray v. Murray, 84 Ala. 363 636, 793
v. Murray, 115 Cal. 266 202, 675, 678, 788
v. Murray, 134 Md. 653 440, 585
v. Murray, 169 Mich. 388 288
Murphy v. Murphy, 194 App. Div. (N. Y.) 395 173
Muse v. Muse, 84 N. Car. 35 653, 696, 743
Musselman v. Barker, 26 Nebr. 737 45, 49
v. Musselman, 44 Ind. 106 503, 720
Mussing v. Mussing, 104 Ill. 126 660
Mutter v. Mutter, 123 Ky. 754 365, 366, 372, 884
Myatt v. Myatt, 44 Ill. 474 705
Myers v. Myers, 41 Barb. (N. Y.) 114 239, 421
v. Myers, 83 Va. 806 289, 677
Myles v. Myles, 77 N. J. Eq. 265 897
Mylius v. Cargill, 19 N. Mex. 278 623
Myrick v. Myrick, 67 Ga. 771 310

N

Names v. Names, 67 Iowa 383 249
Napier v. Church, 132 Tenn. 111 107
v. Napier, 186 Ky. 558 685
v. Napier, 187 Ky. 722 636, 643, 644, 646
Nary v. Braley, 41 Vt. 180 710
Nathan v. Nathan, 102 Nebr. 59 696, 894
Nathans v. Nathans, 2 Phila. (Pa.) 393 199
Nation v. Nation, 206 Ala. 397 545, 555
Nations v. Nations, 201 Mo. App. 639 594
v. Spence (Mo.), 235 S. W. 1064 120
Naumer v. Gray, 41 App. Div. (N. Y.) 361 727
Nave v. Nave, 35 Cal. App. 27 585
Naveja v. Naveja, 110 Misc. (N. Y.) 279 792
Naylor v. Naylor, 59 Pa. Super. Ct. 547 245
Neale v. Neale, 70 Pa. Super. Ct. 219 336
Nealon v. Nealon, 195 App. Div. (N. Y.) 694 169
Neeley v. Neeley, 179 Cal. 232 424
Neff v. Neff, 96 Conn. 273 242
Nehring v. Nehring, 164 Ill. App. 527 631
Nelson v. Brown, 164 Ala. 397 55
v. Nelson, 146 Ark. 362 594, 601, 721
v. Nelson, 18 Cal. App. 602 496, 510
v. Nelson, 200 Ill. App. 584 637
v. Nelson, 193 Iowa 463 598
v. Nelson, 149 Minn. 285 675

[*References are to Sections.*]

Nelson v. Nelson (Mo. App.), 242 S. W. 1002 580
v. State, 84 Tex. Cr. 219 76
v. Sutton, 42 S. Dak. 124 33
v. Vassenden, 115 Minn. 1 204
Neville v. Gile, 174 Mass. 305 157
Nevins v. Nevins, 68 Kans. 410 152, 157, 159, 162
Nevling v. Commonwealth, 98 Pa. 322 46
Newbold v. Newbold, 133 Md. 170 887
Newby v. Newby (Cal. App.), 202 Pac. 891 434, 587
Newcomb v. Newcomb, 13 Bush (Ky.) 544 430, 455
Newell v. Newell, 9 Paige (N. Y.) 25 376
Newhouse v. Commonwealth, 5 Whart. (Pa.) 82 686
v. Newhouse, 14 Ore. 290 792
Newlin v. Newlin, 94 Vt. 26 329, 441
Newlin's Estate, In re, 231 Pa. 312 536
Newman v. Freitas, 129 Cal. 283 204, 728
v. Newman, 69 Ill. 167 690, 709, 713, 721, 722, 727
v. Newman, 211 Mass. 508 427, 499, 500
v. Newman, 27 Okla. 381 500
Newth v. Newth (Mass.), 135 N. E. 551 444
Newton v. Newton, 86 N. J. Eq. 129 424
v. Newton, 145 Wis. 261 772
Nicely v. Nicely, 3 Head (Tenn.) 184 636, 670
v. Nicely, 81 W. Va. 269 242
Nichells v. Nichells, 5 N. Dak. 125 545
Nicholas v. Maddox, 52 La. Ann. 1498 200
Nicholls v. Nicholls, 30 L. J. P. D. & Adm. 163 754
Nichols v. Nichols, 189 Ky. 500 285, 288, 498, 684,, 745
v. Nichols, 169 Mich. 540 210
v. Nichols, 134 Mo. 187 152
v. Nichols, 147 Mo. 387 156, 159
v. Nichols, 31 Vt. 328 225, 226, 430
v. Weaver, 7 Kans. 373 8
Nichols' Estate, In re, 102 Wash. 303 116, 124
Nicholson v. Nicholson, 113 Ind. 131 555
v. Nicholson, 115 S. Car. 326 644
Nickerson v. Nickerson, 13 Wkly. (Pa.) 210 551
Nieberg v. Cohen, 88 Vt. 281 152, 154
Nielchers v. Bertolido, 118 Misc. (N. Y.) 196 446
Nielson v. Nielson, 54 Utah. 544 644
Nightingale v. Leith, 120 Maine 501 21, 32
v. Superior Court, 184 Cal. 583 710
Nipper v. Nipper, 129 Ga. 450 703
v. Nipper, 133 Ga. 216 795
Nissen v. Farquhar, 121 La. 642 694, 698, 701, 708
Nix v. Nix, 57 Tenn. (10 Heisk.) 546 791
Nixon v. Nixon, 15 Mont. 6 795
Noble v. Noble, L. R. 1 P. 691 530
Nogees v. Nogees, 7 Tex. 538 195, 275, 425
Noice v. Brown, 38 N. J. L. 228 204
v. Brown, 39 N. J. L. 133 11
Nolan v. Nolan, 214 Mich. 49 285, 723, 791
v. Nolan, 1 Chan. Chamb. (Ont.) 368 704
Noland v. Noland, 29 Hun (N. Y.) 630 794
Nolin v. Pearson, 191 Mass. 283 81, 153
Nolker v. Nolker (Mo. App.), 226 S. W. 304 651, 653
v. Nolker (Mo.), 208 S. W. 128 246, 427, 511, 580, 892
Noll v. Carlin (Ore.), 199 Pac. 506 160
Nolley v. Nolley, 122 Ark. 440 518
Norcross v. Norcross, 82 N. J. Eq. 195 518
v. Norcross, 155 Mass. 425 827
Nordlund v. Nordlund, 97 Wash. 475 281
Norman v. Norman, 121 Cal. 620 61, 65
v. Norman, 88 W. Va. 640 424, 585, 587, 675, 740
v. Villars, 2 Ex. D. 359 530
Norrell v. Norrell, 138 Ga. 64, 74 S. E. 757 699
Norris v. Norris, 27 Ala. 519 789
North v. North, 5 Mass. 320 247

[*References are to Sections.*]

North v. North, 1 Barb. Ch. (N. Y.) 241 137, 185, 660, 692, 693, 711
Northcot v. Doughty, 4 C. P. Div. 385 3
Northfield v. Plymouth, 20 Vt. 582 140
v. Vershire, 33 Vt. 110 705
Northrup v. Northrup, 200 Mich. 623 279
Norton v. Norton, 2 Aik. (Vt.) 188 367
Nossaman v. Nossaman, 4 Ind. 648 705
Novotny v. Novotny (Minn.), 189 N. W. 258 594, 730
Nowell, In re, 99 Fed. 931 686
Noxon v. Remington, 78 Conn. 296 152, 162
Noyes v. Hubbard, 64 Vt. 302 686, 801
v. Noyes, 194 Mass. 20 229, 421
v. Southworth, 55 Mich. 173 62
Nunn v. Nunn, 91 Ore. 384 336, 904
v. Page, 134 Ky. 698 724, 727, 796
Nye v. State, 77 Tex. Cr. 389 70
Nye's Appeal, 126 Pa. St. 341 275, 643

O

O'Brien v. O'Brien, 19 Nebr. 584 712
v. O'Brien, 36 Ore. 92 685
v. Manning, 101 Misc. (N. Y.) 123 42, 46, 48, 49
O'Bryan v. O'Bryan, 13 Mo. 16 251
O'Callaghan v. O'Callaghan, 69 Ill. 552 785, 794, 795, 798
O'Connell v. O'Connell, 199 App. Div. (N. Y.), 958 173
Odd Fellows Beneficial Assn. v. Carpenter, 17 R. I. 720 136
O'Dea v. O'Dea, 101 N. Y. 23 626
v. O'Dea, 31 Hun. (N. Y.) 441 693
Odell v. Webendorfer, 50 App. Div. (N. Y.) 579 37
Odom v. Odom, 36 Ga. 286 275, 670
Odum v. Odum, 132 Ga. 437 683, 691
Odum, In re, 133 N. Car. 250 794
Oertel v. Oertel, 83 N. J. Eq. 39 333
v. Oertel, 92 N. J. Eq. 327 646
O'Farrell v. O'Farrell, 56 Tex. Civ. App. 51 913
Offield v. Davis, 100 Va. 250 855
O'Gara v. Eisenlohr, 38 N. Y. 296 705
Ogden v. Ogden, 1 Bland (Md.) 284 8
v. State, 3 Nebr. 886 794
Ogg v. Ogg (Tex. Civ. App.), 165 S. W. 912 622
O'Grady v. O'Grady, 109 Kans. 105 500
O'Hagan v. O'Hagan, 4 Iowa 509 709
O'Haly v. O'Haly, 31 Tex. 502 709
O'Hern v. O'Hern, 206 Mo. App. 651 411, 511, 519, 580, 696, 723
O'Kane v. O'Kane, 103 Ark. 382 312
Oklahoma Land Co. v. Thomas, 34 Okla. 681 106
Oldfield's Estate, In re, 175 Iowa 118 29
Oldham v. Oldham (N. Mex.), 208 Pac. 886 685
O'Leary v. Lawrence, 138 Md. 147 136, 137
Olenick v. Olenick, 174 N. Y. S. 140 899
Olguin v. Apodaca (Tex. Com. App.), 228 S. W. 166 7
Olin v. Hungerford, 10 Ohio 268 798
Oliver v. Oliver, 169 Mass. 592 302, 306
v. State, 7 Ga. App. 695 268
Ollschlager's Estate v. Widmer, 55 Ore. 145 63
Olmstead v. Hay, 112 Iowa 349 42
v. Olmstead, 85 Conn. 478 871
v. Olmstead, 216 U. S. 386 447
Olsen v. Olsen, 3 Alaska 616 642, 646, 649
v. Olsen, 4 Alaska 624 492
v. Olsen, 5 Alaska, 459 866
Olson v. Saxton, 86 Ore. 670 36
v. Solverson, 71 Wis. 363 21, 23, 36, 48
v. Superior Court, 175 Cal. 250 469
O'Malley v. O'Malley, 46 Mont. 549 832
Omer v. Omer, 108 Kans. 95 436
Oneale v. Commonwealth, 17 Grat. (Va.) 582 268, 705
O'Neil v. O'Neil, 100 Iowa 743 727
v. O'Neil, 148 Minn. 381 675, 680
v. O'Neil, 112 Wash. 160 587
O'Neill v. O'Neill, 163 N. Y. S. 250 414

[*References are to Sections.*]

O'Neill v. Potvin, 13 Idaho 721 534
Orchardson v. Cofield, 171 Ill. 14 85, 355, 385, 386
O'Reilly v. Sweeney, 54 Misc. (N. Y.) 408 1, 4
Orendorff v. Orendorff, 91 Ill. App. 61 644
Ormsby v. Ormsby, 1 Phila. (Pa.) 578 690, 794, 795
O'Rourke v. O'Rourke, 58 Colo. 300 500
Orr v. Orr, 75 Ore. 137 551, 555
v. Orr, 8 Bush (Ky.) 156 327
Ortiz v. Navarro, 10 Tex. Civ. App. 195 2, 23, 32, 42
Ortman v. Ortman, 203 Ala. 167 740, 767
v. Ortman, 92 Mich. 172 518
Osborne v. Osborne, 146 Ga. 344 710
Osgood v. Osgood, 2 Paige (N. Y.) 621 671, 690, 693, 704
v. State, 64 Wis. 472 225
Osmun v. Winters, 25 Ore. 260 21, 45
v. Winters, 26 Ore. 260 45
v. Winters, 30 Ore. 177 37, 46, 47
Oster v. Oster (Tex. Civ. App.), 130 S. W. 265 427
Ostrom v. Ostrom, 38 Misc. (N. Y.) 232 796
Otillio v. Otillio, 119 La. 965 794
Otton v. Otton, 196 App. Div. (N. Y.) 403 277, 415, 496
Ottway v. Ottway, 13 Pro. Div. 141 730
Otway v. Otway, 2 Phil. Ecc. 109 600
Outlaw v. Outlaw, 118 Md. 498 196, 283, 440, 643, 660
Overhiser v. Overhiser, 63 Ohio St. 77 609, 610
Overing v. Provensal, 117 La. 653 510
Overman v. Clemmons, 19 N. Car. 185 123
Owen v. Coffey, 201 Ala. 531 865
v. Owen, 90 Iowa 365 433
v. Yale, 75 Mich. 256 663
Oxford v. Berry, 204 Mich. 197 793, 794

P

Pace v. Alabama, 106 U. S. 583 105
Pacific Gold Dredging Co. v. Industrial Accident Commission, 184 Cal. 462 595
Paddock v. Robinson, 63 Ill. 99 7, 11, 20
Paddock v. Wells, 2 Barb. Ch. ((N. Y.) 331 111
Paden v. Paden, 28 Nebr. 275 518
Page v. Page, 189 Mass. 85 776
v. Page, 161 N. Car. 170 433, 593, 746
v. Page, 166 N. Car. 90 587, 588, 900
v. Page, 167 N. Car. 350 425
v. Page, 124 App. Div. (N. Y.) 421 720
v. Page, 195 N. Y. 540 722
v. Page, 43 Wash. 293 312
Pain v. Pain, 80 N. Car. 322 793, 795
Paine v. Paine, 43 R. I. 478 580
Palica v. Palica, 114 Wis. 236 660
Palmer v. Andrews, 7 Wend. (N. Y.) 142 30, 43
v. Palmer (Cal. App.), 196 Pac. 89 277
v. Palmer, 45 Mich. 150 275, 276, 283, 285
v. Palmer, 22 N. J. Eq. 88 334
v. Palmer (N. J.), 80 Atl. 486 897
v. Palmer, 1 Paige (N. Y.) 276 660
v. Palmer, 26 Utah 31 198, 284
Pancost v. State, 15 Ohio Cir. Ct. 246 795
Pangle v. Pangle, 134 Md. 166 587, 589, 594
Panther Creek Mines v. Industrial Commission, 206 Ill. 565 596
Panty v. Panty (Ind. App.), 129 N. E. 283 534
Paquet's Estate, In re, 101 Ore. 393 105, 106, 130
Paris v. Strong, 51 Ind. 339 8
Parish v. Parish, 32 Ga. 653 560
Park v. Barron, 20 Ga. 702 175, 613, 815
v. Park, 24 Misc. (N. Y.) 372 186
v. Park, 80 N. Y. 156 794
Parker v. Forehand, 99 Ga. 743 41, 42
v. Newman, 200 Ala. 103 152, 156, 157, 161
v. Parker, 222 Fed. 186 480, 626
v. Parker, 134 Ga. 316 643, 646
v. Parker, 31 Ky. L. 1228 413
v. Parker, 211 Mass. 139 710
v. Parker, 71 Miss. 164 706, 717, 723, 724

[*References are to Sections.*]

Parker v. Parker, 57 N. J. Eq. 577 642, 643, 646
v. Parker, 189 App. Div. (N. Y.) 603 765
v. State, 77 Ala. 47 136
Parkinson v. Murphy (R. I.), 107 Atl. 235 21
Parman v. Parman, 94 Ore. 307 285
Parmelee v. Hutchins, 238 Mass. 561 620, 625
Parmly v. Parmly, 90 N. J. Eq. 490 333, 518
Parramore v. Parramore, 61 Fla. 701 525, 570
Parrish v. Parrish, 67 Kans. 323 37
v. Parrish, 52 Ore. 160 492
Parsons v. Parsons' Estate, 70 Colo. 333 769
v. Parsons, 26 Ky. L. 256 767
v. Parsons, 9 N. H. 309 196, 636, 660, 662, 670
v. Parsons, 40 Utah 602 530
Parton v. Hervey, 1 Gray 119 95, 827, 888
Pastoret v. Pastoret, 6 Mass. 276 427
Patch v. Patch, 86 Vt. 225 446
Patrick v. Patrick, 30 Ky. L. 1364 528
v. Patrick, 139 Wis. 463 536
Patterson v. Gaines, 6 How. (U. S.) 550 55, 71, 136, 138, 144
v. Hayden, 17 Ore. 238 45
v. Hill, 212 Mich. 635 156
v. Patterson, 111 Ill. App. 342 640
v. Patterson, 57 Kans. 275 447
v. Patterson, 4 App. Div. (N. Y.) 146 707
v. Patterson, 45 Wash. 296 341, 572
v. State, 17 Tex. App. 102 268
Patterson's Estate, In re, 237 Pa. 24 705
Pattison v. Pattison, 132 Md. 362 887
Patton v. Patton, 67 Misc. Rep. (N. Y.) 404 440, 622
Paul v. Frazier, 3 Mass. 71 45
v. Paul, 201 Ill. App. 595 511, 695, 705
v. Paul, 278 Ill. 196 690, 708
v. Paul, 41 S. Dak. 383 624
Paule v. Paule, 17 Pa. Co. Ct. 147 712, 716
Pauly v. Pauly, 69 Wis. 419 660
Pawling v. Willson, 13 Johns. (N. Y.) 192 445, 560
Payne v. Payne, 42 Ark. 235 248, 249
v. Payne, 46 Minn. 467 365, 373
v. Payne, 142 Tenn. 320 131, 175
v. Payne, 4 Humph. (Tenn.) 500 275
v. Payne, 10 Ont. L. Rep. 742 644
Pfannebecker v. Pfannebecker, 133 Iowa 425 281, 326, 333
Pfoutz, In re, 40 Pa. Super. Ct. 130 180
Peabody v. Peabody, 104 Mass. 195 275
Pearce v. Pearce, 132 Ala. 221 636
v. Pearce, 53 Pa. Super. Ct. 129 420
v. Stace, 207 N. Y. 506 46
Pearlstine v. Pearlstine, 148 Ga. 756 446, 876
Pearne v. Lisle, Ambl. 76 790
Pearson v. Darrington, 32 Ala. 227 721, 723, 726
v. Pearson, 125 Ga. 132 644, 708
v. Pearson, 179 Ill. App. 127 589
v. Pearson, 104 Misc. (N. Y.) 675 285, 620, 899
v. Pearson, 176 N. Y. S. 626 624
v. Pearson, 230 N. Y. 141 283, 620
Pease v. Pease, 72 Wis. 136 465
Peavey v. Peavey, 76 Iowa 443 252, 276, 278, 685
Peck v. Peck, 214 Ill. App. 41 654
v. Peck, 113 Ind. 168 694
v. Peck, 12 R. I. 485 73, 76
Peckerman v. Peckerman, 91 Misc. (N. Y.) 114 742
Peckford v. Peckford, 1 Paige (N. Y.) 274 744
Pedrick v. Pedrick, 134 Ga. 662 876
Peeke v. Fitzpatrick, 74 Ohio St. 396 796
Peele v. Peele, 50 Iowa 521 792
Peet v. Peet, 52 Mich. 464 136, 828
Peipho v. Peipho, 88 Ill. 438 86
Peirce v. Peirce, 160 Mass. 216 428
Peitzman v. Peitzman, 147 Iowa 704 600
Peixotto v. Board of Education, 212 N. Y. 463 122
Peltier v. Peltier, Har. (Mich.), 19 636

[*References are to Sections.*]

Pemberton v. Pemberton, 169 Ky. 476 685
Pendersen v. Pendersen, 88 Neb. 55 894
Pendleton v. Pendleton, 109 Kans. 600 444
Penn v. Penn, 37 Okla. 650 425, 467, 587, 903
Pennaman v. Pennaman, 153 Ga. 647 175, 637
Penningroth v. Penningroth, 71 Mo. App. 438 714
Pennington v. Fourth Nat. Bank, 243 U. S. 269 675
Pennoyer v. Neff, 95 U. S. 714 678, 679
Penny v. Penny, 88 N. J. Eq. 160 790
Pentecost v. Pentecost, 204 Ala. 152 328
People v. Anderson, 26 Cal. 129 705
v. Baker, 76 N. Y. 78 261, 442, 447, 449, 620, 678, 775
v. Beevers, 99 Cal. 286 95, 261
v. Bennett, 39 Mich. 208 95
v. Case, 241 Ill. 279, 284 182, 198, 420, 536
v. Chapman, 62 Mich. 280 226
v. Circuit Court, 169 Ill. 201 684, 685, 724
v. Clark, 33 Mich. 112 45
v. Crawford, 62 Hun (N. Y.) 160 208
v. Crowley, 102 N. Y. 234 225
v. Cullen, 153 N. Y. 629 605
v. Dawell, 25 Mich. 247 198, 444, 445, 560
v. District Court, 66 Colo. 438 691
v. Jensen, 204 Ill. App. 630 653
v. Goodrich, 79 Ill. 148 204
v. Gorham (Colo.), 203 Pac. 661 587
v. Grell, 65 N. Y. S. 522 686
v. Hovey, 5 Barb. (N. Y.) 117 261, 530
v. Hoxie, 175 Ill. App. 563 594
v. Imes, 110 Mich. 250 139, 143
v. Lambert, 5 Mich. 349 136
v. Le Doux, 155 Cal. 535 268
v. Manfredonio, 117 Misc. (N. Y.) 632 260
v. Maxwell, 39 Misc. (N. Y.) 166 122
v. Mendanhall, 119 Mich. 404 74, 175
v. Perriman, 72 Mich. 184 268
v. Pizzura, 211 Mich. 71 61, 95
People v. Prouty, 262 Ill. 218 631
v. Reynolds, 217 Ill. App. 577 61, 95
v. Schlott, 162 Cal. 347 596
v. Seaman, 107 Mich. 348 175
v. Shea, 201 N. Y. 471 197, 899
v. Souleotes, 26 Cal. App. 309 869
v. Spitzer (Cal. App.), 208 Pac. 181 131, 140
v. Steere, 184 Mich. 556 65
v. Walsh, 132 App. Div. (N. Y.) 462 793
v. Woodley, 22 Cal. App. 674 631
Peppinger v. Low, 6 N. J. L. 384 6
Percival v. Percival, 124 N. Y. 637 708
v. Percival, 106 App. Div. (N. Y.) 111 627
Percy v. Percy (Cal.), 207 Pac. 369 444, 518, 610
Pereira v. Pereira, 156 Cal. 1 204, 585, 588
Peretti v. Peretti, 165 Cal. 717 326, 341, 510
Perkey v. Perkey, 87 W. Va. 656 95, 169
Perkins v. Hersey, 1 R. I. 493 34, 37, 45
v. Perkins, 29 Cal. App. 68 283, 518
v. Perkins, 225 Mass. 82 446, 594, 626
v. Perkins, 16 Mich. 162 636
v. Perkins, 72 Ore. 302 327
v. Potts, 8 La. Ann. 14 200
v. Silverman, 284 Mo. 238 55, 73, 130, 137
Perkins, Ex parte, 18 Cal. 60 721, 793
Perry v. Lovejoy, 49 Mich. 529 157, 160
v. Orr, 35 N. J. L. 295 27, 41
v. Pernet, 165 Ind. 67 795
v. Perry, 7 Pa. Dist. R. 240 646
v. Perry, 94 Vt. 487 476
Perry, Ex parte, 37 Cal. App. 189 596
Persons v. Persons, 7 Humph. (Tenn.) 183 709
Petaluma Savings Bank v. Superior Court, 111 Cal. 488 788
Peterson v. Peterson, 35 Idaho 470 620, 621
v. Widule, 157 Wis. 641 59, 88

[*References are to Sections.*]

Petras v. Petras, 7 Boyce (30 Del.) 290 70, 511
Petrie v. People, 40 Ill. 334 636, 711, 720, 722, 794
Petrie, Ex parte, 38 Ill. 498 794
Pettibone v. Pettibone, 141 App. (Div. (N. Y.) 861 795
Pettingill v. McGregor, 12 N. H. 179 705
Pettis v. Pettis, 91 Conn, 608 236, 626
Pettit, Ex parte, 84 Kans. 637 394
Peyre v. Peyre, 79 Cal. 336 723
Peyton v. Peyton, 97 Nebr. 663 427
Phelan v. Phelan, 12 Fla. 449 447
v. Phelan, 135 Ill. 445 329
Phelps v. Baker, 60 Barb. (N. Y.) 107 626, 678
v. Bergers, 92 Nebr. 851 150, 162
v. Phelps, 176 Ky. 456 244
v. Phelps, 28 App. D. C. 577 424
Philadelphia v. Wetherby, 15 Phila. (Pa.) 403 626
Philbrick v. Philbrick, 27 Vt. 786 455
v. Spangler, 15 La. Ann. 46 705
Philley v. Philley, 207 Mich. 672 276
Phillippi v. Phillippi, 113 Mo. App. 55 765
Phillips v. Allen, 84 Mass. 453 234, 235
v. Madrid, 83 Maine 205 630
v. Meyers, 82 Ill. 67 204
v. Phillips, 176 Ala. 308 525
v. Phillips, 102 Ark. 679 424, 868
v. Phillips, 173 Ky. 608 416
v. Phillips, 42 Nev. 460 684
v. Phillips (Tex. Civ. App.), 203 S. W. 77 589
v. Phillips, 22 Wis. 256 413
v. Phillips, 27 Wis. 252 685, 716
v. Simmons, 11 Abb. Pr. (N. Y.) 287 718
v. State, 13 Ala. App. 325 268
v. Thomas, 70 Wash. 533 159
Phillips, Ex parte, 43 Nev. 368 660, 793
Philpott v. Kirkpatrick, 171 Mich. 495 156
Phinizy v. Phinizy, 151 Ga. 393 723, 725
Phinney v. Andrus, 108 Misc. (N. Y.) 717 219
v. Phinney, 77 Fla. 850 746
Phipps v. Phipps, 168 Mo. App. 697 592, 594
Phoenix Mut. Life Ins. Co. v. Dunham, 46 Conn. 79 609
Physick's Estate, 2 Brewst. (Pa.) 179 705
Piatt v. Piatt, 32 Idaho 407 283, 518, 580, 587, 601
v. Piatt, 9 Ohio 37 741
Pick v. Pick, 99 Nebr. 433 531, 643
Picket v. Garrison, 76 Iowa 347 791
Pidge v. Pidge, 44 Mass. 257 327
Pierce v. Burnham, 45 Mass. 303 531
v. Cobb, 161 N. Car. 300 124, 204
v. Pierce, 20 Mass. 299 239
v. Pierce, 96 Nebr. 511 804
v. Pierce, 3 Pick (Mass.) 299 421
v. Pierce, 52 Wash. 679 589
v. Pierce, 58 Wash. 622 631
v. Pierce, 68 Wash. 415 352
v. Pierce, 107 Wash. 125 352, 427, 536, 723
v. Pierce, 70 Vt. 270 427
Pike v. Pike, 123 Ill. App. 553 705, 722, 724
Pilgrim v. Pilgrim, 57 Iowa 370 343
Pinckard v. Pinckard, 22 Ga. 31 665, 699, 701
Pinkard v. Pinkard, 14 Tex. 356 285, 327, 710, 411
Pinkinson v. Pinkinson, 91 N. J. Eq. 281 643
v. Pinkinson, 92 N. J. Eq. 669 651
Pinkley v. Pinkley, 155 Ky. 203 778
Pinkston v. McLemore, 31 Ala. 308 212
Pinnebad v. Pinnebad, 134 Ga. 496 281, 876
Pinney v. Sulzen, 91 Kans. 407 623
Piper v. Hoard, 107 N. Y. 73 55, 188
v. Kingsbury, 48 Vt. 480 43
Pitcairn v. Pitcairn, 195 N. Y. S. 275 175
v. Pitcairn, 201 Pa. 368 180
Pitel v. Pitel, 90 N. J. Eq. 366 665, 725
Pittis v. Pittis, 82 N. J. Eq. 635 433, 531, 897
Pittman v. Pittman, 72 Ill. App. 500 519
Pitts v. Pitts, 144 Ga. 423 702

[*References are to Sections.*]

Place v. Conklin, 34 App. Div. (N. Y.) 191 123
v. Washburn, 163 Mass. 530 796
Plant v. Plant, 63 Ark. 128 708, 711, 719
Plaster v. Plaster, 47 Ill. 290 663, 767
Platner v. Platner, 66 Iowa 378 636, 643
v. Platner (Iowa), 162 N. W. 613 278, 291
Platt v. Jones, 59 Maine 232 33
v. Platt, 38 Pa. Sup. Ct. 551 281
Plattner v. Plattner (Mo. App.), 91 S. W. 459 685, 720
Pleasanton v. Pleasanton, 7 Boyce (Del.) 292 598, 873
Pleyte v. Pleyte, 15 Colo. 125 685, 713
Plourd v. Jarvis, 99 Maine 161 151
Plummer v. Plummer (Tex. Civ. App.), 154 S. W. 597 600
Plymate v. Plymate (Mo. App.), 180 S. W. 29 326
Poe v. Poe, 93 Ark. 426 251, 868
v. Poe, 149 Ark. 62 411, 684
Poehlman v. Kertz, 204 Ill. 418 34
Pohlman v. Pohlman, 60 N. J. Eq. 28 420
Poillon v. Poillon, 75 App. Div. (N. Y.) 536 703, 713, 716, 722, 730
Polakoff v. Polakoff (Cal. App.), 196 Pac. 778 577, 580
Poland v. Poland, 63 Wash. 597 596
Poler v. Poler, 32 Wash. 400 405
Pollard v. Ward (Mo.), 233 S. W. 14 156
Polley v. Polley, 128 Md. 60 641, 643, 650, 655
Pollitzer v. Pollitzer, 188 App. Div. (N. Y.) 861 296
Pollock v. Pollock, 71 N. Y. 137 242, 244, 252
v. Pollock, 7 S. Dak. 331 685, 606
v. Pollock, 9 S. Dak. 48 334, 487
v. Sullivan, 53 Vt. 507 11, 21, 24
Poloke v. Poloke, 37 Okla. 70 673
Polster v. Polster, 145 Mo. App. 606 638, 681
Pomerantz v. Pomerantz, 71 Pa. Super. Ct. 241 336
Pomeroy v. Wells, 8 Paige (N. Y.) 406 636
Ponthus v. Ponthus, 70 Pa. Super. Ct. 39 685
Pool v. Pratt, 1 D. Chip. (Vt.) 252 1
Poole v. People, 24 Colo. 510 137, 175
v. Wilbur, 95 Cal. 339 693, 698, 712
Pooley v. Dutton, 165 Iowa 745 153, 154, 158, 159
v. Pooley, 178 Iowa 19 279
Pope v. Pope, 161 Ky. 104 511, 587, 590
Popejoy, In re, 26 Colo. 32 636, 643, 793
Porritt v. Porritt, 16 Mich. 140 300, 320
Port v. Port, 70 Ill. 484 71, 75, 705
Porter v. Porter (Cal. App.), 198 Pac. 1006 399
v. Porter, 58 Ill. App. 670 644
v. Porter, 162 Ill. 398 646
v. Porter, 190 Iowa 1126 585
v. Porter, 41 Miss. 116 690, 692, 701, 704, 714, 754
v. Porter, 82 N. J. Eq. 400 328, 330
Portsmouth v. Portsmouth, 3 Add. Ecc. 63 661, 693
Poser v. Kahrs, 2 C. C. R. (N. Y.) 92 49
Poss v. Poss, 164 App. Div. (N. Y.) 213 710
Post v. Post, 55 Misc. (N. Y.) 538 625, 698, 704
Postal v. Postal (Ind. App.), 133 N. E. 17 545
Postlewaite v. Postlewaite, 1 Ind. App. 473 153
Potter v. Clapp, 203 Ill. 592 137
v. Howser, 104 Nebr. 367 158
v. Potter, 145 Ga. 60 653
v. Stanley, 187 Ky. 292 63, 140
Potts v. Chapin, 133 Mass. 276 16
v. Potts, 68 Mich. 492 668, 701, 794
v. Potts, 10 Wkly. N. Cas. (Pa.) 102 555
v. Potts, 81 Wash. 27 856
Poupare v. District Court, 34 Nev. 336 185, 895
Powell v. Benthall, 136 N. Car. 145 153
v. Campbell, 20 Nev. 232 201, 787
v. Lilly, 24 Ky. L. 193 727
v. Powell, 80 Ala. 595 242, 252

[*References are to Sections.*]

Powell v. Powell, 77 Fla. 181, 81 So. 105 329, 875
v. Powell, 282 Ill. 357 879
v. Powell, 104 Ind. 18 519
v. Powell, 18 Kans. 371 85, 365, 369, 385, 430
v. Powell (Tex. Civ. App.) 170 S. W. 111 423
v. Powell, 3 P. & M. 186 609
v. Strickland, 163 N. Car. 393 162
Powelson v. Powelson, 22 Cal. 358 411
Power v. Power, 217 Mich. 597 425
v. Power, 66 N. J. Eq. 320 336, 346, 589
Powers v. Powers, 138 Ga. 65 876
v. Powers, 33 App. Div. (N. Y.) 126 644
v. Powers, 164 App. Div. (N. Y.) 533 592
v. Powers, 20 Nebr. 529 295
v. Powers, 84 App. Div. (N. Y.) 588 434
v. Powers, 117 Wash. 248 187
v. Sumbler, 83 Kans. 1 152
v. Wheatley, 45 Cal. 113 46
Power's Appeal, 120 Pa. St. 320 711
Pozzi v. Pozzi, 87 N. J. Eq. 676 342
Prall v. Prall, 56 Fla. 521 875
v. Prall, 58 Fla. 496 275, 281, 284, 333, 490, 492, 536, 875
Prather v. Prather, 4 Desaus. (4 S. Car.) 33 636, 642, 643, 644, 655
Pratt v. Harrold (Cal. App.), 190 Pac. 372 159
v. Pierce, 36 Maine 448 136
v. Pratt, 197 Ill. App. 530 638, 643, 644, 646, 651
v. Pratt, 157 Mass. 503 428
Pray v. Pray, 128 La. 1037 168, 885
Prendergast v. Prendergast, 146 N. Car. 225 225
Prescott v. Guyler, 32 Ill. 312 5, 12, 23
v. Prescott, 59 Maine 146 680, 723
Presson v. Presson, 38 Nev. 203 444
Prettyman v. Williamson, 1 Penn. (Del.) 224 156, 161, 162
Pretzinger v. Pretzinger, 45 Ohio St. 452 595, 606
Prenit v. Prenit, 88 Neb. 124 283, 894
Price v. Cox, 83 N. Car. 261 27
v. Price, 142 Ala. 631 182
Price v. Price, 90 Ga. 244 788
v. Price, 91 Iowa 693 152, 153, 159
v. Price, 75 Nebr. 552 636, 644, 655
v. Price, 124 N. Y. 589 613
v. Tompkins, 190 App. Div. (N. Y.) 967 131, 173
Primeaux v. Comeaux, 139 La. 549 277, 412
Prince v. Prince, 1 Rich Eq. (S. Car.) 282 636, 653, 677
Prine v. Prine, 36 Fla. 676 85, 178, 431, 685, 693, 733
Pringle v. Pringle, 55 Wash. 93 545
Pritchard v. Pritchard, 189 Mo. App. 470 655
Prochaska v. Prochaska (Iowa), 183 N. W. 417 283, 319, 723
Procita v. Procita, 190 N. Y. S. 21 133, 181, 185
Proctor v. Bigelow, 38 Mich. 282 705
v. Lombard, 233 Mass. 213 219
v. Proctor, 215 Ill. 275 678, 777
Profenius v. Profenius, 90 N. J. Eq. 45 637
Prosser v. Warner, 47 Vt. 667 441, 449, 636, 670, 678
Provost v. Provost, 73 N. J. Eq. 418 336, 807
Pruett v. Pruett, 178 Ky. 802 607
Pruitt v. Pruitt, 205 Ala. 484 580
Pryor v. Pryor, 88 Ark. 302 210, 217, 766
v. Pryor, 151 Ark. 150 411, 518
Puckett v. Puckett, 174 Ala. 315 456
Pugh v. Pugh, 25 S. Dak. 448, 911
Pugsley v. Smyth, 98 Ore. 448 151, 160
Pullman v. Pullman, 92 Wash. 120 549
Purcell v. Purcell, 3 Edw. Ch. (N. Y.) 194 792
v. Purcell, 4 Hen. & M. (Va.) 507 636, 655, 661, 705
Purdy v. Ernst, 93 Kans. 157 594
v. Purdy, 238 Mass. 506 336, 580
Purnell v. Purnell (N. J.), 70 Atl. 187 341
Pusey's Estate, In re, 180 Cal. 368 624
Putnam v. Johnson, 10 Mass. 488 443
v. Putnam, 8 Pick. (Mass.) 433 64, 179

[*References are to Sections.*]

Putnam v. Putnam, 104 Kans. 47 675, 684, 883
Pyle v. Piercy, 122 Cal. 383 7, 26

Q

Quallich v. Quallich, 33 Ohio C. C. 76 646
Quarles v. Quarles, 19 Ala. 363 504
Quealy v. Waldron, 126 La. 258 55, 168, 358, 885
Quelin v. Quelin, 11 Pa. Co. Ct. 265 721
Questal v. Questal, Wright (Ohio) 492 788
Quient v. Quient, 105 Wash. 315 917, 424
Quigley v. Quigley, 45 Hun N. Y. 23 792
Quigly v. Muse, 15 La. Ann. 197 662
Quillian v. Johnson, 122 Ga. 49 11
Quincy v. Quincy, 10 N. H. 272 424, 665
Quinn v. Quinn (Cal. App.), 193 Pac. 593 530
Quirk v. Bank of Commerce & Trust Co., 244 Fed. 682 118, 119

R

R. v. R., 20 Wis. 331 551
Rabb v. Rabb, 150 Ill. App. 554 638, 644
Rademacher v. Rademacher, 74 N. J. Eq. 570 229, 421
Rader v. Rader, 136 Iowa 223 283
Radford v. Radford, 214 Mich. 545 96
Raher v. Raher, 150 Iowa 511 678
Railsbach v. Railsbach, 92 Ore. 623 285
Raines v. Raines, 138 Ga. 790 780
Ralston's Appeal, 93 Pa. St. 133 340
Ramsay v. Ramsay, 125 Miss. 185 740, 793
Ramsdell v. Ramsdell, 47 Wash. 444 492, 677
Ramsden v. Ramsden, 91 N. Y. 281 636
Ramsey v. Ramsey, 162 Ky. 741 276, 531
Randall v. Randall, 175 Ill. App. 392 511
v. Randall, 4 Maine 326 253
v. Randall, 7 Mass. 502 477, 479
v. Randall, 37 Mich. 563 399
Randazzo v. Randazzo (Mo. App.), 236 S. W. 1061 70, 71, 130
Randolph v. Field, 84 Misc. (N. Y.) 403 699
v. Field, 165 App. Div. (N. Y.) 279 699
Random v. Random, 41 N. Dak. 163 592, 901
Rang v. Rang, 211 Ill. App. 385 740, 767, 768
Ransom v. Ransom, 54 Misc. (N. Y.) 410 446
Rapp v. Rapp, 149 Mich. 218 319
v. Rapp, 162 Mo. App. 673 420
Rariden v. Rariden, 33 Ind. App. 284 636
Rash v. Pratt (Del. Super.), 111 Atl. 225 151, 156, 160, 162
Raspberry v. Raspberry, 189 Ky. 502 723, 740
Rast v. Rast, 113 Ala. 319 701, 708, 721
Ratcliffe v. Walker, 117 Va. 569 153
Rath v. Rath, 2 Nebr. (Unof.) 600 153
Rathmann v. Rathmann, 196 Ill. App. 20 638
Rauch v. Rauch (Tex. Civ. App.), 237 S. W. 334 425
Rawdon v. Rawdon, 28 Ala. 565 167, 182, 385
Rawlins v. Rawlins, 18 Fla. 345 550
Rawson v. Rawson, 35 Ill. App. 505 794
v. Rawson, 37 Ill. App. 184 645
v. Rawson, 37 Ill. App. 491 653, 700, 701, 703, 704, 714
Ray v. Adden, 5 N. H. 82 720, 722, 732
v. Parsons, 183 Ind. 344 153
v. Ray, 106 Ga. 260 704
v. Smith, 9 Gray (Mass.) 141 21, 37
Raymond v. Raymond, 13 Ill. App. 189 710
v. Raymond (N. J. Eq.), 79 Atl. 430 333
v. Williston, 213 Fed. 525 462
Rayner v. Kinney, 14 Ohio St. 283 46
Raynor v. Nims, 37 Mich. 34 47
Razor v. Razor, 42 Ill. App. 504 685
v. Razor, 149 Ill. 621 645, 653
Rea v. Rea, 123 Iowa 241 675, 678, 679
v. Rea, 174 Mo. App. 715 467, 503

[*References are to Sections.*]

Read v. Read (Ark.), 240 S. W. 410 518
v. Read, 1 Ch. Cas. 115 790
v. Read, 28 Utah 297 708
Reade v. Continental Trust Co., 49 App. Div. (N. Y.) 400 644
Reading Fire Ins. & Trust Co., Appeal of, 113 Pa. 204 136, 137, 705
Ream v. Ream, 81 Ore. 175 904
Reams v. Reams, 202 Ill. App. 491 644
Reavely v. Harris, 145 Ill. App. 545 157
Reaves v. Reaves, 15 Okla. 240 55, 70, 132
Rebstock v. Rebstock, 144 N. Y. S. 289 326, 414
Rector v. Rector, 78 N. J. Eq. 386 242, 326, 333
Redding v. Redding (N. J. Ch.), 424, 585
Reed v. Clark, 47 Cal. 194 6, 41, 42, 44, 46, 48
v. Harkrader, 264 Fed. 834 70
v. Passer, 1 Esp. 213 705
v. Stevens, 120 Maine 290 130
v. Reed, 62 Ark. 611 329
v. Reed, 9 Cal. App. 748 555
v. Reed, 40 Cal. App. 102 684, 702, 709, 723
v. Reed, 6 Ind. App. 317 157
v. Reed, 109 Md. 690 606, 610
v. Reed, 52 Mich. 117 447, 649
v. Reed, 85 Miss. 126 695
v. Reed, 106 Misc. (N. Y.) 85 167, 180, 181
v. Reed, 17 Ohio St. 563 685
v. Reed, 49 Ohio St. 654 28
v. Reed, 70 Nebr. 775 711, 719
v. Reed, 70 Nebr. 779 708, 711, 792
v. Reed, 4 Nev. 395 277
Reed's Estate, In re, 247 Pa. 441 216
Rees v. Waters, 9 Watts (Pa.), 90 636
Reese v. Reese, 194 App. Div. (N. Y.) 907 276, 350
Reeve v. Marquis of Conyngham, 2 Car. & K. 444 681
Reeves v. Reeves, 75 Ind. 342 589
v. Reeves, 82 N. Car. 348 703
v. Reeves, 24 S. Dak. 435 554
v. Reeves, 1 Weekly Note Cas. (Pa.) 123 690
Reg. v. Brighton, B. & S. 447 110
v. Millis, 10 Clark & F. 749 705
Rehfuss v. Rehfuss, 169 Cal. 86 198, 528
Reid v. Reid, 21 N. J. Eq. 331 281, 434
Reichert v. Jerome H. Sheip, Inc., 204 Ala. 86 144
Reifschneider v. Reifschneider, 241 Ill. 92 55, 63, 879
v. Reifschneider, 144 Ill. App. 119 644
Reilly v. Reilly, 60 Cal. 624 684, 685
v. Reilly (Tex. Civ. App.), 233 S. W. 379 277, 580
Reinhard v. Reinhard (N. J.), 114 Atl. 404 225
v. Reinhard, 96 Wis. 555 275
Reish v. Thompson, 55 Ind. 34 20
Reischfield v. Reischfield, 100 Misc. (N. Y.) 561 211, 215, 644
Reitman v. Reitman, 168 Ky. 830 589, 594
Rembert v. Rembert, 84 S. Car. 9 704, 910
Remley v. Remley (Cal. App.), 193 Pac. 604 530, 675
Remmers v. Wolf's Estate, 206 Mo. App. 159 796
Renfrow v. Renfrow, 60 Kans. 277 137
Ressor v. Ressor, 82 Ill. 442 668, 743
Reum v. Reum (Tex. Civ. App.), 209 S. W. 760 788
Rex v. Burton, 3 M. & S. 537 359
v. Twyman, 2 Barn & Ald. 386 705
Reynolds v. Adams, 125 Va. 295 132, 136
v. Reynolds, 67 Cal. 176 727
v. Reynolds, 130 Ga. 460 723
v. Reynolds, 151 Ga. 208 249, 580
v. Reynolds, 85 Mass. 605 176, 336
v. Reynolds, 3 Allen (Mass.), 605 16, 173, 356
v. Reynolds, 24 Wend. (N. Y.) 193 606
v. Reynolds, 68 W. Va. 15 333, 334, 516, 677, 918
v. United States, 98 U. S. 145 55, 231
Rhame v. Rhame, 1 McCords Eq. (S. Car.) 197 636, 641, 643, 644, 655, 680
Rhea v. Rhenner, 1 Pet. (U. S.) 105, 7 L. ed. 72 175

[*References are to Sections.*]

Rhinehart v. Rhinehart, 126 Miss. 488 786
Rhoades v. Rhoades, 78 Nebr. 495 630
v. Rhodes, 92 N. J. Eq. 252 643, 647, 653
Ricard v. Ricard, 143 Iowa 182 131, 882
Rice v. Rice, 6 Ind. 100 279
v. Rice, 104 Mich. 371 162
v. Rice, 21 Tex. 58 585, 587
v. Rice, 88 W. Va. 54 277, 425, 685
v. Lumley, 10 Ohio St. 596 663
Rich v. Fulton, 104 Nebr. 262 2, 7
v. Mayer, 7 N. Y. S. 69 30, 537
Richard v. Brehm, 73 Pa. 140 55, 73, 136, 705, 845
Richards v. District School Board 78 Ore. 153 122
v. Richards, 1 Grant's Cas. (Pa.) 389 643
v. Richards, 24 Idaho 87 558
v. Richards, 87 Misc. (N. Y.) 134 620, 621
v. Richards, 71 Misc. (N. Y.) 532 703
v. Richards, 37 Pa. St. 225 411, 433
Richardson v. King, 157 Iowa 287 525, 558, 882
v. Richardson, 4 Port (Ala.) 467 208, 692, 720, 733
v. Richardson, 94 N. Y. S. 582 708, 714
v. Richardson, 114 N. Y. S. 912 229, 421, 427
v. Richardson, 50 Vt. 119 459, 502
v. Wilson, 8 Yerg. (Tenn.) 67 199
Richmond v. Richmond (Mo. App.), 225 S. W. 126 559
v. Richmond, 2 N. J. Eq. 90 710
v. Richmond, 10 Yerg. (Tenn.) 343 520
v. Roberts, 98 Ill. 472 38, 43, 49
v. Sangster (Tex. Civ. App.), 217 S. W. 723 624, 626
Rickerson v. Rickerson, 203 Ala. 203 710
Ricketts v. Harvey, 106 Ind. 564 7
v. Ricketts, 4 Gill (Md.) 105 203, 709, 711, 712, 715, 722, 729, 789
Ridgely v. Ridgely, 79 Md. 298 180, 260, 458
Rie v. Rie, 34 Ark. 37 278, 512
Rieden v. Rieden, 206 Mich. 550 587
Riesen v. Riesen, 148 Ill. App. 460 229, 421
Righter v. Righter (Ky.), 114 S. W. 786 644
Riggins v. Riggins, 191 Ky. 22 587
v. Riggins, 192 Ky. 500 685, 723
Riggs v. Riggs, 91 Kans. 593 506
Rigney v. Rigney, 127 N. Y. 408 197, 678
Rigsby v. Rigsby, 82 Ark. 278 334
Rilly v. Rilly, 60 Cal. 624 685
Rime v. Rater, 108 Iowa 61 23, 29, 36, 48
Rindlaub v. Rindlaub, 19 N. Dak. 352 311, 901
v. Rindlaub, 28 N. Dak. 168 765
Rinehart v. Bills, 82 Mo. 534 151
Ring v. Ring, 118 Ga. 183 195, 311
Ringgold v. Ringgold, 128 Va. 485 276, 292, 327, 340
Risk v. Risk, 195 N. Y. S. 536 333, 335
Ristine v. Ristine, 4 Rawle (Pa.) 460 427
Ritayik v. Ritayik, 202 Mo. App. 74 356
Ritter v. Ritter, 5 Blackf. (Ind.) 81 356
Rivers v. Rivers, 33 Idaho 349 580
v. Rivers, 60 Iowa 378 252, 302
Robbins v. Robbins, 101 Ill. 416 765
v. Robbins, 100 Mass. 150 425, 518
v. Robbins, 140 Mass. 528 195, 421
Roberts v. Cohen (Ore.), 206 Pac. 293 152, 157, 158
v. Druillard, 123 Mich. 286 44, 46
v. Fagan, 76 Kans. 536 480
v. Mason, 10 Ohio St. 277 47
v. Playle, 150 Iowa 279 610
v. Roberts, 150 Ga. 757 546
v. Roberts, 103 Kans. 65 427
v. Roberts, 135 Minn. 397 678, 800
v. Roberts (Ore.), 206 Pac. 1060 277
v. Roberts, 3 P. Wms. 66 123

[*References are to Sections.*]

Robertson v. Cole, 12 Tex. 356 169
Robertson, Ex parte, 27 Tex. App. 628, 704
v. Robertson, 138 Minn. 290 636, 653
v. Robertson (Mo.), 163 S. W. 266 503
v. Robertson, 137 Mo. App. 93 701, 708
v. Robertson, 1 Edw. Ch. (N. Y.) 360 704
v. Robertson, 9 Daly (N. Y.) 44 558
v. Robertson (Okla.), 176 Pac. 387 283, 285
Robinson v. Craver, 88 Iowa 381 39, 43
v. Robinson, 79 Cal. 511 741
v. Robinson, 112 Miss. 224 661, 742
v. Robinson, 149 Mo. App. 733 492, 493, 534
v. Robinson, 123 N. Car. 136 468
v. Robinson, 41 Nev. 276 895
v. Robinson, 82 N. J. Eq. 466 695
v. Robinson, 83 N. J. Eq. 150 518
v. Robinson, 84 N. J. Eq. 201 435
v. Robinson, 66 N. H. 600 411
v. Robinson, 21 R. I. 81 790
v. Robinson, 77 Wash. 663 547, 551, 553
v. Ruprecht, 191 Ill. 424 705
Robinson, In re, 27 Chan. Div. 160 676, 686
Roby v. Roby, 9 Idaho 371 684, 685
Roche v. Washington, 19 Ind. 53 106
Rockcastle Mining, Lumber & Oil Co. v. Baker, 167 Ky. 66 705
Rockwell v. Morgan, 13 N. J. Eq. 119 670
Roder v. Roder, 168 Wis. 283 608
Rodgers v. Rodgers, 56 Kans. 483 678
v. Rodgers, 13 Ky. L. 203 285
Roe v. Roe, 29 Pittsb. L. J. (Pa.) 319 378
v. Watson, 151 Ga. 365 793
Roemer v. Darrah, 65 Kans. 599 160
v. Traylor, 60 Tex. Civ. App. 437 610
Rogers v. Park, 4 Hun (N. Y.) 480 851
v. Rogers, 103 Ga. 763 729
Rogers v. Rogers, 3 Hag. Ecc. 57 239
v. Rogers, 35 Idaho 645 518, 680
v. Rogers, 49 Ind. App. 506 622
v. Rogers, 13 Ky. Law 526 884
v. Rogers, 122 Mass. 423 424
v. Rogers, 214 Mich. 516 334, 598
v. Rogers, 18 N. J. Eq. 445 327
v. Rogers, 67 N. J. Eq. 534 424
v. Rogers, 81 N. J. Eq. 311 511, 897
v. Rogers, 81 N. J. Eq. 479 326, 334, 335, 341
v. Rogers, 89 N. J. Eq. 1 518
v. Rogers, 4 Paige (N. Y.) 516 211
v. Rogers, 51 Ohio St. 1 594
v. Rogers, 4 Sw. & Tr. 82 685
v. Rogers, 81 Wash. 502 233, 424, 427
v. Vines, 28 N. Car. 293 660, 769
Rohrback v. Rohrback, 75 Md. 317 685, 730
Rolater v. Rolater (Tex.), 198 S. W. 391 609
Rolette v. Rolette, 1 Pin. (Wis.) 370 210
Rolfsen v. Rolfsen (Ky. App.), 115 S. W. 213 427, 884
Rolle v. Rolle, 194 N. Y. S. 661 465
Romaine v. Chauncey, 129 N. Y. 566 660, 662, 674, 676, 677, 728, 740
Romich v. Romich, 16 Pa. Co. Ct. 195 421
Ronalds v. Ronalds, 3 P. & M. 259 692
Roosevelt v. Kellogg, 20 Johns. (N. Y.) 210 444
Root v. Root, 164 Mich. 638 284, 424, 465, 500
Roote v. Roote, 33 App. D. C. 398 424, 425
Roper v. Clay, 18 Mo. 383 2, 28, 33, 34, 45
Rorie v. Rorie, 132 Ga. 719 876
v. Rorie, 134 Ga. 69 644
Rose v. Clark, 8 Paige (N. Y.) 574 705
v. Mitchell, 21 R. I. 270 159, 160
v. Rose, 9 Ark. 507 411, 643
v. Rose, 90 Ark. 16 587
v. Rose, 109 Cal. 544 703, 713, 719, 722, 723
v. Rose, 53 Mich. 585 701

[*References are to Sections.*]

Rose v. Rose, 129 Mo. App. 175 285, 467
v. Rose, 11 Paige (N. Y.) 166 680, 699, 703, 704, 714
Roseberry v. Roseberry, 17 Ga. 139 661, 690, 708
Rosecrance v. Rosecrance, 127 Mich. 322 570
Rosen v. Rosen, 37 Ill. App. 493 680
Rosenberger v. Rosenberger, 150 Ky. 803 225, 250
Rosenbleet v. Rosenbleet, 122 Ill. App. 408 644
Rosenfeld v. Rosenfeld, 63 Mo. App. 411 685
Rosenwasser v. Rosenwasser, 110 Misc. (N. Y.) 38 229
v. Rosenwasser, 117 Misc. (N. Y.) 123 598
Rosholt v. Mehus, 3 N. Dak. 513 610, 612
Ross v. Griffin, 53 Mich. 5 685, 690, 701
v. Ross, 69 Ill. 569 636, 641, 644
v. Ross, 89 N. J. Eq. 261 248
v. Ross, 47 Mich. 185 696, 701, 703
v. Ross, 89 Miss. 66 701
Rossen v. Rossen, 35 Ill. App. 505 794
Roth v. Roth, 77 Misc. (N. Y.) 673 645
Rott v. Goehring, 33 N. Dak. 413 150, 152, 156, 159
Roundy v. Roundy (Utah), 202 Pac. 211 599
Rouse v. Rouse, 47 Iowa 422 487
Roush v. Roush, 90 W. Va. 491 281, 285
Rowden v. Rowden (Tex. Civ. App.), 212 S. W. 302 296, 490, 519
Rowe v. Rowe, 84 Kans. 696 275, 284
v. Rowe, 76 Ore. 491 622, 623
v. Young, 123 Ark. 303 124, 211
Rowell v. Rowell, 97 Kans. 16 595, 596
Royal v. Mosaic Templars of America, 143 Ark. 596 131
v. Smith, 40 Iowa 615 35
Rozsa v. Rozsa, 117 Misc. (N. Y.) 728 173
Rubin v. Klemer (R. I.), 114 Atl. 131 42, 48, 49
Rubinson v. Rubinson, 110 Misc. (N. Y.) 114 173
Rublinsky v. Rublinsky, 24 N. Y. S. 920 690, 696, 715
Ruckman v. Ruckman, 58 How. Pr. (N. Y.) 278 276, 328
Rudasill v. Rudasill (Tex. Civ. App.), 206 S. W. 983 694
Rudd v. Rounds, 64 Vt. 432 159
v. Rudd, 33 Mich. 101 327
v. Rudd (Mo. App.), 238 S. W. 537 411, 424
Ruge v. Ruge, 97 Wash. 51 765
Rugh v. Ottenheimer, 6 Ore. 231 55, 59
Rupp v. Rupp, 156 App. Div. N. Y. 389 620
Rumping v. Rumping, 36 Mont. 39 196, 444, 448, 490, 492
Rumpring v. Rumpring, 41 Mont. 33 701
Rundle v. Pegram, 49 Miss. 751 705
Runkle v. Runkle, 96 Mich. 493 399, 424
Runyan v. Runyan, 72 Ind. App. 469 741
Rush v. Flood, 105 Ill. App. 182 662
v. Rush, 46 Iowa 648 558
v. Wick, 31 Ohio St. 521 1, 3, 35
Russell v. Cowles, 81 Mass. (15 Gray) 391 5, 6, 37, 42
v. Russell, 20 Cal. App. 457 594
v. Russell, 1 Ind. 510 663
v. Russell, 4 Greene (Iowa) 26 660, 662
v. Russell, 150 Iowa 137 641, 642
v. Russell, 156 Iowa 674 882
v. Russell, 69 Maine 336 668, 709, 712, 713, 793
v. Russell, 15 Phila. (Pa.) 168 794
Rutledge v. Rutledge, 159 Mo. App. 661 433
v. Rutledge, 177 Mo. App. 469 596, 701
Rutter v. Collins, 96 Mich. 510 5, 38
Ryals v. Ryals, 130 La. 244 167, 885
Ryan v. Ryan, 9 Mo. 539 692
v. Ryan, 156 Mo. App. 655 435
v. Ryan, 30 Ore. 226 289
Rybakowicz v. Rybakowicz, 290 Ill. 550 580, 746
Rycraft v. Rycraft, 42 Cal. 444 397
Ryder v. Ryder, 66 Vt. 158 171, 247, 365, 425
Ryer v. Ryer, 67 How. Pr. (N. Y.) 369 795

[*References are to Sections.*]

S

S. v. S., 192 Mass. 194 379
Sabot v. Sabot, 97 Wash. 395 917
Sabourin v. Sabourin (Mo. App.), 213 S. W. 490 594
Sackrider v. Sackrider, 60 Iowa 397 643
Sadler v. Sadler, 115 S. Car. 217 694, 708, 723
Safford v. Maxwell, 23 La. Ann. 345 674
v. Safford, 224 Mass. 392 888
St. George v. Biddeford, 76 Maine 593 386
St. Sure v. Lindsfelt, 82 Wis. 346 628
Salchert v. Reinig, 135 Wis. 194 32, 35, 48, 49
Salta v. Salta (N. H.), 116 Atl. 438 585, 594, 596
Salvin's Will, In re, 173 N. Y. S. 897 131, 133
Sammons v. Pike, 108 Minn. 291 534
Sample v. Sample, 82 Nebr. 37 636
Sampson v. Sampson, 223 Mass. 451 545, 888
v. Sampson, 16 R. I. 456 765
v. Sampson, 112 Wash. 1, 592
Sanborn v. Bay, 194 Fed. 351 42, 49
Sanchez v. Sanchez, 21 Fla. 346 794
Sandford v. Sandford, 40 Hun (N. Y.) 540 794
v. Sandford, 2 R. I. 64 690, 713
Sandall v. Sandall, 57 Utah 150 580, 600
Sanders v. Burnham, 91 Vt. 480 159
v. Coleman, 97 Va. 690 15, 29, 43
v. Sanders, 184 Ky. 119 336, 548, 725
v. Sanders, 157 N. Car. 229 411, 900
v. Sanders, 167 N. Car. 317 594, 595, 596, 598
v. Sanders, 25 Vt. 713 238, 240
v. Sanders, 135 Wis. 613 413
Sanderson v. Sanderson, 178 N. Car. 339 335
Santmyer v. Santmyer, 48 App. D. C. 310 213, 606
Saperstone v. Saperstone, 73 Misc. (N. Y.) 631 629
Sapp v. Wightman, 103 Ill. 150 678
Sargent v. Sargent (N. J.), 114 Atl. 428 229
Sargent v. Sargent, 92 N. J. Eq. 703 242, 245, 251
v. Sargent, 36 N. J. Eq. 644 346
Sargood v. Sargood, 77 Vt. 498 306
Sasserno v. Sasserno (Mass.), 134 N. E. 239 177
Saterlee v. Saterlee, 28 Colo. 290 284
Satterwhite v. Satterwhite, 144 La. 308 588, 885
Sauer v. Schulenberg, 33 Md. 288 34, 42, 44, 45
Saul, Ex parte, 31 Cal. App. 382 585
Saunders v. Saunders, 2 Edw. Ch. (N. Y.) 491 708
Saunders v. Saunders, 10 Jur. 143 275, 287
v. Saunders, 82 N. J. Eq. 491 276, 284
Savage v. Savage, 143 Ark. 388 636
Saville v. Saville, 103 Ore. 117 424, 500
v. Saville, 76 Pa. Super. Ct. 458 336
Sawyer v. Sawyer, 108 Misc. (N. Y.) 447 703
Saxon v. Wood, 4 Ind. App. 247 6, 7
Saxton v. Barber, 71 Ore. 230 160
Sayles v. Sayles, 21 N. H. 312 204, 210
Sayles v. Sayles, 41 R. I. 170 292, 424
Scanlan v. Scanlan, 41 Ill. App. 449 545
Scarborough v. Scarborough, 54 Ark. 20 512
Schaeffer v. Schaeffer, 160 App. Div. (N. Y.) 48 173
v. Krestovnikow, 88 N. J. Eq. 192 897
v. Krestovnikow, 89 N. J. Eq. 549 77, 137
Schammel v. Schammel, 74 Cal. 36 708
Schaub v. Schaub, 117 La. 727 313
Schaus v. Manhattan Gas Co., 14 Abb. Prac. (N. S.) 371 35
Scheffling v. Scheffling, 44 N. J. Eq. 438 238
Scheinkman v. Scheinkman, 64 Misc. (N. Y.) 443 640
Schellenbarger v. Blake, 67 Ind. 75 33
Schermerhorn v. Schermerhorn, 197 App. Div. (N. Y.) 284 536
Schichtl v. Schichtl, 88 Iowa 210 278
Schilling v. Osten, 7 Boyce (Del.) 524 42, 47

[*References are to Sections.*]

Schindel v. Schindel, 12 Md. 294 644
Schlarb v. Schlarb, 168 Iowa 364 533, 600
Schlater v. Le Blanc, 121 La. 919 536
Schloemer v. Schloemer, 49 N. Y. 82 712
Schmalholz v. Schmalholz, 111 App. Div. (N. Y.) 543 721, 725
Schmid v. Schmid, 10 Ohio App. 24 475
Schmidt v. Schmidt (N. J.), 117 Atl. 400 335
Schmitt v. Schneider, 109 Ga. 628 187
Schneider v. Biberger, 76 Wash. 504 610
v. Kohn, 24 Ky. L. 924 723
v. Schneider, 183 Cal. 335 165, 187
v. Tapfer, 92 Ore. 520 158, 159, 160
Schmuck v. Schmuck, 163 Ky. 133 587, 592
Schoen v. Schoen, 175 Wis. 20 288, 675
Schoennauer v. Schoennauer, 77 Wash. 132 595
Schoessow v. Schoessow, 83 Wis. 553 281, 333
Scholl v. Scholl, 194 Mo. App. 559 283
Schonborn v. Schonborn, 27 Wash. 421 636, 642, 681
Schonfield v. Turner, 75 Tex. 324 609
Schonwald v. Schonwald, 62 N. Car. 215 661, 694
Schooler v. Schooler, 77 Ga. 601 603 468
Schoras v. Staba, 150 La. 674 289
Schorn v. Berry, 63 Hun (N. Y.) 110 156
Schradin v. Schradin, 24 Ohio Cir. Ct. 647 639
Schraeder v. Schraeder, 26 Ill. App. 524 639, 646
Schroter v. Schroter, 56 Misc. (N. Y.) 69 171
Schrow v. Schrow, 103 Mass. 574 515
Schuchart v. Schuchart, 61 Kans. 597 137
Schuele v. Schuele, 57 Ill. App. 189 794, 795
Schulze v. Schulze, 83 App. Div. (N. Y.) 375 580
Schulze v. Schulze, 149 Ga. 532 534
Schuler v. Schuler, 209 Ill. 522 776
Schumacher v. Great Northern R. Co., 23 N. Dak. 231 840
Schuster v. Schuster, 84 Minn. 403 685, 716, 730
Schutte v. Schutte, 90 W. Va. 787 242, 279, 288
Schuyler v. Schuyler (N. J.), 3 Atl. 517 642
Schwab v. Schwab, 93 Md. 382 467
Schwartz v. Schwartz, 6 Ohio Dec. 525 409
Schwarzmiller v. Schwarzmiller, 111 Wash. 672 480
Schwingle v. Keifer (Tex.), 135 S. W. 194 136
Scism v. Scism, 184 Mo. App. 543 694, 698
Scoggins v. Scoggins, 80 N. Car. 318 588
Scolardi v. Scolardi, 42 R. I. 456 196, 197, 545, 579
Scott v. Independent Ice Co., 135 Md. 343 61
v. O'Brien, 33 Ky. L. 450 156
v. O'Brien, 129 Ky. 1 157, 162
v. Scott, 174 Iowa 740 882
v. Scott, 17 Ind. 309 462, 560, 700
v. Scott, 61 Tex. 119 284, 411
v. Scott, 19 Ky. L. 929 643, 644, 646
v. Scott, 8 Pa. Dist. Ct. 548 725
v. Scott, 80 Kans. 489 883
v. Scott, 83 Conn. 634 662
v. Scott, 27 La. Ann. 594 284
v. Shufeldt, 5 Paige (N. Y.) 43 168, 356
Scott's Case (1746) 2 Bland's Ch. (Md.) 568 636
Scragg v. Scragg, 63 Hun (N. Y.) 633 704
Scribner v. Scribner, 93 Minn. 195 580
Scroggins v. Scroggins, 14 N. Car. 535 356, 359
Searles v. Searles, 140 Minn. 385 776, 800
Sears v. Wegner, 150 Mich. 388 188
Sealey v. Smith, 81 Okla. 97 106
Seaman's Will, In re, 218 N. Y. 77 117
Sebastian v. Rose (Ky. App.), 122 S. W. 120 884
Sebree v. Sebree, 293 Ill. 228 137
Seddon v. Seddon, 82 Fla. 48 296, 576

[*References are to Sections.*]

Sedgwick v. Sedgwick, 50 Colo. 164 310, 313, 457, 870
Seeds v. Seeds, 139 Iowa 717 341
Seeley v. Seeley, 30 App. D. C. 191 585, 589, 623
Seeley v. Seeley, 64 N. J. Eq. 1 574
Seibert v. Seibert (N. J.), 83 Atl. 230 427
Seigmund v. Seigmund, 46 Wash. 572 397, 587
Seiler, In re, 164 Cal. 181 530, 535
Seilheimer v. Seilheimer, 40 N. J. Eq. 412 356
Selah v. Selah, 23 N. J. Eq. 185 431
Sell v. Sell, 58 Mont. 329 196
Sellers v. Sellers, 141 Ind. 305 690
Sellman v. Bowen, 8 Gill & Johns. (Md.) 50 136
Sesostris Youchican v. Texas & P. Ry. Co., 147 La. 1080 106
Setzer v. Setzer, 128 N. Car. 170 225, 334
Severa v. National Slavonic Society of the United States, 138 Wis. 144 919
Severns v. Severns, 107 Ill. App. 141 281
Sewall v. Sewall, 122 Mass. 156 425, 445, 447
Seward v. Anderson, 77 Okla. 165 675
v. Johnson, 77 Okla. 83 675
Seybold v. Morgan, 38 Ill. App. 39 636
Seymour v. Hazard, 1 Johns. Ch. (N. Y.) 1 790
Seymour, In re, 113 Misc. (N. Y.) 421 70, 71, 73, 131, 132, 135, 136
Shackelford v. Hamilton, 93 Ky. 80 15, 29
Shackleton v. Shackleton, 48 N. J. Eq. 364 424, 425
Shafer v. Ritchie, 49 Utah 111 624
v. Shafer, 30 Mich. 163 726
Shaffer v. Shaffer, 219 Ill. App. 200 685
v. Shaffer (Iowa), 181 N. W. 261 242, 285, 424, 598
Shaffner v. Shaffner, 212 Ill. 492 794, 795
Shafher v. State, 20 Ohio 1 95, 841
Shafto v. Shafto, 28 N. J. Eq. 34 376, 513
Shallcross v. Shallcross, 135 Ky. 418 587, 590, 592, 594
Shankland v. Shankland, 301 Ill. 524 211, 214
Shannon v. Shannon, 68 Mass. 285 636, 670
v. Shannon, 4 Allen (Mass.), 134 560
Sharon v. Sharon, 67 Cal. 185 440, 685
v. Sharon, 84 Cal. 484 661, 695, 699, 706, 708, 711, 717, 719, 720, 723, 724, 729
Sharp v. Sharp, 116 Ill. 509 278
v. Baker, 51 Ind. App. 547 610
v. Sharp, 105 Md. 581 275
v. Sharp, 65 Okla. 76 777, 778
Sharpe v. Sharpe, 134 Mo. App. 278, 114 S. W. 584 440, 465
Shatney v. Shatney, 76 N. H. 391 896
Shaw v. Shaw, 2 App. D. C. 204 636, 655
v. Saxman, 46 App. D. C. 526 212
v. Shaw, 17 Conn. 189 280, 283
v. Shaw, 92 Iowa 722 661, 706
v. Shaw, 98 Mass. 158 441, 446
v. Shaw, 5 Misc. (N. Y.) 497 721, 725
v. Shaw, 89 N. J. Eq. 214 342
v. Shaw, 140 N. Y. S. 388 462, 579
v. Shaw, 10 Ohio App. 216 493
Shay v. Shay, 9 Phila. (Pa.) 521 467
Sheafe v. Sheafe, 24 N. H. 564 740
Sheahan v. Barry, 27 Mich. 217 21, 23, 30, 33, 42, 43, 44, 45
Shearin v. Shearin, 5 Jones Eq. (N. Car.) 233 671, 704
Shearer v. Shearer (Mo. App.), 169 S. W. 592 427
v. Shearer, 112 S. Car. 126 653
Sheedy, In re, 189 App. Div. (N. Y.) 582 77, 625
Sheehan v. Sheehan, 77 N. J. Eq. 411 420
Shehan v. Shehan (Ky. App.), 153 S. W. 243 884
v. Shehan, 152 Ky. 191 589, 594
Sheldon v. Sheldon, 146 App. Div. (N. Y.) 430 291
Shelhart v. Shelhart, 195 Mich. 144 395
Shellenbarger v. Blake, 67 Ind. 75 23, 32, 35
Shelton v. Shelton, 102 Ark. 54 518
v. Pendleton, 18 Conn. 417 726
v. Shelton, 125 Va. 381 539

[*References are to Sections.*]

Shepard v. Shepard, 99 App. Div. (N. Y.) 308 660, 662, 706, 709, 710
Shepard, In re, 97 Fed. 187 686
Shepherd v. Shepherd, 174 Ky. 615 358
v. Shepherd (Ky. App.), 192 S. W. 658 884
v. Shepherd, 18 Pa. Co. Ct. 614 716, 721
Sheppard v. Sheppard, 15 Cal. App. 614 646, 655
Sheppey v. Stevens, 177 Fed. 484 118
Shequin v. Shequin, 161 Wis. 183 529
Sheridan v. Sheridan, 186 N. Y. S. 470 173
Sherley v. Sherley (Tex. Civ. App.), 237 S. W. 645 525
Sherman v. Rawson, 102 Mass. 395 34, 45, 46
v. Sherman, 174 Iowa 145 168, 882
Sherwood's Appeal, 17 Week. No. Cas. (Pa.) 338 475
Shields v. Lewis, 20 Ky. L. 1601 38
Shillock v. Shillock, 24 Cal. App. 191 667
Shilman v. Shilman, 174 N. Y. S. 385 420, 629, 899
Shine v. Shine (Mo. App.) 189 S. W. 403 589
Shipley v. Shipley, 187 Iowa 1295 636, 653, 703
Shirey v. Shirey, 87 Ark. 175 424
Shockey v. Shockey, 191 Ky. 839 296, 326, 496
Shofield v. Shofield, 51 Pa. Super. Ct. 564 110
Shook v. Shook (Tex. Civ. App.), 125 S. W. 638 913
v. Shook (Tex. Civ. App.), 145 S. W. 699 536
Shore v. People, 26 Colo. 516 794
Shore v. Shore, 4 N. Y. Super. (2 Sandf.) 715 704
Shoro v. Shoro, 60 Vt. 268 168
Shors v. Shors, 133 Iowa 22 636, 641, 643, 647, 685, 713, 716, 882
Short v. Stotts, 58 Ind. 29 8, 24
Shrader v. Shrader, 36 Fla. 502 447, 692, 721
v. Shrader, 119 Miss. 526 175, 182
Shriner v. Shriner, 155 Ill. App. 191 640, 643
Shuck v. Shuck, 70 Ky. 306 313
Shute v. Sargent, 67 N. H. 305 446
Shutt v. Shutt, 71 Md. 193 310
Shy v. Shy, 7 Heisk. (Tenn.), 125 685, 721, 730
Sickler v. Mannix, 68 Nebr. 21 157
Sickles v. Carson, 27 N. J. Eq. 440 168
Siddens v. Siddens, 31 Ky. L. 66 217
Siegal v. Siegal, 19 N. Y. S. 906 707
v. Sigel, 28 Abb. N. C. 308 710
Sikes v. Sikes, 143 Ga. 314 643, 644
Silberstein v. Silberstein, 218 N. Y. 525 328
Sills v. Sills, 118 Wash. 94 277
Silva v. Silva, 81 Okla. 159 675, 740
Silveira v. Silveira, 34 Misc. (N. Y.) 267 169
Silverman v. Silverman, 140 Mass. 560 640, 699
Silverstein v. Silverstein, 178 Ill. App. 145 341
Silvey v. Silvey, 192 Mo. App. 179 624
Silvia, Ex parte, 123 Cal. 293 794, 796
Simmonds v. Simmonds, 78 Misc. (N. Y.) 571 534
Simmons v. Stevens, 135 La. 675 168
v. Simmons, 8 Mich. 318 510
v. Simmons, 62 N. Car. 63 678
v. Simmons, 22 Cal. App. 448 585, 594, 508
Simms v. Simms, 175 U. S. 162 767
Simon v. Busby, 119 Ind. 13 46
v. Meaux, 143 La. 760 284, 288
v. Simon, 34 Pa. Super. Ct. 182 411, 414
Simonds v. Simonds, 57 Hun (N. Y.) 290 710
v. Simonds, 103 Mass. 572 231
Simons v. Simons, 13 Tex. 468 248
v. Simons, 23 Tex. 344 636
Simonton v. Simonton, 33 Idaho 255 636, 653
Simpkins v. Simpkins, 136 Ark. 588 249, 411, 868
v. Simpkins, 14 Mont. 386 558
Simpson v. Black, 27 Wis. 206 46
v. Dutcher, 123 N. Y. S. 340 681
v. Simpson, 91 Iowa 235 636, 685, 730
v. Simpson, 31 Mo. 24 336, 642, 749
Sims v. Davis, 48 Nebr. 720 727
v. Sims, 122 Miss. 745 165, 185

[*References are to Sections.*]

Sims v. Sims, 121 N. Car. 297 85, 385, 459, 839
v. Sims, 79 N. J. L. 577 152
Sinclair v. Sinclair, 57 N. J. Eq. 222 176, 180, 356
Sindowski v. Sindowski, 25 Del. 547 873
Singer v. Singer, 165 Ala. 144 504
v. Singer, 41 Barb. (N. Y.) 139 555, 624
Singer's Estate, 233 Pa. St. 55 210
Singletary v. Singletary, 130 Ga. 435 694, 698
Siniard v. Siniard, 145 Ga. 541 876
Sipple v. Laclide Gaslight Co., 125 Mo. App. 81 596
Sisemore v. Sisemore, 17 Ore. 542 281, 343
Sisk v. Sisk, 99 Ark. 94 518
Sistare v. Sistare, 218 U. S. 1, 54 447, 622, 776, 899
Sissung v. Sissung, 65 Mich. 168 176, 356
Skeen v. Skeen (Tex. Civ. App.), 190 S. W. 1118 219
Skellie v. Skellie, 152 Ga. 707 275
Skinner v. Skinner, 47 Ind. App. 670 424, 425, 500
v. Tirrell, 159 Mass. 474 636
Skittletharpe v. Skittletharpe, 130 N. Car. 72 645, 655
Skolfield v. Skolfield, 86 Maine 31 433
Slack v. Slack, Dud. (Ga.) 165 704
v. Slack, 89 N. J. Eq. 589 242, 245
Slade v. Slade, 106 Mass. 499 793, 794
Slaton v. Milburn, 180 Ky. 655 151, 156, 159
Slattery v. Slattery, 139 Iowa 419 585, 591
v. Slattery, 87 N. J. Eq. 673 897
Slaughter v. Slaughter (Tex. Civ. App.), 118 S. W. 193 913
Slocum v. Slocum, 86 Ark. 469 500, 503, 704
Sloan v. Cox, 4 Hayw. (Tenn.) 75 768
v. Kane, 10 How Pr. (N. Y.) 66 168
v. Sloan's Adm'r, 185 Ky. 369 684
Sloan, In re, 50 Wash. 86 136, 182
Sloss-Sheffield, S. & I. Co. v. Salser, 158 Ala. 511 47
Slowikowski v. Slowikowski, 172 Wis. 460 802
Small v. Small, 42 Iowa 111 673, 694, 697; 711, 719
v. Small, 28 Nebr. 843 589
Smedley v. Smedley, 30 Ala. 714 276
Smilie v. Smilie, 24 Cal. App. 420 869
Smillie v. Mendoza, 68 Colo. 461 37, 38, 41, 46, 48
Smith v. Bank, 115 Tenn. 12 851
v. Blanton (Tex. Civ. App.), 240 S. W. 651 595, 597
v. Blunt, 84 Okla. 225 75
v. Brown, 3 Tex. 360 420
v. Braun, 37 La. Ann. 225 41, 45
v. Compton, 67 N. J. L. 548 15, 21, 29, 34, 42, 43, 46, 48
v. Frates, 107 Wash. 13 587, 589
v. Fuller, 138 Iowa 91 132, 137, 138
v. Hall, 69 Conn. 651 29, 30, 33
v. Heine Safety Boiler Co., 119 Maine 552 139
v. Hurd, 50 Minn. 503 678
v. Huson, 1 Phillim. 294 705
v. Lynn, 9 Ohio App. 141 153
v. McPherson, 176 Cal. 144 2, 11, 26, 34, 385, 386
v. New York Life Ins. Co., 57 Fed. 133 791
v. Rice, 178 Iowa 673 151, 153, 160
v. Reed, 145 Ga. 724 175
v. Sherman, 4 Cush. (Mass.) 408 25, 42
v. Smith, 205 Ala. 502 61
v. Smith, 119 Cal. 183 289
v. Smith, 61 Colo. 71 870
v. Smith, 30 Del. 283 873
v. Smith, 7 Boyce (Del.), 283 311
v. Smith, 84 Ga. 440 815
v. Smith, 136 Ga. 197 575
v. Smith, 32 Idaho 478 131
v. Smith, 101 Ill. App. 187 536
v. Smith, 149 Ill. App. 596 242, 310
v. Smith, 155 Ill. App. 14 589
v. Smith, 214 Ill. App. 302 644
v. Smith, 172 Iowa 329 638, 644, 646
v. Smith, 179 Iowa 723 284
v. Smith, 4 Greene (Iowa) 266 481, 486, 560
v. Smith, 181 Ky. 55 248, 275, 427

[*References are to Sections.*]

Smith v. Smith (Ky. App.), 186 S. W. 176 884
v. Smith (Ky. App.), 203 S. W. 884 884
v. Smith, 9 Mass. 422 479
v. Smith, 13 Mass. 231 608, 663
v. Smith, 171 Mass. 404 28, 171, 247, 355, 356
v. Smith, 184 Mass. 394 685
v. Smith, 13 Gray (Mass.) 209 560
v. Smith, 51 Mich. 607 168
v. Smith, 172 Mich. 175 310, 319
v. Smith, 192 Mich. 566 153, 159, 162
v. Smith, 151 Mo. App. 649 692
v. Smith, 206 Mo. App. 646 373
v. Smith (Mo. App.), 144 S. W. 1199 701
v. Smith, 33 N. J. Eq. 458 694
v. Smith, 75 N. J. Eq. 5 579
v. Smith (N. Y.), 114 Atl. 412 242
v. Smith, 92 App. Div. (N. Y.) 442 707
v. Smith, 194 App. Div. (N. Y.) 543 71, 73, 76
v. Smith, 112 Misc. (N. Y.) 371 167
v. Smith, 1 Edw. Ch. (N. Y.) 255 664, 695, 711
v. Smith, 4 Paige (N. Y.) 432 424, 425, 427
v. Smith, 10 N. Dak. 219 447, 574
v. Smith (Ohio), 133 N. E. 792 565
v. Smith, 3 Ore. 363 711, 716
v. Smith, 5 Ore. 186 519
v. Smith, 8 Ore. 100 275
v. Smith, 11 Pa. Co. Ct. 465 690
v. Smith, 15 Pa. Super. Ct. 366 580
v. Smith, 42 S. Dak. 205 154, 159
v. Smith, 51 S. Car. 379 690, 710, 711, 712
v. Smith, 4 Swab. & Tr. 228 690
v. Smith, 98 Tenn. 101 152
v. Smith (Tex.), 200 S. W. 1129 612
v. Smith (Tex. Civ. App.), 218 S. W. 602 229, 239, 245, 421
v. Smith, 74 Vt. 20 667, 678
v. Smith, 81 W. Va. 761 793, 798
Smith v. Waalkes, 109 Mich. 16, 66 N. W. 679 203
Smith, Ex parte, 34 Ala. 455 692, 721
Smith, Ex parte, 40 Tex. Cr. 179 794
Smith's Estate, In re, 4 Wash. 702 856
Smithers v. Smithers, 145 La. 752 441
Smithson v. Smithson, 37 Nebr. 535 545
Smithson's Case, 2 Vent. 345 790
Smithston v. Smithston, 113 Miss. 644 310
Smyth v. Greacen, 96 App. Div. (N. Y.) 275 7
Smyth v. Smyth, 2 Add. Ecc. 254 661, 669, 693, 695
Smyth's Estate, 1 Leg. Gaz. Rep. (Pa.) 210 705
Smythe v. Smythe, 80 Ore. 150 462
Sneed v. Ewing, 5 J. J. Marsh. (Ky.) 460 70, 71, 136, 705
v. Sneed, 14 Ariz. 17 284, 444, 445, 446, 448, 867
Snell v. Snell, 191 Ill. App. 239 182, 525
Sneve v. Lunder, 100 Minn. 5 44
Snider v. Snider, 179 Ind. 583 694, 708
Snow v. Snow, 280 Fed. 1013 589, 594
Snouffer v. Snouffer, 150 Iowa 58 333, 518, 644
Snodgrass v. Snodgrass, 40 Kans. 494 673
Snook v. Snook, 110 Wash. 310 795
Snow v. Duxstad, 23 Wyo. 82 685
v. Gould, 74 Maine 540 204
Snowman v. Wardwell, 32 Maine 275 30
Snuffer v. Karr, 197 Mo. 182 175
Snyder v. Snyder, 3 Barb. (N. Y.) 621 704
v. Snyder (Ind. App.), 131 N. E. 248 160
v. Snyder, 98 Misc. (N. Y.) 431 292
v. Snyder, 57 Pa. Super. Ct. 575 219
v. Snyder, 10 Phila. (Pa.) 306, 1 Week. No. Cas. 187 449
Sobol v. Sobol, 88 Misc. (N. Y.) 277 171
Sodini v. Sodini, 94 Minn. 301 465
Solomon v. Solomon, 140 Ga. 379 620

[*References are to Sections.*]

Solomon v. Solomon, 26 N. Y. Super. Ct. (3 Rob.) 669 704
Somers v. Somers, 39 Kans. 132 673
Soper v. Soper, 29 Mich. 305 284
Sopwith v. Sopwith, 3 Sw. & Tr. 105 723
Sorge v. Sorge, 112 Wash. 131 587, 589, 601
Sortore v. Sortore, 70 Wash. 410 467
South & N. Ala. R. Co. v. McLendon, 63 Ala. 266 30
Southard v. Rexford, 6 Cow. (N. Y.) 254 31, 37, 43, 46
Southwick v. Southwick, 97 Mass. 327 195, 281, 333
Southworth v. Southworth, 168 Mass. 511 772
Sowders v. Edmunds, 76 Ind. 123 678
Sower's Appeal, 89 Pa. St. 173 334
Spade v. State, 44 Ind. App. 529 596
Spafford v. Spafford, 199 Ala. 300 636
v. Spafford, 16 Vt. 511 478
Spain v. Spain, 177 Iowa 249 757
Spangenberg v. Christian (Minn.), 186 N. W. 700 160
Spansenberg v. Carter, 151 La. 1038 334, 427
Sparhawk v. Sparhawk, 114 Mass. 355 530
v. Sparhawk, 120 Mass. 390 740, 765
Sparks v. Ross, 75 N. J. Eq. 550 131
v. Southall, 54 L. T. 362 116
v. Sparks, 25 App. D. C. 356 684, 685, 698, 704, 708, 720
v. Sparks, 69 N. Car. 319 704
Sparkman v. Sparkman (Tex. Civ. App.) 209 S. W. 252 913
Spatz v. Spatz, 189 App. Div. (N. Y.) 438 703, 708, 723
Spaugh v. Hartman, 150 N. Car. 454 132
Spaulding v. Spaulding, 11 Ohio App. 143 620
Spears v. Burton, 31 Miss. 547 705
Speer v. Sykes, 102 Tex. 451 591
Speiser v. Speiser, 188 Mo. App. 328 211, 233, 424, 427, 701
Spellings v. Parks, 104 Tenn. 351 43, 45
Spencer v. Clark, 54 Utah 83 914
v. Ensign, 33 Idaho 577 365
v. Lawler, 79 Cal. 215 794
Spencer v. Pollock, 83 Wis. 215 137
v. Simmon, 160 Mich. 292 46, 48
v. Spencer, 61 Fla. 777 528
v. Spencer, 97 Minn. 56 595
v. Spencer, 84 Misc. (N. Y.) 264 705
Spencer, Ex parte, 83 Cal. 460 663, 740
Spengler v. Spengler, 38 Mo. App. 266 646
Spiller v. Spiller, 2 N. Car. 482 636
Spitsnaugle v. Spitsnaugle, 87 Kans. 408 525
Spofford v. Spofford, 18 Idaho 115 433, 878
Spohr's Estate, In re, 197 Ill. App. 348 635
Spondre, In re, 98 Misc. (N. Y.) 524 182
Spooner v. Spooner, 149 Ga. 467 692, 694, 710, 723
Spradling v. Spradling, 74 Okla. ———, 181 Pac. 148 620, 622, 685
Spragins v. Houghton, 2 Scam. (Ill.) 377 444
Sprague v. Craig, 51 Ill. 288 2, 30, 43
v. Sprague, 73 Minn. 474 680, 682
Spratler v. Spratler, 203 Mich. 498 755
Spratt v. Spratt (Minn.), 185 N. W. 509 591
v. Spratt (Minn.), 187 N. W. 227 585, 587, 594, 596
Sprayberry v. Merk, 30 Ga. 81 720, 722, 723, 727, 732
Springer v. Springer, 21 Ky. L. 1292 643, 644
Sprung v. Morton, 182 Fed. 330 70
Spurlock v. Spurlock, 80 Ark. 37 243
Spute v. Spute, 74 Wash. 665 352
Squire v. State, 46 Ind. 459 140, 263, 268
Sramek v. Sklenar, 73 Kans. 450 42, 44, 45, 47
Staack v. Detterding, 182 Iowa 582 120
Stacey v. Dolan, 88 Vt. 369 31
Stackhouse v. Stackhouse, 88 Nebr. 184 242, 894
Stafford v. Stafford, 299 Ill. 438 585, 587, 590, 594

[*References are to Sections.*]

Stafford v. Stafford, 92 Misc. (N. Y.) 563 462
Stallings v. Stallings, 127 Ga. 464 202, 476, 477, 690, 692, 702, 703, 708, 788
Stalvey v. Stalvey, 132 Ga. 307 876
Stamm v. Wood, 86 Ore. 174 5, 45, 158
Stampfli v. Stampfli (Cal. App.), 199 Pac. 829 285, 577, 580, 722, 740
Stanbrough v. Stanbrough, 60 Ind. 275 636, 642
Standford v. Gentry, 32 Mo. 477 5
Standley v. Standley, 143 Ill. App. 278 698, 704
Standridge v. Standridge, 31 Ga. 223 449
Stanfield v. Stanfield, 22 Okla. 574 594
Stanford v. Stanford, 1 Edw. 317 690
Stanglein v. State, 17 Ohio St. 453 268
Stanley v. Stanley, 32 Wash. 489 162
Stanton v. Willson, 3 Day (Conn.) 37 196, 596
Stapelberg v. Stapelberg, 77 Conn. 31 170, 811
Staples v. Staples (Tex. Civ. App.), 136 S. W. 120 427
v. Staples, 87 Wis. 592 703
Star v. Peck, 1 Hill (N. Y.) 270 705
Starbuck v. Starbuck, 62 App. Div. (N. Y.) 437 626
Stark v. Johnson, 43 Colo. 243 143
v. Stark, 115 Mo. App. 436 710, 711
Starkey v. Starkey, 21 N. J. Eq. 135 643
Starr v. Pease, 8 Conn. 541 529
Staton v. Staton, 164 Ky. 688 767
Stauffer v. Stauffer (Mo. App.), 207 S. W. 240 565, 892
v. Stauffer, 205 Mo. App. 515 646
Stay v. Stay, 53 Wash. 534 341, 536, 917
State v. Abbey, 29 Vt. 60 139, 268
v. Armington, 25 Minn. 29 268, 560
v. Ashley, 37 Ark. 403 268
v. Barilleau, 128 La. 1033 186
v. Baughn, 162 Iowa 308 321
v. Behrman, 114 N. Car. 797 132
State v. Bittick, 103 Mo. 183 56, 89, 831
v. Brassfield, 81 Mo. 151 45
v. Brinneman, 120 Ind. 357 462
v. Britton, 4 McCord (S. Car.) 256 268
v. Brown, 31 Wash. 397 772
v. Calhoun, 206 Mo. App. 298 685
v. Clark, 54 N. H. 456 268
v. Collins, 29 Del. 260 873
v. Cone, 86 Wis. 498 95
v. Cook, 66 Ohio St. 566 795
v. Coolidge, 72 Wash. 42 596
v. Cooper, 103 Mo. 266 55
v. Couvillion, 117 La. 935 824
v. Dent, 29 Kans. 416 793
v. Second District Judicial Court (Mont.), 40 Pac. 66 795
v. District Court, 31 Mont. 511 684, 685, 785
v. District Court, 38 Mont. 166 545
v. District Court, 46 Mont. 425 594, 620
v. District Court of Silver Bow County, 57 Mont. 517 185
v. District Court of First Judicial Dist. in and for Lewis and Clark County, 58 Mont. 316 588, 795
v. Doyle, 107 Minn. 498 480, 890
v. Duket, 90 Wis. 272 55, 59, 196, 302
v. Duncan, 110 S. Car. 253 910
v. Ellison (Mo.), 233 S. W. 1065 610
v. Fenn, 47 Wash. 561 631
v. Gallagher, 20 R. I. 266 268
v. Galloway, 5 Cold. (Tenn.) 326 794
v. Gonce, 79 Mo. 600 132, 268
v. Goodrich, 14 W. Va. 834 144, 268
v. Grimm, 239 Mo. 340 440
v. Hand, 87 Nebr. 189 64, 65
v. Henderson, 84 Iowa 161 225
v. Herren, 175 N. Car. 754 444, 447
v. Hicks, 143 N. Car. 689 261
v. Hilton, 3 Rich. Law 434 705
v. Hodgkins, 19 Maine 155 268, 705, 825
v. Hughes, 35 Kans. 626 74, 132, 136, 268

[*References are to Sections.*]

State v. Jackson, 80 Mo. 175 59
v. Johnson, 149 La. 89 620
v. Johnson, 12 Minn. 476 140
v. Judge, 114 La. 44 685
v. Kean, 10 N. H. 347 143, 144, 268
v. Kennedy, 76 N. Car. 251 59, 64, 105
v. King, 49 La. Ann. 1503 793
v. Kittle, 86 W. Va. 587 792
v. La More, 53 Ore. 261 243
v. Langford, 90 Ore. 251 596
v. Libby, 44 Maine 469 132, 268
v. Matlock, 70 Iowa 229 268
v. Maxwell, 89 W. Va. 31 653
v. Melton, 120 N. Car. 591 268
v. Moran, 37 Nev. 404 514, 895
v. Morse, 31 Utah 213 446
v. Nadal, 69 Iowa 478 268
v. Nakashima, 62 Wash. 686 110, 917
v. Neal, 19 Wash. 642 704
v. Norman, 13 N. Car. 222 261
v. Otis, 135 Ind. 267 7
v. Parker, 106 N. Car. 711 95, 839
v. Patterson, 24 N. Car. 346 175
v. Pendleton, 67 Kans. 180 268
v. Phillips, 32 Fla. 403 685
v. Plym, 43 Minn. 385 268
v. Richardson, 122 La. 1064 420
v. Robbins, 28 N. Car. 23 138, 268
v. Rombauer, 99 Mo. 216 792, 796
v. Ross, 76 N. Car. 242 64
v. Sachs, 3 Wash. 371 729
v. Samuel, 19 N. Car. 177 107
v. Sanders, 30 Iowa 582 225, 268
v. Sartwell, 81 Vt. 22 631
v. Schweitzer, 57 Conn. 532 645
v. Seals, 16 Ind. 352 268
v. Second Judicial Dist. Ct. 14 Mont. 398 765
v. Second Judicial District Court, 31 Mont. 511 793
v. Seddon, 93 Mo. 520 685, 708
v. Seventh District Judge, 22 La. 264 685
v. Shields, 45 Conn. 256 225
v. Sighers, 124 La. 115 596
v. Smith, 6 Greenl. Maine 462 587
v. Smith, 42 Mont. 211 893
State v. Smith, 101 S. Car. 293 261, 910
v. Smith, 17 Wash. 430 795
v. Snyder, 89 W. Va. 96 631
v. Sortviet, 100 Minn. 12 6
v. Stewart, 57 Utah 224 95
v. Stiles, 62 Ill. App. 408 242
v. St. Louis Court of Appeals, 88 Mo. 135 685, 711
v. St. Louis Court of Appeals, 99 Mo. 216 685, 720
v. Superior Court, 55 Wash. 343 917
v. Superior Ct., 55 Wash. 347 636, 701
v. Superior Court, 78 Wash. 372 533
v. Templeton, 18 N. Dak. 525 440, 673, 677, 697
v. Thompson, 76 N. J. L. 197 836
v. Trahan, 125 La. 312 594
v. Trull, 147 La. 444 61
v. Tutty, 41 Fed. 753 55, 59
v. Ulrich, 110 Mo. 350 268
v. Walker, 36 Kans. 297 55, 59, 822
v. Watson, 20 R. I. 354 447, 545
v. Watters, 25 N. Car. 455 105
v. Weatherby, 43 Maine, 258 96, 179, 539, 886
v. Westmoreland, 76 S. Car. 145 626
v. Weston, 90 Vt. 125 243
v. Whaley, 10 S. Car. 500 705
v. White, 19 Kans. 445 268
v. Williams, 20 Iowa 98 268
v. Wilson, 22 Iowa 364 705
v. Wilson, 121 N. Car. 650 839
v. Wolfe, 63 Fla. 290 528
v. Worthingham, 23 Minn. 528 829
v. Yoder, 113 Minn. 503 261, 631, 890
v. Zichfield, 23 Nev. 304 55, 71, 73, 834
States v. States, 37 N. J. Eq. 195 356
Stebbins v. Palmer, 1 Pick (Mass.) 71 25
Stedman v. Stedman, 179 Cal. 288 580
Steed v. Steed, 54 Utah 244 430, 525
Steel v. Steel, 104 N. Car. 631, 635 359

[*References are to Sections.*]

Steel v. Steel, 11 Week, No. Cas. (Pa.) 21 424
Steele v. Steele, 96 Ky. 382 642, 645, 749
v. Steele, 119 Ky. 466 720
v. Steele, 1 MacArth. (D. C.) 505 281
Steensland v. Steensland, 43 S. Dak. 416 643
Steffens v. Steffens, 16 Daly (N. Y.) 363 242
Steger v. Steger, 67 Ill. App. 533 727
Steimer v. Steimer, 37 Misc. (N. Y.) 26 173
Steinfeld v. Levy, 16 Abb. Prac. (N. S.) 26 (N. Y.) 7
Steinkopf v. Steinkopf, 165 Wis. 224 919
Steller v. Steller, 25 Mich. 159 793, 794, 795
Stephen v. Stephen, 102 Minn. 301 636, 653
Stephens v. Stephens, 194 Ky. 180 587
v. Stephens, 62 Tex. 337 449
Stephenson v. Osborne, 41 Miss. 119 216
Stepp v. Stepp, 178 Ky. 337 741
Stevens v. Allen, 139 La. 658 885
v. Allen, 139 La. 663 446
v. Reed, 37 N. H. 49 705
v. Stevens, 123 Ky. 545 327
v. Stevens, 170 Mo. App. 322 411
v. Stevens, 49 Mich. 504 753
v. Stevens, 1 Metc. (Mass.) 279 727
Stevenson's Estate, In re, 272 Pa. 291 57, 130, 137
Stevenson v. Stevenson, 34 Hun (N. Y.) 157 674
v. Stevenson, 19 Ont. Pr. 48 716
Sternberg v. Sternberg, 73 Pa. Super. Ct. 328 336
Sternberger v. Sternberger, 113 App. Div. N. Y. 898 716, 720
Stewart v. Anderson, 111 Iowa 329 42
v. Hagerty, 251 Pa. 603 158, 159
v. Lee, 70 N. H. 181 25
v. Munchandler, 2 Bush. (Ky.) 278 107
v. Smith, 92 Wis. 76 43
v. Stewart, 198 App. Div. (N. Y.) 337 620
Stewart v. Stewart, 101 Ark. 86 528, 692
v. Stewart, 156 Cal. 651 505
v. Stewart, 32 Idaho 180 350, 441, 447, 594
v. Stewart, 175 Ind. 412 275, 285
v. Stewart, 78 Maine 548, 7 Atl. 473 281, 333
v. Stewart, 105 Md. 297 225
v. Stewart (N. J.), 114 Atl. 851 420, 518
v. Stewart, 2 Swan (Tenn.) 591 490
v. Stewart, 27 W. Va. 167 636, 677
v. Vandervort, 34 W. Va. 524 175, 185, 260, 693
Stewart, Ex parte, 77 Misc. (N. Y.) 524 623
Stewartson v. Stewartson, 15 Ill. 145 744
Stieber v. Stieber, 82 Okla. 205 338, 580
Stieglitz v. Stieglitz, 92 N. J. Eq. 292 516, 518
Stiles v. Tilford, 10 Wend. (N. Y.) 338 41
Stillman v. Stillman, 99 Ill. 196, 660, 700, 701, 709, 710, 721, 729, 705
v. Stillman, 115 Misc. (N. Y.) 106 427, 723
v. Stillman, 7 Baxt. (Tenn.) 169 788
Stilphen v. Houdlette, 60 Maine 447 663
Stilwell v. Stilwell, 186 Iowa 177 153, 159
Stivers v. Wise, 18 App. Div. (N. Y.) 316 666, 693
Stockman v. Whitmore, 140 Iowa 378 722
Stockton Iron Co. v. Walters, 18 Cal. App. 373 579
Stoddard v. Stoddard, 227 N. Y. 13 218
v. Stoddard, 187 App. Div. (N. Y.) 279 219
Stokes v. Anderson, 118 Ind. 533 204
v. Mason, 85 Vt. 164 44
v. Stokes, 198 N. Y. 301 899
Stolz v. Stolz, 96 Wash. 227 427
Stone v. Appel, 12 Ill. App. (12 Brad.) 582 13, 14, 15, 21
v. Bayley, 75 Wash. 184 597, 598
v. Duffy, 219 Mass. 178 593, 594, 596, 769, 888

[*References are to Sections.*]

Stone v. Sanborn, 104 Mass. 319 38
v. Stone, 206 Ala. 568 335, 336
v. Stone, 3 Curt. Ecc. 341 690
v. Stone, 161 Mich. 565 594
v. Stone, 162 Mich. 319 565
v. Stone, 134 Mo. App. 242 480
v. Stone, 25 N. J. Eq. 445 479, 486, 487
Stoner v. Stoner, 134 Ga. 368 278, 284, 425, 876
Storer v. Markley, 164 Ind. 535 32, 35
Storey v. Storey, 125 Ill. 608 204, 663
Storke v. Storke, 99 Cal. 621 685, 698
v. Storke, 116 Cal. 47 716
Storms v. Storms, 71 N. J. Eq. 549 427
Story v. Story, 91 N. J. Eq. 515 242
v. Story, 1 Walk. Ch. (Mich.) 421 711, 712, 758
Stout v. Prall, 1 N. J. L. 79 47
v. Stout, 211 Mich. 238 430, 525
v. Stout, 99 Ore. 133 580, 684
Stoutenburg v. Lybrand, 13 Ohio St. 228 420
Stovall v. Stovall, 29 Okla. 125 903
Stover v. Stover, 7 Idaho 185 727
Stowers v. Singer, 113 Ky. 584 45
Stoy v. Stoy, 41 N. J. Eq. 370 798
Strader v. Armstrong, 192 Iowa 1368 158
Strahorn v. Strahorn, 82 Mo. App. 580 289
Strait v. Strait, 3 McArthur (D. C.) 415 447
Stratford v. Stratford, 92 N. Car. 297 460
Stratton v. Dole, 45 Nebr. 472 43, 48
v. Stratton, 73 Maine 481 594
v. Stratton, 77 Maine 373 798
Strauss v. Strauss, 122 App. Div. N. Y. 729 620
Strauss's Estate, In re, 168 Pa. St. 561 136
Strobridge v. Strobridge, 21 Hun (N. Y.) 288 793
Streicher v. Streicher, 202 Mich. 588 240
Streitwold v. Streitwold, 181 U. S. 179 447
Streitwolf v. Streitwolf, 58 N. J. Eq. 563 447
Stretch v. Parket, 1 Rolle. Abr. 22 24
Stribley v. Welz, 8 Ohio Cir. Ct. 571 49
Strickland v. Strickland, 80 Ark. 451 427, 726, 730
v. Strickland (N. J.), 117 Atl. 391 318, 334
Strickler v. Strickler, 202 Mich. 588 889
Stripe v. Meffert, 287 Mo. 366 74
Strode v. Strode, 3 Bush (Ky.) 227 175, 185, 661, 695
Strong v. Strong, 1 Abb. Pr. (N. S.) 358 704
v. Strong (Mo. App.), 216 S. W. 543 680, 703
v. Strong, 5 Robt. 612 707
Stuart v. Cole, 42 Tex. Civ. App. 478 536
v. Stuart, 123 Mass. 370 793
Stull's Estate, In re, 183 Pa. St. 625 65
Sturgis v. Fay, 16 Ind. 429 678
v. Sturgis, 51 Ore. 10 55, 63, 65, 666, 704, 785, 806
Sturtevant v. Sturtevant, 10 Ohio App. 132 157, 159
Sudbury v. Sudbury, 179 Iowa 1039 551
Sullivan v. Garesche, 229 Mo. 496 116
v. Grand Lodge, 97 Miss. 218 136
v. Kelley, 85 Mass. 148 234
v. Lloyd, 221 Mass. 108 4
v. Sullivan, 2 Add. Ecc. 299 665
v. Sullivan, 34 Ind. 368 425
v. Sullivan, 49 Wash. 508, 685, 720, 730
v. Sullivan, 52 Wash. 160 411, 917
v. Valtiquette, 66 Colo. 170 151, 162
Sulzer v. Yott, 57 Ill. 164 49
Summer v. Summer, 54 Wis. 642 694
Summers v. Summers, 179 Ind. 8 432
v. Summers (Ind. App.), 98 N. E. 900 644
v. Summers, 146 Ky. 653 528
Summers, Ex parte, 27 N. Car. 149 794
Summit v. Yount, 109 Ind. 506 120
Sumner v. Sumner, 118 Ga. 408 710
v. Sumner, 123 Ga. 118 710
v. Sumner, 54 Wis. 642 711, 719, 720, 721, 722, 727
Sun Insurance Co. v. White, 123 Cal. 196 787

[*References are to Sections.*]

Surbeck v. Surbeck (Mo. App.), 208 S. W. 645 152, 157, 159
Suter v. Suter, 72 Miss. 345 447
Sutermeister v. Sutermeister (Mo. App.), 209 S. W. 955 334, 536, 892
Sutherlin v. Sutherlin, 27 Ind. App. 301 300
Sutton v. Warren, 10 Metc. (Mass.) 451 64
v. Sutton, 82 N. J. Eq. 648 343
Suydun v. Suydun, 79 N. J. Eq. 144 334, 698, 701, 704
Svanda v. Svanda, 93 Nebr. 404 167, 395, 894
Svendsen v. Svendsen, 37 S. Dak. 353 850
Svendsen's Estate, In re, 37 S. Dak. 353 705
Svenson v. Svenson, 178 N. Y. 54 171
Swallow v. Swallow, 84 N. J. Eq. 109 709
Swalp v. Swalp, 104 Kans. 171 723
Swan v. Hammond, 138 Mass. 45 62
Swank v. Swank, 75 Pa. Super. Ct. 112 708, 710, 723
Swearingen v. Swearingen, 18 Ga. 316 695, 698
v. Swearingen, 19 Ga. 265 668, 703, 708, 709
Sweasey v. Sweasey, 126 Cal. 123 681
Sweat v. Sweat, 123 Ga. 801 720, 723
Sweikhart v. Hanrahan, 184 Mich. 201 160
Sweeney v. Sweeney, 42 Nev. 431 594, 765
Sweet v. Sweet (Conn.), 118 Atl. 36 289
Sworoski v. Sworoski, 75 N. H. 1 436, 441
Sy Joc Lieng v. Gregorio Sy Quia, 228 U. S. 335 144
Sykes v. Halsted, 3 N. Y. Sup. (1 Sand.) 483 636, 665
Sylvester v. Sylvester, 180 Mich. 512 889
Sylvis v. Sylvis, 11 Colo. 319 275, 279, 518
Symington v. Symington (N. J. Ch.), 36 Atl. 21 681, 708
Symons v. Symons, 275 Fed. 1015 242
Szlauzis v. Szlauzis, 255 Ill. 314 182, 187, 188
Szymanski v. Szymanski, 151 Wis. 145 727

T

Taber v. Taber (N. J. Eq.), 66 Atl. 1082 424
Tabers v. Tabers (Ky.), 242 S. W. 584 496
Tabler v. Peverill, 4 Cal. App. 671 610
Tafel v. Tafel, 169 App. Div. (N. Y.) 417 792
Taft v. Taft, 80 Vt. 256 241, 242, 243
Tait v. Tait, 3 Misc. (N. Y.) 218 356
Taliaferro v. Taliaferro, 171 N. Y. S. 25 794
Talley v. Talley, 215 Pa. 281 215, 427
Tallmon v. Tallmon, 166 Iowa 370 210, 639, 640, 642
Talman v. Leonard, 6 App. D. C. 224 785
Tamke v. Vangsnes, 72 Minn. 236 44, 47, 48
Tanton v. Tanton (Tex. Civ. App.), 209 S. W. 429 131, 427
Tarbox v. Tarbox, 120 Maine 407 579
Tarrant v. Tarrant, 156 Mo. App. 725 310, 313, 334, 892
Tartt v. Negus, 127 Ala. 301 805
Tasker v. Stanley, 153 Mass. 148 153
Tatro v. Tatro, 18 Nebr. 395 603
Tatum v. Davis, 144 Mo. App. 125 594
Taub v. Taub, 87 N. J. Eq. 624 807
Taubman v. Davis (Mo. App.), 203 S. W. 654 802
Tauton v. Tauton (Tex. Civ. App.), 209 S. W. 429 913
Tawson v. Tawson, 49 App. D. C. 45 725
Taylor v. Robinson, 29 Maine 323 136, 705
v. Stone, 218 Mass. 248, 105 N. E. 890 622, 626
v. Swett, 3 La. 33, 22 Am. Dec. 156 137
v. Taylor, 7 Colo. App. 549 185, 685, 693, 730
v. Taylor, 63 Fla. 659 496
v. Taylor, 64 Fla. 521 480, 875
v. Taylor, 33 Idaho 445 723, 727
v. Taylor, 80 Iowa 29 335
v. Taylor, 108 Md. 129 643

[References are to Sections.]

Taylor v. Taylor, 112 Md. 666 326, 335, 887
v. Taylor, 93 N. Car. 418 660, 663
v. Taylor, 5 N. Dak. 58 425
v. Taylor, 73 N. J. Eq. 745 641, 642, 643, 644
v. Taylor, 19 N. Mex. 383 668
v. Taylor, 20 N. Mex. 13 395
v. Taylor, 123 App. Div. (N. Y.) 220 516
v. Taylor, 181 N. Y. S. 894 173
v. Taylor, 54 Ore. 560 608
v. Taylor, 70 Ore. 510 185, 904
v. Taylor, 144 Tenn. 311 462, 685, 740, 765
v. Taylor, 4 Desaus. (S. Car.) 167 636, 643, 646
v. Taylor (Vt.), 112 Atl. 355 444, 580
v. White, 160 N. Car. 38, 75 S. E. 941 L. R. A. 1916C 704 173, 900
Taylor, In re, 9 Paige (N. Y.) 611 134, 705
Taylor's Estate, In re, 5 Ind. Ter. 219 210, 214
Tayman v. Tayman, 2 Md. Ch. 393 665, 690, 692, 711, 712, 714, 715, 724
Tedder v. Tedder, 108 S. Car. 271 61, 136, 849
Tefft v. Marsh, 1 W. Va. 38 38
v. Tefft, 35 Ind. 44 260
Teft v. Teft, 3 Mich. 67 196
Tegethoff v. Tegethoff, 198 Mo. App. 167 892
Tehsman v. Tehsman (N. J. Ch.), 117 Atl. 34 622, 635, 646, 653, 765
Terkleson v. Peterson, 216 Mass. 531 211
Terrill v. Terrill, 2 Alaska 475 443, 490
Territory v. Harwood, 15 N. Mex. 424 898
Terwilliger's Estate, In re, 63 Misc. (N. Y.) 479 136
Teter v. Teter, 101 Ind. 129 71, 132, 137, 820
Tew v. Tew, 80 N. Car. 316 225
Texas & P. R. Co. v. Smith, 91 Ark. 362 579
Thayer v. Thayer, 101 Mass. 111 243
v. Thayer, 9 R. I. 377 459, 693, 711, 713, 714
Thelen v. Thelen, 75 Minn. 433 447, 534
Therkelsen v. Therkelsen, 35 Ore. 75 711, 713, 721
Thiess v. Thiess, 124 Md. 292 511
Thomas v. Thomas, 150 Ark. 43 135, 140
v. Thomas, 148 Ga. 567 876
v. Thomas, 44 Ill. App. 604 765, 798
v. Thomas, 51 Ill. 162 251, 302
v. Thomas, 109 Ill. App. 352 690, 712
v. Thomas, 152 Ill. 577 644, 646
v. Thomas, 250 Ill. 354 585
v. Thomas (N. J.), 74 Atl. 125 494
v. Thomas, 87 N. J. Eq. 668 897
v. Thomas, 18 Barb. (N. Y.) 149 704
v. James (Okla.), 171 Pac. 855 842
v. Thomas, 76 Pa. Super. Ct. 54 244
v. Thomas, 2 Coldw. (Tenn.) 123 424
v. Thomas, 53 Wash.. 297, 101 131
Thomas, Succession of, 144 La. 25 131, 175
Thomason v. Thomason, 142 Ky. 176 226, 430
v. Thomason, 73 S. Car. 129 203
Thome v. Farrar, 57 Wash. 441 168
Thompkins v. Wadley, 3 Thomp. & C. 424 35
Thompson v. Clendening, 1 Head (Tenn.) 287 43
v. Emery, 127 La. 718 276
v. Mentzer, 216 Ill. App. 470 772
v. Nims, 83 Wis. 261 133
v. Patten, 70 Ind. App. 490 120
v. Scott, 34 N. Dak. 503, 159 N. W. 21 37
v. State, 28 Ala. 12 261, 560, 626
v. Thompson, 91 Ala. 591 441
v. Thompson (Ind. App.), 130 N. E. 655 518
v. Thompson, 186 Iowa 1066 278, 283, 289
v. Thompson, 148 La. 499 168
v. Thompson, 114 Mass. 566 61, 705

[*References are to Sections.*]

Thompson v. Thompson, 205 Mich. 124, 276, 292, 293, 723, 740, 755, 889
v. Thompson, 32 N. Dak. 530 283, 518
v. Thompson, 89 N. J. Eq. 70 626
v. Thompson, 173 N. Y. S. 561 219
v. Thompson (Okla.), 173 Pac. 1037 612
v. Thompson, 1 P. & M. 553 700
v. Thompson, 50 Pa. Super. Ct. 150 229, 421
v. Thompson, 10 Rich. Eq. (S. Car.) 416 636, 642, 748
v. Thompson, 3 Head (Tenn.) 527 690, 706, 711, 714, 718, 719, 721, 723, 727
v. Thompson, 226 U. S. 551 620, 775
v. Thompson, 53 Wis. 153 413
Thoms v. King, 95 Tenn. 60 626
Thorn v. Knapp, 42 N. Y. 474 41, 43, 44, 46, 47
Thorndike v. Boston, 1 Metc. (Mass.) 245 444
v. Thorndike, 1 Wash. Ter. 175 727
Thorne v. Farrar, 57 Wash. 441 358
Thorp v. Thorp, 46 N. Dak. 113 504
v. Thorp, 90 N. Y. 602 179, 630
v. Thorp, Wright (Ohio), 763 400
Thorpe v. Thorpe, 9 R. I. 57 327
Thrall v. Thrall, 83 Hun (N. Y.) 188 709
Thrall, In re, 12 App. Div. (N. Y.) 235 709
Threewits v. Threewits, 4 De-Saus. Eq. (S. Car.) 560 643, 646, 647
Thrift v. Thrift, 30 R. I. 357 900
Throckmorton v. Throckmorton, 86 Va. 768 245
Thrush v. Fullhart, 230 Fed. 24 42, 49
Thurston v. Cavenor, 8 Iowa 155 5, 6
v. Thurston, 38 Ill. App. 464 721
v. Thurston, 99 Mass. 39 565
v. Thurston, 58 Minn. 279 456
Tiedeman v. Tiedeman, 36 Nev. 494 441
v. Tiedemann, 92 Misc. (N. Y.) 417 778
Tierney v. Tierney, 169 Mich. 600 511, 889
Tiffany v. Tiffany, 84 Iowa 122 385, 430, 456, 706
Tiffin v. Tiffin, 2 Bin. (Pa.) 202 660, 770
Tiffin v. Tiffin, 209 Mich. 232 751
Till v. State, 132 Wis. 242 244
Tillman v. Tillman (S. Car.), 81 S. E. 1101 910
Tilton v. Tilton, 16 Ky. L. 538 320, 680
Timerson v. Timerson, 2 How. Prac. (N. Y.) 526 425
Tines v. Tines (Mo. App.), 216 S. W. 563 587
Tinker v. Crooks, 22 Hun. (N. Y.) 579 795
Tipton v. Tipton, 169 Iowa 182 326, 575
Tirrell v. Tirrell, 72 Conn. 567 326, 329
v. Tirrell, 107 Misc. (N. Y.) 179 211
v. Tirrell, 232 N. Y. 224 211
Tobin v. Shaw, 45 Maine 331 38, 39, 42
v. Tobin, 29 Ind. App. 382 767
v. Tobin, 60 Pa. Super. Ct. 476 518
Todd v. Kerr, 42 Barb. (N. Y.) 317 560
v. Orr, 44 Okla. 459 579
v. Todd, 84 Conn. 591 326, 871
Todd, Ex parte, 119 Cal. 57 794, 795
Todhunter v. De Graff, 164 Iowa 567 548
Tolen v. Tolen, 2 Blackf. (Ind.) 407 196, 441
Tolerton v. Williard, 30 Ore. 579 787
Tolman v. Leonard, 6 App. D. C. 224 685
v. Tolman, 1 App. D. C. 299 636, 711, 712, 719, 721
Tolzman v. Tolzman, 130 Minn. 342 329, 467
Tompkins v. Tompkins, 92 N. J. L. 113 171
v. Wadley, 3 Thomp. & C. (N. Y.) 424 30
Tomppert v. Tomppert, 13 Bush (Ky.) 326 173
Toncray v. Toncray, 123 Tenn. 476 626, 767 775, 912
Tonn v. Tonn, 16 N. Dak. 17 684, 685, 721

[*References are to Sections.*]

Topfer v. Topfer (N. J. Eq.), 68 Atl. 1071 510
Topham v. Topham, 50 App. D. C. 229 242, 252
Topper v. Perry, 197 Mo. 531 55, 71, 132, 133
Torlothing v. Torlothing, 82 Mo. App. 192 421
Torrens v. Torrens (N. J. Ch.), 118 Atl. 332 242
Torrey v. Hardy (Mo.), 196 S. W. 1100 20
Tortorich v. Maestri, 146 La. 124 532
Totten v. Read, 16 Daly (N. Y.) 282 48
Tourtelot v. Tourtelot, 4 Mass. 506 240
Towns v. Towns, 171 Wis. 32 196, 765
Townsand v. Townsand, 21 Ill. 540 528
Townsend v. Cleveland Fire Proofing Co., 18 Ind. App. 568 157
v. Huntzinger, 41 Ind. App. 223 608
Towson v. Towson, 258 Fed. 517 586, 642
v. Towson, 126 Va. 640 335, 443, 621, 916
Trammell v. Vaughan, 158 Mo. 214 15, 21, 29, 42, 44, 47, 55
Trask v. Trask, 114 Maine 60 173, 886
Travers v. Reinhardt, 25 App. D. C. 567 813
v. Reinhardt, 205 U. S. 423 71, 136, 137
Travis v. Schnelby, 68 Wash. 1 15, 29
Traylor v. Richardson, 2 Ind. App. 452 727, 731
Tremper v. Tremper, 39 Cal. App. 62 601, 703, 708, 740, 772
Trenchard v. Trenchard, 245 Ill. 313 288, 879
Trevino v. Trevino, 63 Tex. 650 636
Trotter v. Trotter, 77 Ill. 510 636
Trough v. Trough, 59 W. Va. 464 792
True v. Ranney, 21 N. H. 52, 53 Am. Dec. 164 55, 386, 180
v. True, 6 Minn. 458 553
Truitt v. Truitt, 154 Ill. App. 242 424
Trumbull v. Trumbull, 71 Nebr. 186 153
Tubbs v. Van Kleek, 12 Ill. 446 34, 41, 45
Tuck v. Tuck, 117 App. Div. (N. Y.) 421 421
Tucker v. Hyatt, 144 Ind. 635 2, 33, 35
v. People, 117 Ill. 88 140, 268
v. People, 122 Ill. 583 268
v. Tucker, 74 Miss. 93 159
Tuffelmire v. Tuffelmire, 192 Mich. 147 275, 276
Tumbleson v. Tumbleson, 79 Ind. 558 744
Tuning v. Tuning, 90 W. Va. 457 336
Tureman v. Tureman, 4 Ill. App. 335 644
Turner v. Baskin, 2 Ohio Dec. 224 33
v. Evans, 134 Md. 238 117
v. Turner, 44 Ala. 437 425, 661, 667, 701, 721
v. Turner (Cal.), 203 Pac. 109 336
v. Turner, 80 Cal. 141 694, 700, 723
v. Turner, 108 Fed. 785 676, 686
v. Turner, 26 Ind. App. 677 586
v. Turner, 189 Mass. 373 60, 137
v. Turner, 234 Mass. 37 643
v. Turner, 47 Tex. Civ. App. 391 203, 789
v. Turner, 87 Vt. 65 444, 915
v. Williams, 202 Mass. 500 131, 136, 262
v. Winter, 1 Selw. N. P. 295 681
v. Woolworth, 221 N. Y. 425 899
Turney v. Avery, 92 N. J. Eq. 473 171
v. Turney, 4 Edw. Ch. (N. Y.) 566 250
Turpin v. Public Admr. 2 Bradf. Sur. (N. Y.) 424 705
v. State, 55 Md. 462 513
Turrel v. Turrel, 2 Johns. Ch. (N. Y.) 391 692
Tuttle v. Tuttle (Mass.), 134 N. E. 231 646
v. Tuttle (Mo. App.), 240 S. W. 509 411
v. Tuttle, 21 N. Dak. 503 285, 518
v. Tuttle, 46 N. Dak. 79 555
v. Tuttle, 191 N. Y. S. 769 497
v. Tuttle, 26 S. Dak. 306 911

[*References are to Sections.*]

Tutwiler v. Tutwiler, 205 Ala. 283 636, 641, 650, 653
v. Tutwiler, 118 Va. 724 916
Tuxford v. Tuxford, 9 Sask. L. R. 251 640
Twohig v. Twohig, 176 Wis. 275 587
Twohy v. Twohy, 130 Va. 557 580, 598, 723, 740
Tyler v. Aspinwall, 73 Conn. 493 550
v. Odd Fellows Mut. Relief Assn., 145 Mass. 134 609
v. Salley, 82 Maine 128 34, 42, 45
v. Tyler, 99 Ky. 31 678
Tyrrell v. Tyrrell, 3 Atl. (N. J.) 266 671, 690, 704
Tyrrell's Estate, In re, 185 N. Y. S. 762 131
Tyson v. State, 83 Fla. 7 173

U

Uecker v. Thiedt, 133 Wis. 148 755
Uhl v. Irwin, 3 Okla. 388 203, 789
Uhler v. Uhler, 128 N. Y. S. 963 395
Uhlmann v. Uhlmann, 51 N. Y. Super. Ct. 361 723, 729
v. Uhlmann, 17 Abb. N. Cas. (N. Y.) 263 589
Ullman v. Ullman, 151 App. Div. (N. Y.) 419 587
Ulman v. Meyer, 10 Fed. 241 8, 308
Umbenhower v. Labus, 85 Ohio 238 841
Umlauf v. Umlauf, 103 Ill. 651 644, 655
v. Umlauf, 9 Ill. App. 517 644
v. Umlauf, 22 Ill. App. 580 704, 710, 721, 756
Underwood v. Underwood, 50 App. D. C. 323 333, 335, 420
v. Underwood, 83 W. Va. 272 539, 918
United States v. Green, 98 Fed. 63 136
v. Lambert, 2 Cranch C. C. 137 268
v. Snow, 4 Utah 295 264
United States Trust Co. v. Maxwell, 26 Misc. (N. Y.) 276 705
Unsoeld v. Unsoeld, 216 Mass. 594 303, 888
Unzicker v. Unzicker, 101 Nebr. 837 894
Utley v. Utley, 155 Mich. 258 279

V

Vachikinas v. Vachikinas (W. Va.), 112 S. E. 316 441, 442
Valentine v. Pollak, 95 Conn. 556 152, 157, 158, 162
Valiquet v. Valiquet, 177 Fed. 994 622
Valleau v. Valleau, 6 Paige (N. Y.) 207 226, 232
Van Aernam v. Van Aernam, 1 Barb. Ch. (N. Y.) 375 234
Van Camp v. Van Camp, (Cal. App.), 199 Pac. 885 279, 580
Vance v. Vance, 8 Maine 132 249
Van Cleaf v. Burns, 118 N. Y. 549 605
Van Claeve v. Bucher, 79 Cal. 600 796
Vandegrift v. Vandegrift, 30 N. J. Eq. 76 693, 703, 704
Vanderburgh v. Vanderburgh (Minn.), 188 N. W. 276 211, 214, 215, 336, 653
Vandergucht v. DeBlaquiere, 8 Sim. 315, 2 Jur. 738 790
Vanderpool v. Richardson, 52 Mich. 336 5, 38, 42, 48, 54, 55
Vandeveer v. Higgins, 59 Nebr. 333 62
Van Dommelen v. Van Dommelen, 218 Mich. 149 55
Vanduzer v. Vanduzer, 6 Paige (N. Y.) 366 203, 662
v. Vanduzer, 70 Iowa 614 644, 685
Van Dyke v. Van Dyke, 125 Ga. 491 722, 785, 793, 795
Vanfossen v. State, 37 Ohio St. 317 261, 444, 447
Van Horn v. Van Horn, 196 App. Div. (N. Y.) 472 217, 219, 622, 753
v. Van Horn, 48 Wash. 388, 93 Pac. 670 622, 731
Van Houten v. Morse, 162 Mass. 414 16, 28
Van Natta v. Van Natta, 188 Ind. 75 684, 740
Van Ness v. Ransom, 215 N. Y. 557 709
v. Van Ness (Tex.), 218 S. W. 1076 802
Vanness v. Vanness, 128 Ark. 543 868
Van Orden, In re, 96 Fed. 86 686
Van Sickle v. Harmeyer, 172 Ill. App. 218 766

[*References are to Sections.*]

Van Slyke **v. Van Slyke,** 186 Mich. 324 550
Van Storch **v. Griffin, 71** Pa. St. 240 678
Van Syckle v. Van Syckle, 168 App. Div. (N. Y.) 924 594
Van Valkenburgh v. Van Valkenburgh (Minn.), 188 N. W. 276 211
v. Bishop, 164 N. Y. S. 86 674
Van Vleck v. Van Vleck, 21 App. Div. (N. Y.) 272 720
Van Voorhis v. Brintnell, 86 N. Y. 18 11, 539, 631, 678
v. Van Voorhis, 90 Mich. 276 685, 713, 714
Van Wickle v. Van Wickle (N. J.), 108 Atl. 761 424
Varner v. Varner, 35 Tex. Civ. App. 381 281
Varney v. Varney, 52 Wis. 120 173, 355, 356
v. Varney, 54 Wis. 422 456, 685
Varnum v. American Bonding & Trust Co., 156 Ill. App. 306 706
Vaughan v. Buck, 3 El. & Eq. 135 677
v. Smith, 177 Ind. 111 37, 48
Vaughn v. Vaughn, 89 App. Div. (N. Y.) 611 721
Vaughn, Ex parte, 205 Ala. 296 594
Vayette v. Myers, 303 Ill. 562 420
Vazakas v. Vazakas, 109 N. Y. S. 568 168
Veal v. Veal, 140 La. 879 277
Veeder v. Veeder, 189 Iowa 912 285, 288, 350, 518
Veneall v. Veness, 4 F. & F. 344 5, 144
Verbeeck v. Verbeeck (N. J. Ch.), 115 Atl. 136 700, 716, 720
Verbuck v. Verbuck (N. J. Ch.), 115 Atl. 136 701
Verholf v. Van Houwenlengen, 21 Iowa 429 140
Verner v. Verner, 62 Miss. 260 636, 701, 721
v. Verner, 64 Miss. 184 645
Vernilye v. Vernilye, 14 How. Pr. (N. Y.) 470 203
Vetterlein, Petition of, 14 R. I. 378 447
Vickers v. Faubion (Tex. Civ. App.), 224 S. W. 803 587, 594, 620, 623, 631
v. Vickers (Nev.), 199 Pac. 76 501, 644
v. Vickers, 89 W. Va. 236 645, 653
Vierling v. Binder, 113 Iowa 337 29, 35, 48
Viertel v. Viertel, 212 Mo. 562 596
v. Viertel, 99 Mo. App. 710 229, 685
v. Viertel, 123 Mo. App. 63 425
Vigil v. Vigil, 49 Colo. 156 746, 870
Vigno v. Vigno, 79 N. H. 108 175, 558, 896
Vincent v. Black, 30 Idaho 636 559
v. Le Doux, 146 La. 144 413, 430
v. Parker, 7 Paige (N. Y.) 65 788
v. Vincent, 16 Daly (N. Y.) 534 695
Vine v. Casmey, 86 Minn. 74 34
v. Vine, 12 Cal. App. 458 585
v. Vine, 21 R. I. 190 785
Vinsant v. Vinsant, 49 Iowa 639 302
Vinson v. Vinson, 94 Ga. 492 696
Vischer v. Vischer, 12 Barb. (N. Y.) 640 560
Vittum v. Gilman, 48 N. H. 416 25
Vogt v. Guidry (Tex. Civ. App.), 220 S. W. 343 21, 31, 42, 43
Volkmore v. Volkmore, 147 Cal. 175 644
Von Bernuth v. Von Bernuth, 76 N. J. Eq. 487 427, 465, 500, 590
Vondal v. Vondal, 175 Mass. 383 171
Von Der Brelie v. Von Der Brelie, 198 Ill. App. 187 644
Von Storch v. Griffin, 71 Pa. St. 240 30
v. Griffin, 77 Pa. St. 504 35
Von Trott v. Von Trott, 118 Wis. 29 711, 715, 719
Voorhees v. Voorhees, 46 N. J. Eq. 55
Voss v. Voss, 157 Wis. 430 427, 433, 517, 531, 919
Votaw v. Votaw, 90 Nebr. 699 285
Vreeland v. Vreeland, 18 N. J. Eq. 43 130, 136, 690, 721
Vroom v. Marsh, 29 N. J. Eq. 15 185, 692, 693

W

Wabberson v. Wabberson, 27 Misc. N. Y. 125 693
Wabeke v. Wabeke (Iowa), 98 N. W. 559 427

[*References are to Sections.*]

Wachholz v. Wachholz, 75 Wis. 377 278, 295
Wacker v. Wacker, 55 Pa. Super. Ct. 380 333
Wade v. Kalbfleisch, 58 N. Y. 282 25, 55, 198
v. Wade, 96 Cal. xviii 647
v. Wade (Mo. App.), 229 S. W. 432 243, 424, 610
Wadell v. Wallace, 32 Okla. 140 11, 21, 33, 34
Wadsworth v. Wadsworth, 81 Cal. 182 197, 465
v. Western Union Tel. Co., 86 Tenn. 695 42
Waer v. Waer (N. J.), 90 Atl. 1039 244
Wagenseller v. Simmers, 97 Pa. St. 465 14, 15, 21, 37
Wagley v. Wagley (Tex. Civ. App.), 230 S. W. 493 580
Wagner v. Treesh, 71 Ind. App. 551 606
v. Wagner, 130 Md. 346 425
v. Wagner, 132 Mich. 343 769
v. Wagner, 203 Mich. 328 889
v. Wagner, 34 Minn. 441 713, 722
v. Wagner, 36 Minn. 239 565, 685, 711
v. Wagner (Mo. App.), 215 S. W. 784 159, 160
v. Wagner, 80 Ore. 256 280
Wagoner v. Wagoner (Md.), 10 Atl. 221 250
v. Wagoner, 287 Mo. 567 55, 446, 626
Wahle v. Wahle, 71 Ill. 510 248, 644, 645, 670
Wain v. Barney, 219 Ill. App. 401 710
Wait v. Wait, 4 N. Y. 95 663
Wakefield v. Wakefield, 94 Ore. 605 427
Wald v. Wald, 124 Iowa 183 722
v. Wald, 168 Mo. App. 377 585, 594
Walden v. Walden, 151 Ga. 549 684
v. Walden, 113 Wash. 677 579, 580
Waldhorn v. Waldhorn, 165 Mich. 130 288
Waldron v. Waldron, 85 Cal. 251 283
v. Waldron, 45 Fed. 315 162
v. Waldron, 151 Ga. 549 722
v. Waldron, 55 Pa. St. 231 711, 714, 719, 793
Waldrop v. State, 41 Tex. Cr. 194 268
Wales v. Wales, 119 Mass. 89 556
Walker v. Johnson, 6 Ind. App. 600 29, 35, 43
v. Laighton, 31 N. H. 111 338
v. Walker, 82 N. Y. 260 792
v. Walker, 147 Ark. 376 678, 741
v. Walker, 14 Cal. App. 487 341
v. Walker, 60 Colo. 577 432
v. Walker, 64 Fla. 536 326, 334
v. Walker, 111 Maine 404 886
v. Walker, 125 Md. 649 624, 626, 636, 639, 640, 641
v. Walker, 151 N. Car. 164 132
v. Walker, 20 Hun (N. Y.) 400 792
v. Walker (Nev.), 198 Pac. 433 444, 575, 580
v. Walker, 41 Nev. 4 610
v. Walker, 10 Prac. Rep. (Ont.) 633 710
v. Walker, 32 R. I. 28 448, 909
v. Walker (R. I.), 82 Atl. 385 909
v. Walker (R. I.), 86 Atl. 894 579
v. Walker (R. I.), 94 Atl. 672 493, 496
v. Walker, 38 R. I. 362 351
v. Walker, 9 Wall. (U. S.) 743 210
v. Walker, 92 Vt. 443 427, 915
Walker's Estate, In re, 176 Cal. 402 469
Wall v. Wall, 196 Mich. 512 279, 329
v. Williamson, 8 Ala. 48 106
Wallace v. McDaniel, 59 Ore. 378 904
v. Mutual Ben. Life Ins. Co., 97 Minn. 27 600
v. Wallace, 137 Iowa 356
v. Wallace, 171 Ky. 192 500
v. Wallace, 189 Ky. 451 680
v. Wallace, 74 N. H. 256 766
v. Wallace, 75 N. H. 217 636, 720, 765, 896
v. Wallace, 26 S. Dak. 229 536
Waller v. State, 40 Ala. 325 225
Walling v. Walling, 16 N. J. Eq. 389 706
Wallingsford v. Allen, 10 Pet. (U. S.) 583 213

[*References are to Sections.*]

Wallingsford v. Wallingsford, 6 Har. & J. (Md.) 485 644, 655, 660, 674, 676
Wallner v. Wallner, 167 Mo. App. 677 427
Walls v. State, 32 Ark. 565 95
Walmsley v. Robinson, 63 Ill. 42 6
Walsh v. Walsh, 61 Mich. 554 275
v. Walsh, 4 Misc. (N. Y.) 448 704
Walston v. Walston (Iowa), 126 N. W. 145 755
Walter v. Walter, 15 App. D. C. 333 709
v. Walter, 190 Ky. 49, 226 S. W. 374 338, 684, 723, 740
v. Walter, 217 N. Y. 439 899
Waltermire v. Waltermire, 110 N. Y. 183 285
Walter v. Stockberger, 20 Ind. App. 277 15, 21, 24, 37
v. Walters (Minn.), 186 N. W. 693 558
Walton v. Walton, 76 Miss. 662 327
v. Walton, 178 N. Car. 73 185, 653
v. Walton, 57 Nebr. 102 575
v. Walton (Tex. Civ. App.), 228 S. W. 921 70
v. Walton (Tex. Com. App.), 228 S. W. 921 136
Wanamaker v. Wanamaker, 10 Phila. (Pa.) 466 480, 545
Wand v. Wand, 14 Cal. 512 278, 589
Wander v. Wander, 111 App. Div. (N. Y.) 189 169
Wandersee v. Wandersee, 132 Minn. 321 589
Wanecke v. Kratky, 69 Nebr. 770 13, 14, 21, 29
Wann v. Wann, 85 Ark. 471 587
Ward v. Bailey, 118 N. Car. 55 180
v. Dulaney, 23 Miss. 410 386
v. Ward, 144 Ga. 312 644
v. Ward, 24 Ga. App. 695 131
v. Ward, 103 Ill. 477 285
v. Ward, 7 Penn. (Del.) 364 336, 341, 873
v. Ward, 1 Tenn. Ch. 262 490, 704, 710
v. Ward, 70 Vt. 430 792
Ward Lumber Co. v. Henderson-White Mfg. Co., 107 Va. 626 678
Ward's Estate, 30 Pittsburg L. J. 394 845
Ward's Will, 70 Wis. 251 62
Wares v. Wares, 122 Mo. App. 129 411
Warfield v. Warfield, 97 Ark. 125 334
Wark v. Wark, 73 Pa. Super. Ct. 274 580
Warne v. Warne, 36 S. Dak. 573 690
Warner v. Commonwealth, 2 Va. Cas. 95 268
v. Warner, 54 Mich. 492 344, 395
v. Warner, 69 N. H. 137 522
Warnock v. Moore, 91 Kans. 262 157
Warren v. Warren, 174 Iowa 162 70, 152, 203, 601, 718, 772, 798
Warwick v. Cooper, 5 Sneed (Tenn.) 659 851, 912
Washburn v. Washburn, 9 Cal. 475 397
v. Washburn, 5 N. H. 195 238
Washington, B & A. R. Co. v. State, 136 Md. 103 133
v. Washington, 11 Va. 524 916
Wass v. Wass, 41 W. Va. 126 525
v. Wass, 42 W. Va. 460 708, 713, 730
Waterman v. Waterman, 80 Ore. 511 284
Waters v. Waters, 49 Mo. 385 703, 709, 710, 718, 720, 721, 722, 723, 727, 765, 792, 796
Watkins v. DeArmond, 89 Ind. 553 345
v. Watkins, 125 Ind. 163 447
v. Watkins, 65 L. J. P. 75 676
v. Watkins, 135 Mass. 83 441
v. Watkins, 66 Mo. App. 468 685, 709
Watkinson v. Watkinson, 68 N. J. Eq. 632 444
Watson v. Burnley, 150 Ga. 460 211
v. Davidson, 141 Ark. 591 159
v. Lawrence, 134 La. 194 55, 138, 143
v. Watson, 52 N. J. Eq. 349 281
Watters v. Watters, 168 N. Car. 411 167, 355, 900
Watts v. Watts, 160 Mass. 464 228, 335, 545, 565, 585, 644
Waughop v. Waughop, 82 Wash. 69 167
Way v. Way, 64 Ill. 406 475
Waymire v. Getmore, 22 Ohio St. 271 4, 841
Weaver v. Bachert, 2 Penn. 80 5, 7, 23, 34, 37, 45, 141

[*References are to Sections.*]

Weaver & Weaver, 33 Ga. 172 709, 723
v. Weaver, 178 N. Y. 621 414
Weatherall v. Weatherall, 56 Wash. 344 131
Weatherbee v. Weatherbee, 20 Wis. 499 485
Weatherford v. Weatherford, 20 Ala. 548 136
Webb v. Jones, 36 N. J. Eq. 163 62
v. Wayne, Cir. Judge, 144 Mich. 674 693
v. Webb, 140 Ala. 262 795
v. Webb, 150 Ga. 670 695, 708
Webber v. Webber, 79 N. Car. 572 692
v. Webber, 83 N. Car. 280 559
Weber v. Weber, 113 Ark. 471 152
v. Weber, 93 App. Div. N. Y. 149 793
v. Weber, 195 Mo. 126 42, 696, 708
v. Weber, 16 Ore. 163 677
v. Weber, 1 Swab. & Tr. 219 660, 690
Webster v. Modern Woodmen, 192 Iowa 1376 631
v. Reed, 11 How. (U. S.) 437, 13 L. ed. 761 678
v. Webster, 43 Cal. App. 772 684, 740
v. Webster, 58 Maine 139 606, 607
v. Webster, 2 Wash. 417 673
Weedon v. Weedon, 34 Pa. Super. Ct. 358 497
Weeks v. L'Ecluse, 177 N. Y. S. 284 211
v. Mays, 87 Tenn. 442 25, 30
Wehrenbrecht v. Wehrenbrecht, 200 Mo. App. 452 580, 892
Weidenhoft v. Primm, 16 Wyo. 340 850
Weidert v. Weidert, 106 Wash. 410 580
Weidner v. Weidner, 85 Hun (N. Y.) 432 792
Weigand v. Weigand, 41 N. J. Eq. 202 641, 643
Weigel v. Weigel, 63 N. J. Eq. 677 331
Weir v. Weir, 10 Grant Ch. (U. C.) 565 646, 647
Weis v. Weis, 123 App. Div. (N. Y.) 409 471
Weisberg v. Weisberg, 112 App. Div. (N. Y.) 231 110, 170
Weishaupt v. Weishaupt, 27 Wis. 621 685, 690, 703, 704
Weiss v. Weiss, 174 Mich. 431 427
Welch v. Baker, 83 N. J. Eq. 330 589
v. Welch, 16 Ark. 527 479
v. Welch, 33 Wis. 534 587
Welday v. Welday (Mo. App.), 232 S. W. 1045 580, 685
Welge v. Jenkins (Tex. Civ. App.), 195 S. W. 272 7
Welker v. Wallace, 117 Wash. 52 35
Weller v. Weller, 154 Mo. App. 6 395, 411
Wellington v. Wellington, 137 Ill. App. 394 518
Wellman v. Wellman, 191 Ill. App. 514 467, 496, 498
v. Wellman, 178 Mich. 107 425
Wells v. Allen, 38 Cal. App. 586 137
v. Hardy, 21 Tex. Civ. App. 454 3
v. Padgett, 8 Barb. (N. Y.) 323 42, 44, 45, 46
v. Wells, 11 App. D. C. 392 585
v. Wells, 209 Mass. 282 622, 776
v. Wells, 39 Okla. 765 276
v. Wells, 46 Okla. 88 684
v. Wells, 27 S. Dak. 257 531, 636
v. Wells, 99 Wash. 492 587
Wells' Estate, 194 N. Y. 548 70
Welsh v. Badeaux, 131 La. 469 698
Welty v. Welty, 195 Ill. 335 686
Welty v. Sparks, 179 Iowa 1390 158
Wendel v. Wendel, 30 App. Div. 447 86, 173
Wendling v. Wendling, 134 N. Y. S. 55 395, 536
Wendt v. Wendt, 106 Nebr. 554 152
Wenninger v. Mitchell, 139 Mo. App. 420 123
Weppler v. Weppler, 91 N. J. Eq. 535 651
Werner v. Chicago & N. W. Co., 105 Wis. 300 39, 187, 622
Werres v. Werres, 102 Ill. App. 360 706
Wertz v. Wertz, 43 Iowa 534 430
Wesley v. Wesley, 181 Ky. 135 319, 884
Wesner v. O'Brien, 56 Kans. 724 675
Wessels v. Wessels, 28 Ill. App. 253 278
West v. Oakey, 84 Okla. 59 49
v. West, 100 Ohio St. 33 598
v. West, 126 Va. 696 700, 725, 740, 746, 793

[*References are to Sections.*]

West Cambridge v. Lexington, 18 Mass. 506 631
Wester v. Martin, 115 Ga. 776 710, 795
Westerfield v. Westerfield, 36 N. J. Eq. 195 700, 701, 711, 714
Western & A. R. Co., v. Williams, 22 Ga. App. 192 596
Western Coal & Mining Co. v. Industrial Commission, 296 Ill. 408 135
Western Un. Tel. Co. v. Cooper, 71 Tex. 507 45
Westfall v. Westfall (Mo. App.), 236 S. W. 393 124
v. Westfall, 100 Ore. 224 173, 176, 350
Westmeath v. Westmeath, 4 Eng. Ecc. 238 276
Weston v. Weston, 143 Mass. 274 888
Westphal v. Westphal, 81 Minn. 242 498
Wetherington v. Wetherington, 57 Fla. 551 285, 875
Wetmore v. Markoe, 106 U. S. 68 660, 686
v. Mell, 1 Ohio St. 26 6
v. Wetmore, 149 N. Y. 520 706
v. Wetmore, 5 Ore. 469 456, 623
Weyer v. Weyer, 40 Cal. App. 765 475, 498, 791
Whalen v. Layman, 2 Blackf. (Ind.) 194 34, 45, 145
Whaley v. Whaley, 68 Iowa 647 276
Wheat v. Wheat (Tex. Civ. App.), 239 S. W. 667 211
Wheeler v. Lowell, 91 Vt. 278 596
v. Wheeler, 90 Ark. 608 868
v. Wheeler, 18 Ill. App. 330 704
v. Wheeler, 53 Iowa 511 275, 276, 279, 285, 411
v. Wheeler, 101 Md. 427 310
v. Wheeler, 2 Pa. Dist. R. 567 300
v. Wheeler, 79 Wis. 303 187
Whetstone v. Whetstone, 31 Iowa 276 712
W. H. Gallaspy's Sons Co. v. Massey, 99 Miss. 208 201
Whinnery v. Whinnery, 21 Cal. App. 59 424
Whipp v. Whipp, 54 N. H. 580 467
Whippen v. Whippen, 171 Mass. 560 63, 65
Whipple v. Whipple, 43 N. H. 235 520
Whise v. Whise, 36 Nev. 16 570
Whitaker v. Whitaker (Del.), 111 Atl. 743 572
v. Whitaker, 92 Vt. 301 915
Whitcomb v. Whitcomb, 46 Iowa 437 21, 37, 60, 447, 551, 636, 670
White v. Brotherhood of American Yeomen, 124 Iowa 293 600
v. Equitable Nuptial Ben. Union, 76 Ala. 251 123
v. Hill, 176 Ala. 480 70, 865
v. Lowe, 1 R. E. D. F. 37 705
v. McDowell, 74 Wash. 44 765
v. Thomas, 12 Ohio St. 312 44, 46
v. Warren, 214 Mass. 204 775
v. White, 206 Ala. 231 475, 580
v. White, 154 App. Div. (N. Y.) 250 196, 596, 600
v. White, 73 Cal. 105 668
v. White, 82 Cal. 427 136, 137, 705
v. White, 86 Cal. 212 720, 728
v. White, 97 Cal. 604 716
v. White, 130 Cal. 597 202, 788
v. White, 50 Ill. App. 149 723
v. White, 76 Kans. 82 156, 150
v. White, 233 Mass. 39 622
v. White, 66 Misc. (N. Y.) 592 576
v. White, 169 Mo. App. 40 506
v. White, 65 N. J. Eq. 741 590
v. White, 77 N. H. 26 585
v. White, 84 N. J. Eq. 512 229, 421
v. White, 87 N. J. Eq. 354 645
v. White, 100 Ore. 387 278, 279, 296, 427, 433, 685
v. White, 121 Va. 244 490, 916
v. White, 140 Wis. 538 154, 162
v. White, 167 Wis. 615 530, 919
White, In re, 113 Cal. 282 203
Whitehead v. Clinch, 3 N. Car. 3 705
v. Whitehead, 84 Vt. 321 915
Whitenack v. Whitenack, 36 N. J. Eq. 474 250
Whitfield v. Whitfield, 89 Ga. 471 333
Whitford v. Whitford, 100 Ark. 63 198
Whitley v. Meador, 137 Tenn. 163 606
Whitlock v. Whitlock, 268 Ill. 218 518

[*References are to Sections.*]

Whitmore v. Brown, 147 Ark. 147 798
v. Whitmore, 49 Mich. 417 685, 730
Whitmore, Ex parte, Dick. 143 790
Whitney v. Whitney, 7 Bush (Ky.) 520 723
v. Whitney, 22 How. Pr. (N. Y.) 175 704
v. Whitney, 78 Nebr. 240 536
v. Whitney Elevator & Co. 180 Fed. 187 217
Whitsell v. Mills, 6 Ind. 229 179, 529, 663
Whittaker v. Whittaker, 151 Ill. 266 514
Whittem v. State, 36 Ind. 196 32
Whittington v. McCaskill, 65 Fla. 162 875
Whittle v. Schlemm, 93 N. J. L. 78 212, 219
Whittley v. Whittley, 60 Misc. (N. Y.) 201 558
Wiedner v. Wiedner (Tex. Civ. App.), 231 S. W. 448 427, 518
Wiemer v. Wiemer, 21 N. Dak. 371 420, 547, 549
Wier v. Still, 31 Iowa 107 173
Wiggins v. Keizer, 6 Ind. 252 8, 344
Wightman v. Coates, 15 Mass. 1, 8 Am. Dec. 77 6, 21, 37
v. Wightman, 4 Johns. Ch. (N. Y.) 343 167, 838
v. Wightman, 45 Ill. 167 793
Wilber v. Wilber, 90 N. J. Eq. 7 491, 500, 536
Wilbur v. Johnson, 58 Mo. 600 42, 45
Wilbur's Estate, In re, 8 Wash. 35 65
Wilcox v. Wilcox, 171 Cal. 770 173
Wilde v. Wilde, 37 Nebr. 891 420
v. Wilde, 2 Nev. 306 702, 709, 713
Wilds v. Bogan, 57 Ind. 453 45
Wiles v. Wiles, 3 Md. 1 662
Wiley v. Stewart, 145 La. 1081 107, 175
Wilhelm v. Wilhelm, 90 Ore. 435 326, 335, 580, 904
Wilkins v. Wilkins, 84 Nebr. 206 335, 536, 592, 593
v. Wilkins, 146 Ga. 382, 91 S E. 415 795
Wilkinson v. Elliott, 43 Kans. 590 201, 787
v. Payne, 4 T. & R. 468 705
v. Pomeroy, 10 Blackf. 524 35
Will v. Will, 134 Ill. App. 67 638
Willard v. Stone, 7 Cow. (N. Y.) 22, 17 1, 3, 28, 43
v. Willard, 4 Mass. 506 237, 502
v. Willard, 194 App. Div. (N. Y.) 123 576
v. Willard, 6 Baxt. (Tenn.) 297 168, 358
Willcox v. Wayne Circuit Judge, 83 Mich. 1 462
Wille v. Wille, 88 N. J. Eq. 581 244
Willett v. Willett (Mo. App.), 196 S. W. 1058 892
Willey v. Howell, 159 Ky. 805 160
v. Howell, 168 Ky. 466 536
v. Willey (Cal. App.), 196 Pac. 101 703
v. Willey, 18 Manitoba L. R. 298 644
v. Willey, 22 Wash. 115 685
Williams v. Gass, 43 La. Ann. 868 312
v. Herrick, 21 R. I. 401 848
v. Hollingsworth, 6 Baxt. (Tenn.) 12 30, 34, 45
v. McKeene, 193 Ill. App. 615 110, 818
v. Monroe, 18 B. Mon. (Ky.) 514 726
v. Norwoods, 2 Yerg. (Tenn.) 329 46
v. Osenton, 220 Fed. 653 161
v. State, 54 Ala. 131 136, 268, 805
v. State, 67 Ga. 260 107
v. Williams (Cal. App.), 206 Pac. 650 480, 555
v. Williams, 20 Colo. 51 152, 162
v. Williams, 23 Fla. 324 425, 590
v. Williams, 137 Ga. 791 702
v. Williams, 77 Ill. App. 229 647
v. Williams, 13 Ind. 523 594
v. Williams, 136 Ky. 71 196, 510, 643, 884
v. Williams, 101 Minn. 400 275, 285
v. Williams, 121 Mo. App. 349 333
v. Williams, 180 N. Car. 273 490, 492
v. Williams, 78 N. J. Eq. 13 444
v. Williams, 81 N. J. Eq. 17 518
v. Williams, 92 N. J. Eq. 672 518

[*References are to Sections.*]

Williams v. Williams, 130 N. Y. 193 326
v. Williams, 101 Neb. 369 894
v. Williams, 83 Ore. 59 777, 778
v. Williams, 4 S. Car. (4 Desaus.) 183 646
v. Williams, 6 S. Dak. 284 685, 741, 792
v. Williams, 29 Wis. 517 685, 708, 710, 722, 723, 729
v. Williams, 46 Wis. 464 76, 137, 705
v. Williams, 63 Wis. 58 173, 260
Williams, In re, 208 N. Y. 32 686
Williamson v. Williamson, 179 Iowa 489 447, 545, 882
v. Williamson, 183 Ky. 435 287, 680, 682
v. Williamson, 34 App. D. C. (N. Y.) 536 173, 355, 874
v. Williamson, 169 App. Div. (N. Y.) 597 622
Williford v. Williford, 162 Ill. App. 24 653
Willits v. Willits, 76 Nebr. 228 55, 198, 358, 660, 685, 693, 730
Willoughby v. Willoughby, 71 Colo. 356 530
Wills v. Myers, 4 Ky. L. 839 30
v. Wills, 168 Ky. 35 694, 698
v. Wills, 74 W. Va. 709, 82 S. E. 1092 L. R. A. 1915B, 770 281, 288
v. Wills, 168 Ky. 35 587, 596
v. Wills, 176 Ind. 631 490
Willson v. Willson, 84 Wash. 240 585
Wilmington Trust Co. v. Hendrixson (Del. Super.), 114 Atl. 215 61, 70
Wilmore v. Wilmore, 15 B. Mon. (Ky.) 49 680
Wilson v. Burnett, 105 Misc. (N. Y.) 279 705
v. Carnley (1908), 1 K. V. 729 11
v. Cook, 256 Ill. 460 64, 631, 879
v. Ensworth, 85 Ind. 399 6
v. Hinman, 182 N. Y. 408 660, 709, 769
v. Holt, 83 Ala. 528 64, 179
v. Mitchell, 48 Colo. 454 536, 594
v. Nichols, 72 Conn. 173 356
v. Ray, 13 Ind. 1 8
v. Smelser, 13 Ind. App. 33 6, 39
Wilson v. Wilson, 97 Ark. 643 285, 868
v. Wilson, 128 Ark. 110 312
v. Wilson, 49 Iowa 544 712
v. Wilson, 67 Ill. App. 522 646
v. Wilson, 40 Iowa 230 699
v. Wilson, 49 Iowa 544 692, 695, 721
v. Wilson, 99 Iowa 688 692
v. Wilson, 115 Maine 341 153
v. Wilson, 104 Miss. 347 385, 891
v. Wilson, 89 Nebr. 749 427
v. Wilson, 1 Desaus. (S. Car.) 219 692
v. Wilson, 134 Tenn. (7 Thomp.) 697 912
v. Wilson (Tex. Civ. App.), 231 S. W. 830 723
v. Wilson, Wright (Ohio), 128 799
Wilson, Ex. parte, 73 Cal. 97 795
Wimbraugh v. Wimbraugh, 125 Md. 619 168, 887
Winans v. Winans, 205 Mass. 388 444, 888
v. Winans, 124 N. Y. 140 576
Winder v. Winder, 86 Nebr. 495 554
Winemiller v. Winemiller, 114 Ind. 540 741
Wing v. Hurlburt, 15 Vt. 607 726, 732
Wingo v. Rudder (Tex.), 120 S. W. 1073 144, 631
Winkemeier v. Winkemeier, 11 App. Div. (N. Y.) 199 716
Winkler v. Winkler, 104 Miss. 1 694, 708, 891
v. Winkler, 273 Mo. 60 892
Winkles v. Powell, 173 Ala. 46 196, 338, 865
Winn v. Sanford, 148 Mass. 39 210
Winner v. Schucart, 202 Mo. App. 176 596, 622
v. Winner, 171 Wis. 413 176
Winslow v. Winslow, 7 Mass. 96 237, 455, 459, 502
Winston v. Winston, 50 App. D. C. 321 446, 448, 492
v. Winston, 165 N. Y. 553 250, 447
Winter v. Dibble, 251 Ill. 200 879
v. Superior Court, 70 Cal. 295 720, 721, 792
v. Winter, 191 N. Y. 462 211, 213
Winter, Ex parte, 70 Cal. 291 684, 780

[*References are to Sections.*]

Winterberg v. Winterberg, 177 Ill. App. 493 493, 642, 644, 646
Winters v. Duncan (Tex. Civ. App.), 220 S. W. 219 71
Winton v. Winton, 161 N. Y. S. 405 211
Wisdom v. Wisdom, 24 Nebr. 551 447, 545, 558
Wise v. Crandall (Mo.), 215 S. W. 245 120
v. Schloesser, 111 Iowa 19 1, 3
v. Wise, 67 Ind. App. 647 607
v. Wise, 159 App. Div. (N. Y.) 575 645
v. Wise (S. Car.), 111 S. E. 792 643
v. Wise, 60 S. Car. 426 643, 644, 647
Withers v. Richardson, 5 T. B. Mon. (Ky.) 94 299, 305, 312
Wittick v. Wittick, 164 Iowa 485 110, 821, 882
Wofford v. State (Tex.), 132 S. W. 929 71
Wo-gin-up's Estate, In re, 57 Utah 29 106, 131, 175
Wolcott v. Patterson, 100 Mich. 227 732
v. Wolcott, 32 Ohio Cir. Ct. R. 587 310
Woldson v. Larson, 164 Fed. 548 156, 159, 162
Wolf v. Frank, 92 Md. 138 152
v. Wolf, 121 Ga. 113 580
v. Wolf, 41 N. Dak. 109 427, 901
v. Wolf, 38 N. J. Eq. 128 300
v. Wolf, 109 Misc. (N. Y.) 366 175, 620
v. Wolf, 111 Misc. (N. Y.) 391 95, 153, 162, 169
v. Wolf, 194 App. Div. (N. Y.) 33 95, 153
Wolff v. Wolff (Cal.), 37 Pac. 858 684, 685
Wolkovisky v. Rapaport, 216 Mass. 48 420
Wolters v. Shultz, 1 Misc. (N. Y.) 196 14, 42
Wolverton v. State, 16 Ohio 173 208
Womack v. Womack, 73 Ark. 281 580
v. Womack, 125 Ill. App. 441 727
Womble v. Womble (Tex. Civ. App.), 152 S. W. 473 341, 913
Wood v. Baker, 43 Misc. (N. Y.) 310 181
v. State, 62 Ga. 406 268
v. Wood, 54 Ark. 172 447
v. Wood, 59 Ark. 441 680, 703
v. Wood, 140 Ark. 361 444, 704, 723
v. Wood, 56 Fla. 882 695
v. Wood, 135 Ga. 385 876
v. Wood, 136 Iowa 128 545, 550, 559, 882
v. Wood, 141 Mass. 495 294
v. Wood, 61 N. Car. 538 706
v. Wood, 181 N. Car. 227 475
v. Wood, 7 Lans. (N. Y.) 204 709
v. Wood, 2 Paige (N. Y.) 108 238, 240, 424, 427, 703, 704
v. Wood, 8 Wend. (N. Y.) 357 704, 712
v. Wood, 7 Misc. (N. Y.) 579 776
Wood's Estate, In re, 288 Mo. 588 212, 214
Woodall v. Alexander, 107 Kans. 632 623
v. Woodall, 136 Ga. 700 710
v. Woodall, 147 Ga. 676 703
Woodard v. Bellamy, 2 Root (Conn.) 354 30
Woods v. Waddle, 44 Ohio St. 449 636
Woodward v. Blake, 38 N. Dak. 38 901
v. Woodward, 41 N. J. Eq. 224 421
Woodward Iron Co. v. Bradford 206 Ala. 447 175
v. Brown, 167 Ala. 316 579
Wooley v. Wooley, 24 Ill. App. 431 641, 690, 701, 704
Woolfolk v. Woolfolk, 96 Ky. 657 643
Woolworth v. Woolworth, 115 App. Div. (N. Y.) 405 704
Worden v. Worden, 3 Edw. Ch. (N. Y.) 387 668, 704, 758
Work v. Campbell, 164 Cal. 343 154
Workman v. Workman, 43 Ind. App. 382 153, 158
v. Workman, 191 Ky. 124 448, 585
Worthington v. District Court, 37 Nev. 212 198, 440, 442, 448, 895
Worthy v. Worthy, 36 Ga. 45 455, 459

[*References are to Sections.*]

Wortman v. Wortman, 17 Abb. Pr. (N. Y.) 66 558
Wottrich v. Freeman, 71 N. Y. 601 144
Wray v. Wray, 19 Ala. 522 226, 636, 670, 681
Wright v. Fort Howard, 60 Wis. 119 39
v. Wright, 200 Ala. 489 494, 865
v. Wright (Cal. App.), 199 44 336
v. Wright, 93 Conn. 296 795
v. Wright, 1 Edw. 62 690, 701, 711
v. Wright, 81 Fla. 456 327, 342
v. Wright, 2 Md. 429 196, 440
v. Wright, 162 Mich. 445 699
v. Wright, 3 Tex. 168 461, 703
v. Wright, 6 Tex. 29 709, 754, 792
v. Wright, 74 Wis. 439 793, 794
v. Wright, 125 Va. 526 330, 430
Wright, Ex parte, 65 Ind. 504 704
Wright's Estate, In re, 180 N. Y. S. 635 175
Wrigley, Matter of, 8 Wend. (N. Y.) 140 444
Wrynn v. Downey, 27 R. I. 454 6, 42, 45
Wuest v. Wuest, 17 Nev. 217 711
Wulff v. Wulff, 151 App. Div. (N. Y.) 22 799
Wulke v. Wulke, 149 Minn. 289 335, 536
Wurth v. Wurth (N. J. Ch.), 511
Wygodsky v. Wygodsky, 134 Md. 344 684, 690, 698, 704, 710, 723, 740
Wylie's Estate, In re, 187 App. Div. (N. Y.) 840 212
Wyrick v. Wyrick, 162 Mo. App. 723 646

Y

Yakima Joe v. Lo-is-lap, 191 Fed. 516 904
Yale v. Curtiss, 151 N. Y. 598 5, 40, 42
Yale Gas Stove Co. v. Wilcox, 64 Conn. 101 356
Yard's Estate, In re, 116 Misc. (N. Y.) 19 210
Yates v. Yates, 36 App. D. C. 518 531
v. Yates, 211 N. Y. 163 243, 245
v. Yates, 157 Wis. 219 529, 594
v. Yates, 165 Wis. 250 760
Yawger v. Yawger (N. J.), 86 Atl. 419 333, 334
Yeager v. Yeager, 43 Ind. App. 313 198, 462, 536
v. Yeager (Mo. App.), 185 S. W. 743 295
Yetter v. Yetter, 45 Pa. Super. Ct. 332 644, 646
Yocum v. Yocum, 3 Pa. Dist. 615 421
Yoder v. Yoder, 105 Wash. 491 723, 724, 727, 770
Yoell's Estate, In re, 164 Cal. 540 211, 219
Yost v. Yost, 141 Ind. 584 711, 719, 720
v. Yost, 54 Pa. Super. Ct. 365 427
Youde v. Youde, 136 Iowa 719 600
Young v. Murphy, 3 Bing. N. C. 54 16, 30
v. Naylor, 1 Hill Eq. (S. Car.) 383 187
v. Young, 2 Cent. L. J. 204 690
v. Young, 150 Ga. 515 218
v. Young, 213 Ill. App. 402 131
v. Young, 4 Mass. 430 504
v. Young, 206 Mich. 254 598
v. Young, 18 Minn. 90 576
v. Young, 35 Misc. (N. Y.) 335, 71 686, 795
v. Young, 38 Misc. (N. Y.) 109 576
v. Young, 28 Ohio Cir. Ct. 179 596, 598
v. Young (Tenn.), 57 S. W. 438 345
v. Young, 61 Tex. 191 304
v. Young (Tex. Civ. App.), 127 S. W. 898 356
Youngberg v. Youngberg, 44 S. Dak. 530 675
Youngs v. Youngs, 33 Ill. App. 223 282
v. Youngs, 130 Ill. 230 295, 311
v. Youngs, 78 Mo. App. 225 642, 653, 681
Ysern v. Horter, 91 N. J. Eq. 189 173, 180
Yule v. Yule, 10 N. J. Eq. 138 636, 641, 790

[*References are to Sections.*]

Z

Zachry v. Zachry, 140 Ga. 479 585
v. Zachry, 141 Ga. 404 467, 469
Zahorka v. Geith, 129 Wis. 498 486, 529, 535
Zavaglia v. Notarbartolo, 137 La. 722 620, 621
Zeigenfuss v. Zeigenfuss, 21 Mich. 414 685, 700, 730
Zeigler v. Zeigler, 149 Ga. 508 330
Zeitlin v. Zeitlin, 202 Mass. 205 551, 558
Zentzis v. Zentzis, 163 Wis. 342 765, 778
Zerega v. Zerega (Mo. App.), 200 S. W. 700 587
Zerfass, Appeal of, 135 Pa. St. 522 447
Ziegler v. Cassidy's Sons, 220 N. Y. 98 838
Ziesel v. Ziesel (N. J.), 115 Atl. 435 598
Zilley v. Dunwiddie, 98 Wis. 428 595, 606
Zimmerman v. Whiteley, 134 Mich. 39 153
v. Zimmerman, 242 Ill. 552 427, 592, 879
v. Zimmerman, 113 N. Car. 432 702, 706
v. Zimmerman, 7 Mont. 114 792
Zippe v. Zippe, 143 Ill. App. 638 795
Zumbiel v. Zumbiel, 113 Ky. 841 290
Zweig v. Zweig, 46 Ind. App. 594 275, 881

NORTHFIELD, MINN.
24996

THE LAW OF MARRIAGE AND DIVORCE

CHAPTER 1

PROMISE OF MARRIAGE

Section

1. Nature of the engagement to marry in general.
2. Capacity of parties in general.
3. Capacity of parties—Infancy.
4. Capacity of parties—Mental capacity.
5. Mutuality of promise—Offer and acceptance.
6. Evidence of acceptance of offer.
7. Consideration.
8. Statute of frauds.
9. Conditions in contract.
10. Contract of marriage made on Sunday.
11. Contracts in violation of public policy or morals.
12. Bona fide of parties.
13. Agreement to marry under rules of certain church.
14. Time, place and manner of performance of contract.
15. Postponement of performance.
16. Duress, fraud and concealment.

§ 1. **Nature of the engagement to marry in general.**—Almost universally the completed marriage has its inception in the engagement agreement between the parties to such marriage. This engagement is in the nature of an executory contract; it is something to be executed in the future, and, like all executory contracts, it is binding only on persons of full age,[1]

[1]Wise v. Schloesser, 111 Iowa 16, 82 N. W. 439; Cannon v. Alsbury, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709; Willard v. Stone, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496; Hunt v. Peake, 5 Cow. (N. Y.) 475, 15 Am. Dec. 475; Rush v. Wick, 31 Ohio St. 521, 27 Am. Rep. 523; Pool v. Pratt, 1 D. Chip. (Vt.) 252; Hale v. Ruthven, 20 L. T. R. N. S. 404.

and who are otherwise capable of making a valid contract.[2] In other words the engagement contract intends a mutual agreement to marry by a man and a woman of lawful age who have sufficient intellect to understand the nature of the contract and who are free from any impediment.[3] But it must appear that the parties actually intended matrimony and not an illicit relation. The agreement must show that the parties intended to be husband and wife.[4]

Where the contract between the parties is complete, different and subsequent repetitions amount to ratification of the original promise and do not constitute a new contract.[5]

§ 2. **Capacity of parties in general.**—The consent of competent parties is essential to a valid contract of marriage.[6] The courts, however, will ordinarily presume this competency in the absence of contrary evidence.[7] Accordingly the plaintiff, in an action for a breach of promise, need not prove that she is an unmarried woman as that will be presumed in the absence of an averment and proof to the contrary.[8] Such contract also implies that the party making it is able to perform it, and to assume the sexual obligations that it imposes.[9] A physically and incurably impotent person, however, can not make a valid contract to marry where the marriage of such a person is contrary to the statutory policy of the state.[10] So a valid promise of marriage can not be made by one who is married at the time of the promise.[11] A

[2]A promise to marry made while the woman is the wife of another man is void as against public policy, but this does not disqualify her from making an effective contract to marry after the lapse of the statutory time, (six months in this case), from the date of her divorce. Leaman v. Thompson, 43 Wash. 579, 86 Pac. 926. See also O'Reilly v. Sweeney, 54 Misc. 408, 105 N. Y. S. 1033 (insanity).

[3]Munson v. Hastings, 12 Vt. 346, 36 Am. Dec. 345.

[4]Letters v. Cady, 10 Cal. 533; Clancy v. Clancy, 66 Mich. 202, 33 N. W. 889.

[5]Dyer v. Lalor, 94 Vt. 103, 109 Atl. 30.

[6]Kutch v. Kutch, 88 Nebr. 114, 129 N. W. 169.

[7]Tucker v. Hyatt, 144 Ind. 635, 41 N. E. 1047, 43 N. E. 872; Jones v. Layman, 122 Ind. 569, 24 N. E. 363; Chapman v. Brown, 192 Mo. App. 78, 179 S. W. 774; Ortiz v. Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581.

[8]Tucker v. Hyatt, 144 Ind. 635, 41 N. E. 1047, 43 N. E. 872.

[9]Roper v. Clay, 18 Mo. 383, 59 Am. Dec. 314; Gring v. Lerch, 112 Pa. St. 244, 3 Atl. 841.

[10]Sprague v. Craig, 51 Ill. 288; Gulick v. Gulick, 41 N. J. L. 13.

[11]Rich v. Fulton, 104 Nebr. 262, 177 N. W. 175. Promise repeated after divorce is binding. Smith v. McPherson, 176 Cal. 144, 167 Pac.

promise to marry between cousins is void only where such a marriage is expressly forbidden by statute.[12]

§ 3. **Capacity of parties—Infancy.**—The promise of an infant to marry is in its nature beneficial, and, therefore, avoidable only by such infant;[13] but not by the adult party thereto.[14] At common law the contract might be ratified when the infant arrived at full age; but under an English statute requiring such ratification to be equivalent to a new promise, it was held that the jury were the judges of whether the promise was a fresh one or a mere ratification of the former promise.[15]

A statute which provides that a female under the age of eighteen years of age may contract a marriage without her parents consent is held not to affect the rule that a minor is not bound by an executory contract.[16] And the Michigan Courts have held that the term "contracting marriage" in such a statute does not extend to the executory contract of marriage so as to sustain a breach of promise suit.[17] But in Indiana it has been held regarding the term "marriage contract" when applied to the age of persons to whom a license to marry may be issued, refers both to the public ceremony and to the prior contract to marry which that ceremony implies.[18]

The consent of parent or guardian is not necessary to a valid contract of an infant to marry as such assent affects only the solemnization.[19]

The contract being voidable on the part of an infant she only may sue for damages for breach thereof.[20] Neither can such an action by the infant be defeated for want of mutuality.[21] Nor is

875, L. R. A. 1918B, 66. Not a defense to suit for breach of promise where promisee ignorant of existing marriage of promisor. Ashley v. Dalton, 119 Miss. 672, 81 So. 488.

[12]Alberts v. Albertz, 78 Wis. 72, 47 N. W. 95.

[13]Cannon v. Alsbury, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709; Willard v. Stone, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496; Hunt v. Peake, 5 Cow. (N. Y.) 475, 15 Am. Dec. 475; Rush v. Wick, 31 Ohio St. 521, 27 Am. Rep. 523.

[14]Hugh v. Peake, 5 Conn. 475, 13 Am. Dec. 90; Cannon v. Alsbury, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709; Willard v. Stone, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496.

[15]Northcot v. Doughty, 4 C. P. Div. 385.

[16]Wells v. Hardy, 21 Tex. Civ. App. 454, 51 S. W. 503.

[17]Frost v. Vought, 37 Mich. 65.

[18]Develin v. Riggsbee, 4 Ind. 464.

[19]Cannon v. Alsbury, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709.

[20]Wise v. Schloesser, 111 Iowa 19, 82 N. W. 439; Cannon v. Alsbury, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709.

[21]Davie v. Padgett, 117 Ark. 544, 176 S. W. 333.

an infant party liable for its breach, though seduction may be accomplished thereunder or by reason thereof.[22] The fact that a statute permits an infant to be joined in marriage at the age of eighteen, if a male, and sixteen, if a female, having first obtained the parental assent, does not affect the right of such an infant to refuse to perform a contract to marry.[23]

The minor defendant should be represented by a guardian ad litem.[24]

§ 4. **Capacity of parties—Mental capacity.**—As a general rule one is competent to enter into a contract of marriage if he has a capacity to understand the nature of the contract and the duties and responsibilities which it creates,[25] or if he has sufficient mind to enable him to enter into a valid contract or make a valid deed or will.[26] But it has been held that no greater, if as much, mental capacity is requisite to make such a contract as is required to make ordinary business contracts, or a valid testamentary disposition of one's estate.[27] It has been held that the fact of a party being able to go through the marriage ceremony with propriety, is prima facie evidence of sufficient understanding to make the contract.[28] But this holding did not meet the approval of the Nebraska Supreme Court and was cited, it is said, only for the purpose of showing the trend of judicial thought with regard to the subject.[29]

Where the defendant has been declared incompetent in lunacy proceedings, and there was no renewal or ratification of a promise to marry after restoration, a breach of promise action may not be predicated thereon.[30] The marriage contract of one affected with congenial imbecility of mind to a degree rendering him incapable of consent, is void ab initio.[31]

[22]Wise v. Schloesser, 111 Iowa 19, 82 N. W. 439; Morris v. Graves, 2 Ind. 354; Cannon v. Alsbury, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709; Frost v. Vought, 37 Mich. 65; Willard v. Stone, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496; Hunt v. Peake, 5 Cow. (N. Y.) 475, 15 Am. Dec. 475; Leichtweiss v. Treskow, 21 Hun (N. Y.) 487.

[23]Rush v. Wick, 31 Ohio St. 521, 27 Am. Rep. 523.

[24]Wise v. Schloesser, 111 Iowa 16, 82 N. W. 439.

[25]Kutch v. Kutch, 88 Nebr. 114, 129 N. W. 169; Durham v. Durham, 10 Prob. Div. 80, 82.

[26]Atkinson v. Medford, 46 Maine 510.

[27]Hagenson v. Hagenson, 258 Ill. 197, 101 N. E. 606; Kern v. Kern, 51 N. J. Ch. 574, 26 Atl. 837.

[28]Anonymous, 4 Pick. (Mass.) 32,

[29]Kutch v. Kutch, 88 Nebr. 114, 129 N. W. 169.

[30]O'Reilly v. Sweeney, 54 Misc. 408, 105 N. Y. S. 1033.

[31]Waymire v Jetmore, 22 Ohio 271.

The record of proceedings in lunacy holding the defendant incapable is ordinarily held conclusive on that question.[32]

It would seem that one under guardianship as a spendthrift can not make a valid contract to marry.[33]

§ 5. **Mutuality of promise—Offer and acceptance.**—The promise must be mutual,[34] that is, there must be an offer on the one part and an acceptance on the other. It should be kept constantly in mind that the term "mutual promise" always includes both the offer and the acceptance, one is as important as the other, and both are provable by the same kind of evidence.[35] Without such mutual promise the contract is void for want of consideration.[36] The offer need not be made in any particular form or language. It is sufficient if both parties understand it to be an offer of marriage.[37] Again, the offer may be made by a third person authorized for the purpose.[38] But in order to bind both parties, there must be an acceptance of the offer, a promise in return.[39] The acceptance must be indicated within a

[32]O'Reilly v. Sweeney, 54 Misc. 408, 105 N. Y. S. 1033.

[33]Sullivan v. Lloyd, 221 Mass. 108, 108 N. E. 923.

[34]Hallett v. Collins, 10 How. (U. S.) 174, 13 L. ed. 376; McClurg v. Terry, 21 N. J. Eq. 225. See also notes 97 Am. Dec. 472; 19 Am. St. 370; L. R. A. 1915E, 16; 12 Eng. Rul. Cas. 736.

[35]Hallett v. Collins, 10 How. (U. S.) 174, 13 L. ed. 376; Espy v. Jones, 37 Ala. 379; Letters v. Cady, 10 Cal. 533; Baird v. People, 66 Ill. App. 671; Cates v. McKinney, 48 Ind. 562, 17 Am. Rep. 768; King v. Kersey, 2 Ind. 402; Allard v. Smith, 2 Metc. (Ky.) 297; Morgan v. Yarborough, 5 La. Ann. 316; Clancy v. Clancy, 66 Mich. 202, 33 N. W. 889; Standford v. Gentry, 32 Mo. 477; Hoit v. Moulton, 21 N. H. 586; McClurg v. Terry, 21 N. J. Eq. 225; Homan v. Earle, 53 N. Y. 267; Ellis v. Guggenheim, 20 Pa. St. 287. In Kutch v. Kutch, 88 Nebr. 114, 129 N. W. 169, the court approves the rule formulated by Sir James Haneen in Durham v. Durham, 10 Prob. Div. 80, 82, that a person is competent to enter into a contract of marriage if he has "a capacity to understand the nature of the contract and the duties and responsibilities which it creates." See also notes 97 Am. Dec. 472, 19 Am. St. 370, L. R. A. 1915E, 16; 12 Eng. Rul. Cas. 736.

[36]King v. Kersey, 2 Ind. 402. Where the defendant promised to marry the plaintiff on a fixed date, and the plaintiff, with the knowledge and acquiescence of the defendant, completed her preparation to marry at the date fixed, this is equivalent to a mutual agreement to marry at the fixed time. Adams v. Byerly, 123 Ind. 368, 24 N. E. 130; Haymond v. Saucer, 84 Ind. 3.

[37]Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936; Homan v. Earle, 53 N. Y. 267; Stamm v. Wood, 86 Ore. 174, 168 Pac. 69.

[38]Prescott v. Guyler, 32 Ill. 312.

[39]Espy v. Jones, 37 Ala. 379; Adams v. Byerly, 123 Ind. 368, 24 N. E. 130; Thurston v. Cavenor, 8 Iowa

reasonable time,[40] and before the offer is withdrawn,[41] and must be made known to the other party.[42] The acceptance is equivalent to a promise on the part of the promisee.[43]

§ 6. **Evidence of acceptance of offer.**—An acceptance may be implied from the acts of the parties and from the relations assumed by them at the time of the offer and subsequent thereto.[44] Seduction, for example, may be proved to show that a promise of marriage has been made and accepted.[45] The courts, however, are divided on the question of whether sexual intercourse between the parties may be considered as evidence of the promise and acceptance.[46] There is likewise, a state of complexity, if not confusion on the question of the admission of evidence of the declarations of the plaintiff and her preparation for the marriage ceremony in proof of her acceptance. It is certain, however, that the

155; Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336; Cole v. Holliday, 4 Mo. App. 94; Yale v. Curtiss, 151 N. Y. 598, 45 N. E. 1125; Conrad v. Williams, 6 Hill (N. Y.) 444; Weaver v. Bachert, 2 Pa. St. 80, 44 Am. Dec. 159.

[40]Baird v. People, 66 Ill. App. 671. If, when the offer was made, it was not accepted, but a reply was avoided and the interview then ended, without reference to the offer, there was no contract. Rutter v. Collins, 96 Mich. 510, 56 N. W. 93.

[41]Vensall v. Veness, 4 F. & F. 344.

[42]Graham v. Martin, 64 Ind. 567; Russell v. Cowles, 15 Gray (Mass.) 582, 77 Am. Dec. 391; Green v. Spencer, 3 Mo. 318, 26 Am. Dec. 672.

[43]Erwin v. Jones, 192 Mo. App. 326, 180 S. W. 428.

[44]McKee v. Mouser, 131 Iowa 203, 108 N. W. 228; Wightman v. Coates, 15 Mass. 1, 8 Am. Dec. 77; Green v. Spencer, 3 Mo. 318, 26 Am. Dec. 672; Johnson v. Caulkins, 1 Johns. Cas. (N. Y.) 116, 1 Am. Dec. 102; Willard v. Stone, 7 Cow. (N. Y.) 22, 17 Am Dec. 496; Stamm v. Wood, 86 Ore. 174, 168 Pac. 69.

[45]Wilson v. Ensworth, 85 Ind. 399; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; Saxon v. Wood, 4 Ind. App. 247, 30 N. E. 797; Lauer v. Banning, 140 Iowa 319, 118 N. W. 446; Herriman v. Layman, 118 Iowa 590, 92 N. W. 710; Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177. A contrary doctrine is laid down in two cases, in one of which it is merely dictum unsupported by any authority, but for which a plausible reason is given, and in the other it is supported only by the former case, and cases which simply deny that sexual intercourse is evidence of the promise. Wynn v. Downey, 27 R. I. 454, 63 Atl. 401, 114 Am. St. 63; Felger v. Etzell, 75 Ind. 417.

[46]Boyer v. Sherer, 28 Ill. App. 545; Fletcher v. Ketcham, 160 Iowa 364, 141 N. W. 916; Beans v. Denney, 141 Iowa 52, 117 N. W. 1091; McConahey v. Griffey, 82 Iowa 564, 48 N. W. 983; Dupont v. McAdow, 6 Mont. 226, 9 Pac. 925; Bleiler v. Koons, 132 Pa. 401, 19 Atl. 140. There are many cases in which it has been held that evidence of the conduct of the parties toward each

weight of authority supports the proposition that the bare declarations of the plaintiff made to her parents and relatives in the absence of the defendant and not in any way connected with any acts of the defendant, relative to the engagement are not admissible as evidence of her acceptance.[47] This line of decisions does not allow evidence of preparations for performing the contract, made by the plaintiff in the absence or without the knowledge of the defendant, and not in any way connected with him.[48]

On the other hand, however, it has been held by some of the courts that the declarations of the plaintiff to members of her family while she was receiving the defendant's visits and before

other is admissible as tending to prove the existence of a promise of marriage; but such evidence we think should be limited, and so far as we are advised, it has been limited, to the open, visible and public conduct of the parties toward each other. The illicit intercourse of parties is generally consummated in the strictest privacy and secrecy, and is known only to the parties themselves; and the evidence of the parties or of others in regard to such intercourse can have no possible tendency to prove the existence of a promise of marriage. Felger v. Etzell, 75 Ind. 417.

[47]Liebrandt v. Sorg, 133 Cal. 571, 65 Pac. 1098; Walmsley v. Robinson, 63 Ill. 42, 14 Am. Rep. 111; Graham v. Martin, 64 Ind. 573; Cates v. McKinney, 48 Ind. 562, 17 Am. Rep. 768; Wilson v. Smelser, 13 Ind. App. 31, 41 N. E. 76; Johnson v. Levy, 122 La. 118, 47 So. 422, 16 Ann. Cas. 978; Lewis v. Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385; Russell v. Cowles, 81 Mass. (15 Gray) 582, 77 Am. Dec. 391; McPherson v. Ryan, 59 Mich. 33, 26 N. W. 321; State v. Sortviet, 100 Minn. 12, 110 N. W. 100; Clement v. Skinner, 72 Vt. 159, 47 Atl. 788; Munson v. Hastings, 12 Vt. 346, 36 Am. Dec. 345. "Such declarations made in the absence of the defendant to persons in no way related to, or interested in the parties making them, should not be held admissible." Cates v. McKinney, 48 Ind. 562. But the fact that comparative strangers may have been present with her relatives and those interested in her would not necessarily exclude declarations and expressions of grief. Hughes v. Nolte, 7 Ind. App. 526, 34 N. E. 745. "The mutual promise of marriage is not composed of two distinct parts, unconnected with each other, and to be severally proved by independent evidence. A promise by the defendant at one time and the assent of the plaintiff at another will not do. The proof must be sufficient to show that the defendant not only made the promise but received the consideration of it. The plaintiff's 'assent to the mutual promise' must have been communicated to him or in other words, she must have made a promise to him to make his promise binding." Russell v. Cowles, 81 Mass. (15 Gray) 582, 77 Am. Dec. 391.

[48]Hay v. State, 178 Ind. 478, 98 N. E. 712, Ann. Cas. 1915C, 135; Graham v. Martin, 64 Ind. 567; Russell v. Cowles, 15 Gray (Mass.) 582, 77 Am. Dec. 391.

any estrangement, were admissible to show assent on her part, on the theory that it is part of the res gestae.[49] In still other cases, it is held that when an offer of marriage by the defendant is shown and it is necessary to show the acceptance thereof by the plaintiff, this may be shown by the conduct and statements of the plaintiff in the absence of the defendant.[50] Another class of cases hold that when a promise of marriage by the defendant is shown in pursuance of which the plaintiff made preparations for marriage, her declarations and statements made in connection with such preparations, in the absence of the defendant, are admissible to show her acceptance of the offer.[51]

Where the promise is to marry on a fixed date and the plaintiff with the knowledge and acquiescence of the defendant makes preparation to marry at the time fixed, this is held equivalent to a mutual agreement to marry at that date.[52] But evidence of preparation for marriage is not always admissible until after the promise to marry is shown by other evidence.[53] It would seem very clear that declarations and expressions of grief by the plaintiff not in the presence of defendant, should not be received to prove the existence of a contract to marry as against the defendant.[54]

§ 7. **Consideration.**—The promise to marry does not differ from other contracts in the requirement of a consideration.[55] In

[49]King v. Kersey, 2 Ind. 402; Peppinger v. Low, 6 N. J. L. (1 Halst.) 384; Elkins v. Hamilton, 20 Vt. 625.

[50]Thurston v. Cavenor, 8 Iowa 155; Peppinger v. Low, 6 N. J. L. 384; Leskey v. Bloser, 24 Pa. St. 401; Moritz v. Melhorn, 13 Pa. St. 331; Hutton v. Mansell, 6 Mod. 172. But this exception to the hearsay evidence rule appears to rest upon the doctrine of necessity—a necessity which was thought to arise because of the conditions under which such contracts were generally made, and the rule which then forbade the parties to testify as they may now do in most jurisdictions. State v. Sortviet, 100 Minn. 12, 110 N. W. 100; Lewis v. Tappen, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.

[51]Reed v. Clark, 47 Cal. 194; Dunlap v. Clark, 25 Ill. App. 573; Wilson v. Smelser, 13 Ind. App. 31, 41 N. E. 76; Wetmore v. Mell, 1 Ohio St. 26, 59 Am. Dec. 607.

[52]Adams v. Byerly, 123 Ind. 371, 24 N. E. 370.

[53]Lawrence v. Cooke, 56 Maine 187, 96 Am. Dec. 443; Russell v. Cowles, 15 Gray (Mass.) 582, 77 Am. Dec. 391; McPherson v. Ryan, 59 Mich. 33, 26 N. W. 321.

[54]Jones v. Laymen, 123 Ind. 576, 24 N. E. 363; Cates v. McKinney, 48 Ind. 566, 17 Am. Rep. 768; Wilson v. Smelser, 13 Ind. App. 33, 41 N. E. 76.

[55]Saxon v. Wood, 4 Ind. App. 242, 30 N. E. 797.

this class of cases the mutual promises of the parties are a sufficient consideration to support the contract;[56] and a contract is void for want of consideration where there has been a promise only by one of the parties.[57] A mere option to marry, however, may not be enforced.[58] A subsequent promise to marry has the same character of consideration as that of a previous promise which had been breached.[59]

It is a familiar and fundamental doctrine that no contract is valid which is supported solely by an immoral consideration,[60] and hence a promise to marry in consideration of sexual intercourse, may not be enforced[61] though the woman should become pregnant from such intercourse.[62]

[56]Saxon v. Wood, 4 Ind. App. 242, 30 N. E. 797; Burks v. Shain, 2 Bibb (Ky.) 341, 5 Am. Dec. 616; Haus v. Moeller (Mo.), 18 S. W. 884. A promise of marriage by an executrix who compromises a suit which she had instituted in her fiduciary character in consideration thereof is not void as against sound morals or public policy. Donallen v. Lennox, 36 Ky. (6 Dana) 89.

[57]Adams v. Byerly, 123 Ind. 368, 24 N. E. 130; Saxon v. Wood, 4 Ind. App. 242, 30 N. E. 797; Weaver v. Bachert, 2 Pa. 80, 44 Am. Dec. 159.

[58]Where the plaintiff promised to marry the defendant on his request and he promised the plaintiff to so marry her on her request, the defendant's engagement was a mere option and unenforcible for lack of mutuality. Smythe v. Greacen, 96 App. Div. 275, 91 N. Y. S. 450.

[59]Pyle v. Piercy, 122 Cal. 383, 55 Pac. 141.

[60]Hanks v. Naglee, 54 Cal. 51, 35 Am. Rep. 67; Connolly v. Bollinger, 67 W. Va. 30, 67 S. E. 71, 20 Ann. Cas. 1350. Where the intercourse was not the sole consideration for the contract of marriage it is not void. Welge v. Jenkins (Tex. Civ. App.), 195 S. W. 272; Paddock v. Robinson, 63 Ill. 99, 14 Am. Rep. 112. See notes 63 Am. Dec. 536; 40 Am. St. 174; Chitty, 793.

[61]Hanks v. Naglee, 54 Cal. 51, 35 Am. Rep. 67; Saxon v. Wood, 4 Ind. App. 242, 30 N. E. 797; Gagush v. Hoeft, 198 Mich. 263, 164 N. W. 400; Rich v. Fulton, 104 Nebr. 262, 177 N. W. 175; Steinfeld v. Levy, 16 Abb. Prac. (N. S.) 26 (N. Y.); Olguin v. Apodaca (Tex. Com. App.), 228 S. W. 166; Burke v. Shaver, 92 Va. 345, 23 S. E. 749; Connolly v. Bollinger, 67 W. Va. 30, 67 S. E. 71, 20 Ann. Cas. 1350. Where the intercourse was not the sole consideration for the contract of marriage it is not void. Welge v. Jenkins (Tex. Civ. App.), 195 S. W. 272; Paddock v. Robinson, 63 Ill. 99, 14 Am. Rep. 112. While this rule appears to be firmly fixed in all jurisdictions, courts seem disinclined to lend judicial sanction and protection to the seducer by declaring he may escape the obligation of his contract so made on the plea that it is immoral. Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275. See notes 63 Am. Dec. 536, 40 Am. St. 174; Chitty, 793.

[62]Saxon v. Wood, 4 Ind. App. 242, 30 N. E. 797; Gagush v. Hoeft, 198 Mich. 263, 164 N. W. 400.

The rule would seem otherwise where the sexual embraces were not the sole consideration of the promise.[63] Where, however, the acceptance of the offer to marry is implied, and is so united with the immoral part of the consideration, and so dependent upon the consequences of the immoral conduct proposed, it can not be separated and made to serve as a valid consideration.[64] So if the continuation of illicit relations already existing is the consideration of the promise, it is void.[65] Where, however, there has been a mutual promise, a renewal thereof or a re-assurance in consideration of sexual intercourse does not avoid the contract,[66] or where a woman, relying on the promise of a man to marry her, gives up her body to him, the sexual intercourse is not the consideration of the promise, and the contract is not immoral.[67] And a promise made after the seduction had been accomplished that the woman should come to no harm therefrom, and that if she did he would marry her, where she is at the time pregnant is a valid promise.[68] The sexual intercourse is not the consideration of a promise, if the agreement respecting the event of pregnancy merely related to fixing the time of performance.[69]

It has been held that the dismissal of proceedings in bastardy is a sufficient consideration for a promise to marry the relatrix.[70]

A marriage promise is not without consideration because of a breach of a previous promise.[71]

§ 8. **Statute of frauds.**—It is very generally agreed that a simple contract to marry is not within the statute of frauds, and

[63]Gagush v. Hoeft, 198 Mich. 263, 164 N. W. 400; Welge v. Jenkins, (Tex. Civ. App.), 195 S. W. 272; Connolly v. Bollinger, 67 W. Va. 30, 67 S. E. 71, 20 Ann. Cas. 1350; Elliott on Contracts, § 741.

[64]Ricketts v. Harvey, 106 Ind. 564, 6 N. E. 325; Elkhart County Lodge v. Crary, 98 Ind. 238, 49 Am. Rep. 746; James v. Jellison, 94 Ind. 292, 48 Am. Rep. 151; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; Saxon v. Wood, 4 Ind. App. 245, 30 N. E. 797. In Welge v. Jenkins (Tex. Civ. App.), 195 S. W. 272, the court quotes its apparent approval of the doctrine that the rule that a contract is void if part of the consideration is illegal or against sound morals or public policy, is not applicable to agreements to marry.

[65]Boigneres v. Boulon, 54 Cal. 146.

[66]Welge v. Jenkins (Tex. Civ. App.) 195 S. W. 272.

[67]Erwin v. Jones (Mo.) 180 S. W. 428; Welge v. Jenkins (Tex. Civ. App.), 195 S. W. 272.

[68]Hotchkins v. Hodge, 38 Barb. (N. Y.) 117.

[69]Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275.

[70]State v. Otis, 135 Ind. 267, 34 N. E. 954, 21 L. R. A. 733.

[71]Pyle v. Piercy, 122 Cal. 383, 55 Pac. 141.

hence need not be in writing.[72] The phrase "any agreement made upon consideration of marriage" in a statute would seem to exclude a promise to marry.[73]

Numerous authorities, however, hold that if the contract is not to be performed within a year after the promise, the contract must be in writing, provided the section of the Statute of Frauds so requiring is in force in the particular jurisdiction,[74] but unless a specific time is set it will be presumed either that the contract was to have been performed within the year or that it was a continuing contract.[75] In other words, if it is in reality capable of full performance in good faith within a year without violating its terms, or without the intervention of extraordinary circumstances, then it is not within a statute.[76] So a promise to marry when the defendant recovers his health is not a promise not to be performed within a year within the statute.[77] So a contract to marry as soon as the man may have a suitable home erected and wind up his business affairs may be performed within a year and is therefore not within the statute,[78] and if it be said it might be in one year or in ten years, this will not qualify the contract itself, if no definite time is fixed.[79]

[72]Clark v. Pendleton, 20 Conn. 495; Davis v. Cox, 178 Ind. 486, 99 N. E. 803; Caylor v. Roe, 99 Ind. 1; Short v. Stotts, 58 Ind. 29; Withers v. Richardson, 5 T. B. Mon. (Ky.) 94, 17 Am. Dec. 44; Morgan v. Yarborough, 5 La. Ann. 316; Lewis v. Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385; Ogden v. Ogden, 1 Bland (Md.) 284; Hoitt v. Moulton, 21 N. H. 586.

[73]Withers v. Richardson, 5 T. B. Mon. (Ky.) 94, 17 Am. Dec. 44. The court said "It would be imputing to the legislature too great an absurdity to suppose that they had enacted that all our courtships, to be valid, must be in writing."

[74]Ulman v. Meyer, 10 Fed. 241; Clark v. Pendleton, 20 Conn. 495; Blackburn v. Mann, 85 Ill. 222; Paris v. Strong, 51 Ind. 339; Withers v. Richardson, 5 T. B. Mon. (Ky.) 94, 17 Am. Dec. 44; Lawrence v. Cooke, 56 Maine 187, 96 Am. Dec. 443; Lewis v. Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385; Barge v. Haslam, 65 Nebr. 656, 91 N. W. 528; Derby v. Phelps, 2 N. H. 515; Corduan v. McCloud, 87 N. J. L. 143, 93 Atl. 724, L. R. A. 1915D, 1190; Daggett v. Wallace, 75 Tex. 352, 13 S. W. 49, 16 Am. St. 908; Brown's Stat. of Frauds, 273. But see Nichols v. Weaver, 7 Kans. 373.

[75]Blackburn v. Mann, 85 Ill. 222; Lewis v. Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385; Corduan v. McCloud, 87 N. J. L. 143, 93 Atl. 724, L. R. A. 1915D, 1190; Daggett v. Wallace, 75 Tex. 352, 13 S. W. 49, 16 Am. St. 908.

[76]McElree v. Wolfersberger, 59 Kans. 105, 52 Pac. 69; Corduan v. McCloud, 87 N. J. L. 143, 93 Atl. 724, L. R. A. 1915D, 1190.

[77]McConahey v. Griffey, 82 Iowa 564, 48 N. W. 983.

[78]Huggins v. Carey (Tex. Civ. App.), 149 S. W. 390.

[79]Blackburn v. Mann, 85 Ill. 222.

But an oral promise to marry coupled with an oral agreement made in consideration of the marriage is a single indivisible contract, a part of which being within the Statute of Frauds renders it invalid.[80] And where a man promises to pay a woman a certain sum of money if she would marry him the entire contract must be in writing.[81] The question here considered is quite distinct from a parol antenuptial agreement, concerning property, as such an agreement is in every case void.[82] So an oral agreement to execute an antenuptial contract is within the Statute of Frauds; and if an oral agreement to marry is dependent upon such an agreement, or a part of it, no action can be maintained upon it.[83]

§ 9. **Conditions in contract.**—A promise to marry based on a future event is valid.[84] Even though this contingency be the death of a certain person, such as the divorced wife or the father or mother of one of the parties thereto as such an event is certain to occur. Such a contract is not void as against public policy as affording inducement to crime.[85] A promise to marry when a third person, who is ill, gets well is not a conditional promise.[86]

A contract to marry which restrains the party thereto from marriage with any other parties is not void as being in restraint of marriage.[87]

§ 10. **Contract of marriage made on Sunday.**—As a rule, contracts made on Sunday are voidable but this does not apply to an engagement to marry or a marriage ceremony. "A contract of marriage under our law is a purely civil contract. Nothing is added to its legal force or obligation by entering into it with religious rites or ceremonies. Yet no one would contend that it

[80]Blackburn v. Mann, 85 Ill. 222; Paris v. Strong, 51 Ind. 339; Wilson v. Ray, 13 Ind. 1; Wiggins v. Keizer, 6 Ind. 252; Lawrence v. Cooke, 56 Maine 187, 96 Am. Dec. 443; Chase v. Fitz, 132 Mass. 359.

[81]Cushman v. Burritt, 14 Weekly Dig. (N. Y.) 59.

[82]Koontz v. Koontz, 83 Wash. 180, 145 Pac. 201.

[83]Blackburn v. Mann, 85 Ill. 222; Davis v. Cox, 178 Ind. 486, 99 N. E. 803; Caylor v. Roe, 99 Ind. 1.

[84]Lewis v. Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385; Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. 914. See Caylor v. Roe, 99 Ind. 1; Hamilton v. United States, 41 App. D. C. 359, 51 L. R. A. (N. S.) 809.

[85]Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. 914; Frost v. Knight, 5 L. R. Exch. Cas. 322.

[86]Anderson v. Kirby, 125 Ga. 62, 54 S. E. 197, 114 Am. St. 185, 5 Ann. Cas. 103.

[87]Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. 914.

would be unlawful for a civil magistrate to complete the execution of such a contract by joining parties in matrimony on the Sabbath, or that a contract of marriage entered into before and solemnized by a magistrate would be invalid because the act was done on the Lord's day. The reason is obvious. Such an act does not come within the category of transactions which are connected with, or appertain to, ordinary worldly business. It is neither labor, business, nor work in the sense in which these words are used by the legislature."[88]

§ 11. **Contracts in violation of public policy or morals.**—Contracts for procuring marriage in consideration of money or other considerations are void, both at law and in equity, as being opposed to morality and public policy.[89] A contract dependent upon the success of one of the parties marrying by a certain time is a wager contract and void.[90]

A contract to marry, where both, or either of the parties are married and known to each other to be so, is against public policy and void,[91] although made contingent upon securing a divorce,[92] but where a married man engages to marry a woman, she may maintain an action for the breach if she was ignorant of his marriage at the time of the engagement.[93] A promise of marriage made when the promisor is married does not render invalid a promise made after a divorce from the former marriage;[94] or

[88]Bennett v. Brooks, 9 Allen (Mass.) 118. See also Bloom v. Richards, 2 Ohio St. 387.

[89]Jangraw v. Perkins, 76 Vt. 127, 56 Atl. 532, 104 Am. St. 917. Elliott on Contracts, § 754.

[90]Quillian v. Johnson, 122 Ga. 49, 49 S. E. 801.

[91]Davis v. Pryor, 112 Fed. 274; Paddock v. Robinson, 63 Ill. 99, 14 Am. Rep. 112; Miskell v. Murray, 204 Ill. App. 567; Leaman v. Thompson, 43 Wash. 579, 86 Pac. 926.

[92]Paddock v. Robinson, 63 Ill. 99, 14 Am. Rep. 112; Noice v. Brown, 39 N. J. L. 133, 23 Am. Rep. 213. In Smith v. McPherson, 176 Cal. 144, 167 Pac. 875, L. R. A. 1918B, 66, it is held that while the promise of a married man, known to be such by the woman, to marry her, may not be enforced, the rule does not apply after his divorce, where through a long period of years, he had taken the woman out of the state, and had held her out as his wife, and under repeated promise to marry her, had sustained illicit relations with her.

[93]Paddock v. Robinson, 63 Ill. 99, 14 Am. Rep. 112; Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336; Waddell v. Wallace, 32 Okla. 140, 121 Pac. 245, Ann. Cas. 1914A, 692; Cover v. Davenport, 1 Heisk. (Tenn.) 368, 2 Am. Rep. 706; Pollock v. Sullivan, 53 Vt. 507, 38 Am. Rep. 702.

[94]Morgan v. Muench, 181 Iowa 719, 156 N. W. 819.

where the marriage is not to be performed until after the death of the other's spouse.[95] Nor is a promise to marry after the death of a divorced wife invalid where the delay is caused by religious scruples.[96]

Where a statute fixed the time after a decree of divorce, before which, the parties may not marry, a contract to marry within such time which is to be performed after it has expired, is not invalid.[97] Where, however, the guilty party has been forbidden by the court to remarry during the lifetime of the petitioner, an agreement to marry another is invalid, and no action will lie for a breach of the promise, for there is a legal incapacity.[98] But under a statute providing a second marriage might be contracted by a party whose spouse had been absent five years, and not known by such party to be living, it was held that a contract to marry by a woman whose husband had not been absent for that length of time was invalid, although the marriage contracted for was not to be solemnized until after the expiration of five years.[99]

Where the plaintiff has knowledge that the defendant and another woman, for many years lived and cohabited in the relation of husband and wife, she is chargeable with notice that he is married, and can not maintain the action.[1]

A contract to marry a lewd woman knowing her to be such is valid.[2]

§ 12. **Bona fides of parties.**—It is not essential to the validity of the contract that the promise of marriage be made bona fide

[95]Drennan v. Douglas, 102 Ill. 341, 40 Am. Rep. 595; Paddock v. Robinson, 63 Ill. 99, 14 Am. Rep. 112; Johnson v. Iss, 114 Tenn. 114, 85 S. W. 79, 108 Am. St. 891; Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. 914; Wilson v. Carnley, (1908) 1 K. B. 729, 77 L. J. K. B. 594, 98 L. T. N. S. 265, 24 Times L. Rep. 277, 52 Sol. J. 239, 14 Ann. Cas. 157; 1 British Rul. Cas. 901.

[96]Brown v. Odill, 104 Tenn. 250, 6 S. W. 840, 52 L. R. A. 660, 78 Am. St. 914.

[97]Buelna v. Ryan, 139 Cal. 630, 73 Pac. 466; Judy v. Sterrett, 52 Ill. App. 265; Morgan v. Muench, 181 Iowa 719, 156 N. W. 819; Cooper v. Bower, 78 Kans. 156, 96 Pac. 59; 78 Kans. 164, 96 Pac. 794; Leininger Lumber Co. v. Dewey, 86 Nebr. 659, 126 N. W. 87, 21 Ann. Cas. 471.

[98]Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505; followed in Moore v. Hegeman, 27 Hun (N. Y.) 69. But in the Van Voorhis case the child of the second marriage was held legitimate, as the marriage took place in another state and was valid there.

[99]Johnson v. Iss, 114 Tenn. 114, 85 S. W. 79, 108 Am. St. 891.

[1]Davis v. Pryor, 112 Fed. 274.

[2]Bell v. Eaton, 28 Ind. 468, 92 Am. Dec. 329.

on both sides. It is binding upon the defendant although made mala fide, as much as though it had been bona fide.[3] So a contract to marry between a married man and a single woman, unaware of his marriage, is valid on her part, and on breach thereof is the subject of damages.[4]

§ 13. **Agreement to marry under rules of certain church.**— Where parties enter into mutual promises to marry and expressly agree that their marriage shall be celebrated under and in accordance with the rules and customs of a particular religion and church, such rules and customs become a part of the contract.[5]

§ 14. **Time, place and manner of performance of contract.**— It is not required that a definite time be fixed for the performance of a promise of marriage.[6] The law implies an agreement to marry within a reasonable time.[7] And the reasonableness of time depends upon the circumstances of the particular case.[8] The age and pecuniary circumstances of the parties also are to be considered.[9]

The contract to marry on the occurrence of an event is valid.[10] Although the time within which the contract to marry was to have been performed has not expired an action for breach thereof may be brought upon the defendant's refusal to carry it out.[11] Thus a promise to marry upon the death of the father of one of the parties is breached by the refusal of such party, or his or her

[3]Prescott v. Guyler, 32 Ill. 312.

[4]Kelly v. Riley, 106 Mass. 337, 8 Am. Rep. 336; Cover v. Davenport, 1 Heisk (Tenn.) 368, 2 Am. Rep. 706.

[5]Stone v. Appel, 12 Ill. App. 582; Falk v. Burke, 93 Kans. 93, 143 Pac. 498, L. R. A. 1915B, 279; Wanecek v. Kratky, 69 Nebr. 770, 96 N. W. 651, 66 L. R. A. 798.

[6]Blackburn v. Mann, 85 Ill. 222.

[7]Blackburn v. Mann, 85 Ill. 222; Adams v. Byerly, 123 Ind. 369, 24 N. E. 130; Burke v. Shain, 2 Bibb. (Ky.) 341, 5 Am. Dec. 616; Johnson v. Levy, 118 La. 447, 43 So. 46, 9 L. R. A. (N. S.) 1020, 118 Am. St. 378, 10 Ann Cas. 722; Goldstein v. Sachs, 138 Md. 503, 114 Atl. 593, 15 A. L. R. 1298; Cole v. Holliday, 4 Mo. App. 94; Wagenseller v. Simmers, 97 Pa. St. 465; Connolly v. Bollinger, 67 W. Va. 30, 67 S. E. 71, 63 Am. Dec. 537, 20 Ann. Cas. 1350; Atchinson v. Baker, Peakes Add Cas. 103.

[8]Connolly v. Bollinger, 67 W. Va. 30, 67 S. E. 71, 20 Ann. Cas. 1350.

[9]Wagenseller v. Simmers, 97 Pa. St. 465.

[10]Lewis v. Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.

[11]Kurtz v. Frank, 76 Ind. 598, 40 Am. Rep. 275; Holloway v. Griffith, 32 Iowa 409, 7 Am. Rep. 208; Lewis v. Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385; Burtis v Thompson, 43 N. Y. 246, 1 Am. Rep. 516; Frost v. Knight, L. R. 7 Exch. 111; 1 Moak's Eng. Rep. 218.

marriage to another before the death of the father, and an action may be immediately brought though the father is still alive.[12] And so the contract to marry after the death of a divorced wife of one of the parties is reasonably certain with respect to the time of the performance, since it depends upon an event which must occur, and this also notwithstanding the fact that one of the contracting parties may die before such event takes place.[13] A marriage by the defendant before the time set for his marriage to the plaintiff is a breach of his contract to marry, and she may immediately bring suit.[14] A promise to marry when certain buggies then in process of manufacture were completed is held to imply that they were to be completed within a reasonable time and that the marriage was then to take place.[15]

A promise to marry, whenever to be consummated, can not validly subsist after one of the parties has inter-married with a third person. So where a man under an engagement to marry at a fixed time marries another woman, he can not in a breach of promise suit brought before the fixed time has arrived, claim in defense the possibility of his marriage being dissolved by death or divorce before such time has arrived.[16] And if without the fault of the woman the man wrongfully breaks his promise to marry upon the day specified, it is a breach.[17] But one of the parties is not guilty of a breach unless the other is also ready and willing at the time and place agreed upon for the actual consummation of the marriage.[18]

Where the contract is to marry according to the rules of a particular church and the date fixed therefor happens to be forbidden by such rules a refusal to marry on such day is not a breach.[19]

[12]Frost v. Knight, L. R. 7 Ex. 111, 41 L. J. Ex. 78, 26 L. T. 77.

[13]Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. 914.

[14]Bracken v. Dinning, 141 Ky. 265, 132 S. W. 425.

[15]Bennett v. Beam, 42 Mich. 346, 4 N. 678, 36 Am. Rep. 442.

[16]Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. 914.

[17]Graham v. Martin, 64 Ind. 567; Hughes v. Nolte, 7 Ind. App. 526, 34 N. E. 745; Wolters v. Schultz, 1 Misc. 196, 21 N. Y. S. 768; Lahey v. Knott, 8 Ore. 198; McCormich v. Robb, 24 Pa. St. 44; Lohner v. Coldwell, 15 Tex. Civ. App. 444, 39 S. W. 591.

[18]Fible v. Caplinger, 13 B. Mon. (Ky.) 464.

[19]Stone v. Appel, 12 Ill. App. (12 Brad.) 582; Falk v. Burke, 93 Kans. 93, 143 Pac. 498, L. R. A. 1915B, 279; Wanecek v. Kratky, 69 Nebr. 770, 96 N. W. 651, 66 L. R. A. 798.

The omission to marry upon a particular day is not a breach of the engagement,[20] but a contract to marry at a certain place, during a certain month was breached, where and when the defendant did not appear.[21]

The residence of the woman is, prima facie, the place of marriage when the promise is silent on that point;[22] and a breach of the contract to marry by the man is not excused because the woman refuses to marry elsewhere, although another place had been previously agreed upon for its performance.[23] Where the parties agree to be married in accordance with the rules of a particular church or religion, those rules become part of the marriage contract.[24]

§ 15. **Postponement of performance.**—A mere request for the postponement of the marriage ceremony for reasonable cause does not amount to a repudiation or renunciation of the contract to marry,[25] for each party has a right to a reasonable delay but not a delay without reason or beyond reason.[26] If a party to a marriage contract develops a disease which renders it unsafe or improper for him to marry, without intervening fault on his part, between the date of the contract and the date appointed for the marriage, he is entitled to have the ceremony postponed until the result of the disease is known or is cured.[27] So where a contract to marry had been entered into and the man afterwards discovered he was infected with a contagious venereal disease, he was entitled to postpone the marriage for a reasonable time,

[20]Kelly v. Renfro, 9 Ala. 325, 44 Am. Dec. 441; Falk v. Burke, 93 Kans. 93, 143 Pac. 498, L. R. A. 1915B, 279. In these cases it is said that the contract continues in force until the one or the other of the parties by conduct or words evinces that he or she is unwilling to proceed to the ordinary results.

[21]Grubbs v. Pence, 25 Ky. L. 170, 73 S. W. 785.

[22]Graham v. Martin, 64 Ind. 567.

[23]Goldstein v. Sachs, 138 Md. 503, 114 Atl. 593, 15 A. L. R. 1298.

[24]Falk v. Burke, 93 Kans. 93, 143 Pac. 498, L. R. A. 1915B, 279; Wanecek v. Kratky, 69 Nebr. 770, 96 N. W. 651, 66 L. R. A. 798.

[25]Walters v. Stockberger, 20 Ind. App. 277, 50 N. E. 763; Dyer v. Lalor, 94 Vt. 103, 109 Atl. 30.

[26]Adams v. Byerly, 123 Ind. 368, 24 N. E. 130; Wagenseller v. Simmers, 97 Pa. St. 465.

[27]Mabin v. Webster, 129 Ind. 430, 28 N. E. 863, 28 Am. St. 199; Shackleford v. Hamilton, 93 Ky. 80, 14 Ky. L. 11, 19 S. W. 5, 15 L. R. A. 531, 40 Am. St. 166; Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. 302; Allen v. Baker, 86 N. Car. 91, 41 Am. Rep. 444; Sanders v. Coleman, 97 Va. 690, 34 S. E. 621, 47 L. R. A. 581.

whether or not the woman, with knowledge of his condition was willing for the marriage to take place.[28] If the disease is of a temporary character, and may be easily cured, a postponement may be had until the party so afflicted is cured.[29] The marriage ceremony may be postponed if one of the parties thereto is bedridden.[30] And where the marriage was postponed by agreement on account of the ill health of the woman, who was in good health when the promise was made, there was such a modification of the contract as imposed upon the man the duty of waiting a reasonable time for her recovery before terminating the engagement.[31]

A performance of a contract to marry may be postponed for a reasonable time when the date fixed upon for the ceremony happens to be on a day on which a marriage is forbidden by the rules and customs of the church or religion under which the parties have agreed that it is to be celebrated.[32]

§ 16. **Duress, fraud and concealment.**—A promise to marry made under duress is not binding but it does not vitiate another promise made at a time when not under duress.[33] Even the admissions made by the alleged promisor of the promise while under duress or fear of bodily injury should be received and weighed with great caution.[34] But a man lawfully arrested on a warrant for seduction, who, to procure his discharge, promises to marry the woman, can not urge such arrest as duress in bar of a suit on the promise.[35]

A contract to marry calls for the highest good faith on both sides, and neither party has the right to enforce it against the other, if he or she is incapable of performing the full marital duties.[36] But mere silence on the part of the plaintiff without inquiry on the part of the defendant although resulting in the

[28]Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. 302.

[29]Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. 302.

[30]Smith v. Compton, 67 N. J. L. 548, 52 Atl. 386, 58 L. R. A. 480; Alberts v. Albertz, 78 Wis. 72, 47 N. W. 05, 10 L. R. A. 584; Hall v. Wright, El. Bl. & El., 746.

[31]Travis v. Schnebly, 68 Wash. 1, 122 Pac. 316, 40 L. R. A. (N. S.) 585, Ann. Cas. 1913E, 914.

[32]Stone v. Appel, 12 Ill. App. 582.

[33]McCrum v. Hildebrand, 85 Ind. 204.

[34]Fidler v. McKinley, 21 Ill. 308.

[35]Griffin v. Griffin, 130 Ga. 527, 61 S. E. 16, 16 L. R. A. (N. S.) 937, 14 Ann. Cas. 866; Copeland v. Copeland (Va.), 21 S. E. 241.

[36]Gring v. Lerch, 112 Pa. 244, 3 Atl. 841, 56 Am. Rep. 314; Grover v. Zook, 44 Wash. 489, 87 Pac. 638, 7 L. R. A. (N. S.) 582.

concealment of matters which would prevent the engagement, if known, will not ordinarily constitute fraud on her part.[37] And this is so where no attempt has been made to communicate all the previous circumstances of his or her life and no inquiry has been made in regard thereto,[38] but if without inquiry the woman undertakes to state facts to the man concerning her history, her life, parentage or family, or her former or present position, a suppression of such facts would be a fraud sufficient to vitiate the contract.[39] The physical incapacity at the time of the engagement to fully perform the marriage contract must be disclosed or the contract may be avoided,[40] although it has been said that in such case possibly nominal damages may be awarded,[41] and a fraud is committed on the defendant where the woman conceals the fact from her intended husband that she had a tumor which rendered her incapable of making or carrying out a contract to marry.[42] The fact that the plaintiff had some negro blood in her veins or that her motives were mercenary or that there was a want of affection on her part or that there was an incompatibility resulting from disparity of age, difference in character and disposition, apart from fraud, have been held not to justify a breach of the contract.[43] But the concealment of the fact that the woman had been delivered of a bastard child will justify a breach of the marriage promise.[44]

[37]Van Houten v. Morse, 162 Mass. 414, 38 N. E. 705, 26 L. R. A. 430, 44 Am. St. 373; Potts v. Chapin, 133 Mass. 276; Arkwright v. Newbold (L. R.), 17 Ch. Div. 317, 318.

[38]Van Houten v. Morse, 162 Mass. 414, 38 N. E. 705, 26 L. R. A. 430, 44 Am. St. 373.

[39]Van Houten v. Morse, 162 Mass. 414, 38 N. E. 705, 26 L. R. A. 430, 44 Am. St. 373.

[40]Gring v. Lerch, 112 Pa. 244, 3 Atl. 841, 56 Am. Rep. 314.

[41]Goddard v. Westcott, 82 Mich. 180, 46 N. W. 242.

[42]Goddard v. Westcott, 82 Mich. 180, 46 N. W. 242.

[43]Barry v. Bakeman, 44 Maine 164; Van Houten v. Morse, 162 Mass. 414, 38 N. E. 705, 26 L. R. A. 430, 44 Am. St. 373; Coolidge v. Neat, 129 Mass. 146; Reynolds v. Reynolds, 3 Allen (Mass.), 605; Gring v. Lerch, 112 Pa. 244, 3 Atl. 841, 56 Am. Rep. 314; Young v. Murphy, 3 Bing. N. C. 54; Bench v. Merrick, 1 Car. & K. 163; Lee v. Cook, 4 S. P. 256; Baker v. Cartwright, 10 C. B. N. S. 124; Beachey v. Brown, E. B. & E. 796.

[44]Bell v. Eaton, 28 Ind. 468, 92 Am. Dec. 329; Young v. Murphy, 3 Bing. N. C. 74, 3 Scott. 379, 2 Hodges 154.

CHAPTER 2

BREACH OF MARRIAGE PROMISE AND REMEDIES

Section

20. Duration of contract and its dissolution in general.
21. Essentials of breach in general.
22. Breach of contract induced by third parties.
23. Demand for performance and offer to perform.
24. Jurisdiction.
25. Abatement and survival.
26. Limitation of actions.
27. Attachment and arrest.
28. Defenses in general.
29. Defenses—Diseases and impediments.
30. Defenses—Unchastity of plaintiff.
31. Defenses—Offer to marry.
32. Defenses—Release.
33. Pleading in general.
34. Pleading damages.
35. Pleading defenses.
36. Evidence—Burden of proof.
37. Evidence of contract.
38. Evidence of contract—Letters.
39. Evidence of contract—Opinions.
40. Questions for court and jury.
41. Damages in general.
42. Compensatory damages.
43. Mitigation of damages.
44. Aggravation of damages.
45. Seduction as aggravation of damages.
46. Attacks on character of plaintiff as aggravation of damages.
47. Exemplary damages.
48. Damages affected by pecuniary circumstances of parties.
49. Damages—Amount of award.

§ 20. **Duration of contract and its dissolution in general.**—Generally speaking, a contract to marry necessarily continues in

force until the one or the other of the parties, by conduct or words, manifests an unwillingness to carry it out.[1] It may be dissolved by death, mutual consent of the parties,[2] or for any incapacity, such as infancy,[3] impotency of either party,[4] or marriage within prohibited degrees.[5]

The waiver of the right to sue for the breach is not to be implied from the mere acquiescence of the plaintiff in defendant's announcement of loss of affection.[6]

§ 21. **Essentials of breach in general.**—Ordinarily a contract to marry consists of many promises made at different times, so in the end, if there is a breach, it is only one breach, and it is the ultimate breach of the contract then existing that constitutes the cause of action.[7]

The actionable breach is the breach of a valid existing contract to marry.[8] In determining whether there was a promise of marriage between the parties, the jury have a right to infer it from the conduct and behavior of the parties, as contracting parties are always presumed to intend what their conduct fairly indicates.[9]

The repudiation of the contract to marry may be shown by the acts, words, and conduct of the party who so repudiates, and who repudiates it without sufficient or reasonable cause.[10] There is a repudiation where before, the time set for performance, he

[1]Kelly v. Renfro, 9 Ala. 325, 44 Am. Dec. 441; Falk v. Burke, 93 Kans. 93, 143 Pac. 498, L. R. A. 1915B, 279.

[2]Torrey v. Hardy (Mo.), 196 S. W. 1100; Dreibelbiss v. Banner, 196 Mo. App. 236, 195 S. W. 68.

[3]Reish v. Thompson, 55 Ind. 34; Frost v. Vought, 37 Mich. 65.

[4]Gulick v. Gulick, 41 N. J. L. 13.

[5]Drennan v. Douglas, 102 Ill. 341, 40 Am. Rep. 595; Paddock v. Robinson, 63 Ill. 99, 14 Am. Rep. 112.

[6]Kaker v. Parrish (Tex. Civ. App.), 187 S. W. 517.

[7]Garmong v. Henderson, 112 Maine 383, 92 Atl. 322. See also Anderson v. Kirby, 125 Ga. 62, 54 S. E. 197, 114 Am. St. 185; Connolly v. Bollinger, 67 W. Va. 30, 67 S. E. 71, 20 Ann. Cas. 1350.

[8]Kuhn v. Marquart, 45 N. Dak. 482, 178 N. W. 428.

[9]Adams v. Byerly, 123 Ind. 368, 24 N. E. 130; Dean v. Skiff, 128 Mass. 174; Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336; Wightman v. Coates, 15 Mass. 1, 8 Am. Dec. 77; Ray v. Smith, 9 Gray (Mass.) 141; Hoitt v. Moulton, 21 N. H. 586; Corduan v. McCloud, 87 N. J. L. 143, 93 Atl. 724, L. R. A. 1915D, 1190; Wagenseller v. Simmers, 97 Pa. St. 465; note, 66 L. R. A. 798, 799. See notes, 36 L. R. A. (N. S.) 390 (seduction in aggravation of damages) L. R. A. 1918B, 68.

[10]Kelly v. Renfro, 9 Ala. 325, 44 Am. Dec. 441; Adams v. Byerly, 123 Ind. 368, 24 N. E. 130; Walters v. Stockberger, 20 Ind. App. 277, 50 N. E. 763; Holloway v. Griffith, 32 Iowa 409, 7 Am. Rep. 208; Kennedy v. Rodgers, 2 Kans. App. 764, 44 Pac. 47; Burtis v. Thompson, 42 N. Y. 246, 1 Am. Rep. 516; Waddell v.

declares he will not carry it out,[11] or refuses to communicate with or maintain a suitor's relation with plaintiff,[12] or tells her that "he was all done with her."[13]

If the defendant has put himself in a position where he can not execute the contract, or where through fraud or misrepresentation, the plaintiff is relieved from the contract, the plaintiff may treat such action as a breach.[14] This occurs where the party marries another woman while the engagement contract exists,[15] or it is discovered that the defendant has a living wife from whom he has not been divorced,[16] or where the contract provides that the marriage shall be performed on the death of his divorced wife. he marries another woman while the divorced wife is still living.[17] So it was held that there was a breach where the defendant informed the plaintiff that he had heard reports derogatory to her character, and would not visit her until he had investigated, and he did not communicate with her during more than a month that elapsed until suit was brought.[18] The conclusion was the

Wallace, 32 Okla. 140, 121 Pac. 245, Ann. Cas. 1914A, 692; Clark v. Corey, 24 R. I. 137, 52 Atl. 811; Pollock v. Sullivan, 53 Vt. 507, 38 Am. Rep. 702; Whitcomb v. Wolcott, 21 Vt. 368; Burke v. Shaver, 92 Va. 345, 23 S. E. 749.

[11]Kelly v. Renfro, 9 Ala. 325, 44 Am. Dec. 441; Anderson v. Kirby, 125 Ga. 62, 54 S. E. 197, 114 Am. St. 185; Adams v. Byerly, 123 Ind. 368, 24 N. E. 130; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; Walters v. Stockberger, 20 Ind. App. 277, 50 N. E. 763. And see Holloway v. Griffith, 32 Iowa 409, 7 Am. Rep. 208; Falk v. Burke, 93 Kans. 93, 143 Pac. 498, L. R. A. 1915B, 279; Cooper v. Bower, 78 Kans. 156, 96 Pac. 59; rehearing denied, 78 Kans. 164, 96 Pac. 794; Lewis v. Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385; Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. 302; Burtis v. Thompson, 42 N. Y. 246, 1 Am. Rep. 516; Johnson v. Blomdahl, 90 Wash. 625, 156 Pac. 561; Johnson v. Milling, L. R. 16 Q. B. 460; Frost v. Knight, L. R. 7 Ex. 111; Gough v. Farr, 3 C. & P. 631.

[12]Jones v. Layman, 123 Ind. 569, 24 N. E. 363; Wagenseller v. Simmers, 97 Pa. St. 465; Kelley v. Brennan, 18 R. I. 41, 25 Atl. 346; Olson v. Solverson, 71 Wis. 363, 38 N. W. 329.

[13]Nightingale v. Leith, 120 Maine 501, 115 Atl. 265. See also Vogt v. Guidry (Tex. Civ. App.), 220 S. W. 343.

[14]Birum v. Johnson, 87 Minn. 362, 92 N. W. 1; Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. 302. See notes 66 L. R. A. 801; 18 Ann. Cas. 362.

[15]Folz v. Wagner, 24 Ind. App. 694, 57 N. E. 564; Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. 914; Dyer v. Lalor, 94 Vt. 103, 109 Atl. 30.

[16]Waddell v. Wallace, 32 Okla. 140, 121 Pac. 245, Ann. Cas. 1914A, 692; Pollock v. Sullivan, 53 Vt. 507, 38 Am. Rep. 702.

[17]Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. 914.

[18]Jones v. Layman, 123 Ind. 569, 24 N. E. 363.

same when a man permitted five years to elapse without performing his contract, and has no reasonable excuse therefor.[19] So, since the contract involves protection and respect, as well as affection, it is violated by seduction.[20] Immediate action may be brought where the party repudiates the contract.[21]

A promise to marry when a third person who is ill gets well, is an absolute and not a conditional promise, and a renunciation of a promise before that time occurs, warrants an immediate action.[22] A failure to marry on the day fixed in the contract does not necessarily constitute a breach, as the contract continues in force until one or the other of the parties repudiates it.[23] The plaintiff may not, however, continue to treat the contract as existent, and then claim that it was broken by the postponement.[24] If the date fixed for the ceremony happens without design to fall on a day on which the ceremony is forbidden by the rules and customs of the church or religion to which the parties belong, a refusal to marry on that day is not a breach of the promise.[25]

A breach is justified where it appears the plaintiff has brought criminal proceedings in another state against a third party for seduction.[26]

The bad faith of a breach is shown when the defendant, shortly before he made it, voluntarily and without consideration, denuded himself of his property.[27]

[19]Corduan v. McCloud, 87 N. J. L. 143, 93 Atl. 724, L. R. A. 1915B, 1190.

[20]Osmun v. Winters, 25 Ore. 260, 35 Pac. 250; Sheahan v. Barry, 27 Mich. 217, in which it is said: "Such an engagement brings the parties necessarily into very intimate and confidential relations, and the advantage taken of these relations by the seducer is as plain a breach of trust in all its essential features as any advantage gained by a trustee or guardian or confidential adviser, who cheats a confiding ward, or beneficiary, or client into a losing bargain."

[21]Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. 302; Parkinson v. Murphy (R. I.), 107 Atl. 235.

[22]Anderson v. Kirby, 125 Ga. 62, 54 S. E. 197, 114 Am. St. 185, 5 Ann. Cas. 103.

[23]Kelly v. Renfro, 9 Ala. 325, 44 Am. Dec. 441; Walters v. Stockberger, 20 Ind. App. 277, 50 N. E. 763.

[24]Falk v. Burke, 93 Kans. 93, 143 Pac. 498, L. R. A. 1915B, 279.

[25]Stone v. Appel, 12 Ill. App. 582, 585; Falk v. Burke, 93 Kans. 93, 143 Pac. 498, L. R. A. 1915B, 279; Wanecek v. Kratky, 69 Nebr. 770, 96 N. W. 651, 66 L. R. A. 798.

[26]Garmong v. Henderson, 114 Maine 75, 95 Atl. 409.

[27]Stone v. Appel, 12 Ill. App. 582, 585; Falk v. Burke, 93 Kans. 93, 143 Pac. 498, L. R. A. 1915B, 279; Wanecek v. Kratky, 69 Nebr. 770, 96 N. W. 651, 66 L. R. A. 798; Smith v. Compton, 67 N. J. L. 548, 52 Atl. 386, 58 L. R. A. 480.

§ 22. **Breach of contract induced by third parties.**—Unlike the usual results from intermeddling of third parties with contracts of others, it is not an actionable offence for third parties to attempt to induce or induce either party to a promise of marriage to break the same. The reason for this lies in the matter of public policy and rights of rivals.[28]

§ 23. **Demand for performance and offer to perform.**—Where no definite time has been fixed for the performance of a contract to marry and it has not been repudiated, a request for, or tender of performance is a pre-requisite to a suit for a breach of the promise,[29] for there is no breach until request be made, and performance refused, or until one or the other of the parties has put it out of his or her power to perform the contract,[30] as, for example, by marriage to another.[31]

Where, however, a man renounces his promise to marry and ceases his attentions to the woman, she may bring an action for its breach without formal request that he should fulfill his promise or to offer a performance of the contract on her part.[32] Any acts of the promisor which show a shunning and evasion of the

[28]Leonard v. Whetstone, 34 Ind. App. 383, 68 N. E. 197, 107 Am. St. 252; Homan v. Hall, 102 Nebr. 70, 165 N. W. 881, L. R. A. 1918C, 1195.

[29]Clark v. Pendleton, 20 Conn. 495; Fidler v. McKinley, 21 Ill. 308; Lemke v. Frazenburg, 159 Iowa 466, 141 N. W. 332; Burnham v. Cornwell, 16 B. Mon. (Ky.) 284, 63 Am. Dec. 529; Fible v. Caplinger, 13 B. Mon. (Ky.) 464; Burks v. Sham, 2 Bibb (Ky.) 341, 5 Am. Dec. 616; Cole v. Holliday, 4 Mo. App. 94; Clark v. Corey, 24 R. I. 137, 52 Atl. 811. See also Bowes v. Sly, 96 Kans. 38, 152 Pac. 17; Martin v. Patton, 1 Litt. (Ky.) 233; Green v. Spencer, 3 Mo. 318, 26 Am. Dec. 672; Weaver v. Bachert, 2 Pa. St. 80, 44 Am. Dec. 159; Kelley v. Brennan, 18 R. I. 41, 25 Atl. 346; Ortiz v. Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581; Burke v. Shaver, 92 Va. 345, 23 S. E. 749.

[30]Shellenbarger v. Blake, 67 Ind. 75; Rime v. Rater, 108 Iowa 61, 78 N. W. 835; Elliott Ev. §1863.

[31]Folz v. Wagner, 24 Ind. App. 694, 57 N. E. 564; Killion v. Hulen, 8 Ind. App. 494, 36 N. E. 49; Sheahan v. Barry, 27 Mich. 217.

[32]Greenup v. Stoker, 8 Ill. 202; Jones v. Layman, 123 Ind. 569, 24 N. E. 363; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; Lemke v. Frazenburg, 159 Iowa 466, 141 N. W. 332; Rime v. Rater, 108 Iowa 61, 78 N. W. 835; Holloway v. Griffith, 34 Iowa 409, 7 Am. Rep. 208; Bowes v. Sly, 96 Kans. 388, 152 Pac. 17; Johnson v. Levy, 122 La. 118, 47 So. 422, 16 Ann. Cas. 978; Hill v. Jones, 109 Minn. 370, 123 N. W. 927, 18 Ann. Cas. 359; Birum v. Johnson, 87 Minn. 362, 92 N. W. 1; Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024; Hellenthal v. Bleuhm, 13 Ohio Dec. 514; McCormick v. Robb, 24 Pa. St.

contract, or which indicates the determination not to marry will obviate the necessity of a demand.[33]

A contract to marry at a certain place during a certain month is breached where and when the defendant did not appear, and no request is necessary before bringing an action.[34]

Where the plaintiff had asked the defendant what he was going to do with her, and he replied that he was not going to do anything, this was some evidence of a request on him to fulfil his agreement.[35] In a case where, at the time fixed for the marriage ceremony the defendant was sick and unable to perform the same and before his recovery suit was brought for a breach of the promise and dismissed, it was held that an offer to marry him by the plaintiff is prerequisite to another action.[36]

Where a request is required, it may be made by the father of the plaintiff or other friend whose authority to do so may be inferred from the relation existing between the parties.[37]

An offer to perform may be inferred from evidence that plaintiff had stated in the defendant's presence her readiness to marry him, and that she had made preparations therefor.[38]

§ 24. **Jurisdiction.**—When the temporal courts of England took over from the spiritual courts jurisdiction concerning domestic relations, they did not assume, as the spiritual courts had done, the authority to enforce specific executory contracts to marry, but made the fact of their breach the foundation of an action for damages; and as such it has ever since existed both in England and in America.[39] The principle which upholds an action is as old as the principle which gives damages in any case for the breach of a contract.[40] A suit for breach of a marriage

44; Kelley v. Brennan, 18 R. I. 41, 25 Atl. 346; Burke v. Shaver, 92 Va. 345, 23 S. E. 749; Johnson v. Blomdahl, 90 Wash. 625, 156 Pac. 561; Olson v. Solverson, 71 Wis. 663, 38 N. W. 329.

[33]Folz v. Wagner, 24 Ind. App. 694, 57 N. E. 564; Bowes v. Sly, 96 Kans. 388, 152 Pac. 17.

[34]Grubbs v. Pence, 24 Ky. L. 2183, 73 S. W. 785.

[35]Erwin v. Jones, 192 Mo. App. 326, 180 S. W. 428.

[36]Clark v. Corey, 24 R. I. 137, 52 Atl. 811.

[37]Prescott v. Guyler, 32 Ill. 312.

[38]Green v. Spencer, 3 Mo. 318, 26 Am. Dec. 672.

[39]Cheney v. Arnold, 15 N. Y. 345, 69 Am. Dec. 609; Kuhn v. Marquart, 45 N. Dak. 482, 178 N. W. 428; Stretch v. Parket, 1 Rolle. Abr. 22; Holcroft v. Dickenson, Carter, 233; Holt v. Ward Clarencieux, 2 Stra. 937; Harrison v. Gage, 1 Ld. Raymond 386.

[40]Short v. Stotts, 58 Ind. 29.

contract is an action ex contractu, and not ex delicto, though it partakes somewhat of the characteristics of the latter action.[41] However, an action counting tort wise for fraud and deceit may be had against a married man for promising an unmarried woman to marry her.[42] An action in equity may be maintained to recover damages for the breach of the marriage contract under a West Virginia statute.[43] The refusal to perform a contract to marry renders the party so refusing liable to an action, whether the time for performance has arrived or not.[44]

§ 25. **Abatement and survival.**—At common law an action for a breach of promise of marriage would not survive, for, although in form ex-contractu it was in fact to recover damages for a personal injury, and all such actions died with the person.[45] But this is not because it is an action ex-contractu as distinguished from tort, but for the reason that the injury is purely personal, in which the representative of the estate has no interest.[46] Where special damages are alleged, however, the action will not ordinarily abate by the death of the party to the contract.[47] However, the term "special damages" seems not to have been clearly defined, but generally speaking, they are damages of such a character as might be given in evidence to aggravate damages, in one action, or be itself the substantive cause of action, as in the case of trespass, quare clausum, and carrying away plaintiff's goods.[48]

[41]Conrad v. Bare, 29 Iowa Cir. Ct. 153. Assumpsit proper remedy. Dietrich v. Davies (Pa.), 117 Atl. 915.

[42]Bukowski v. Kuznia (Minn.), 186 N. W. 311; Pollock v. Sullivan, 53 Vt. 507, 38 Am. Rep. 702.

[43]McKinsey v. Squires, 32 W. Va. 41, 9 S. E. 55.

[44]Walters v. Stockberger, 20 Ind. App. 277, 50 N. E. 763; Kennedy v. Rodgers, 2 Kans. App. 764.

[45]Stewart v. Lee, 70 N. H. 181, 46 Atl. 31; Vittum v. Gilman, 48 N. H. 416; Hayden v. Vreeland, 37 N. J. L. 372, 18 Am. Rep. 723.

[46]Hayden v. Vreeland, 37 N. J. L. 372, 18 Am. Rep. 723.

[47]Stebbins v. Palmer, 1 Pick (Mass.) 71, 11 Am. Dec. 146; Smith v. Sherman, 4 Cush. (Mass.) 408; Chamberlain v. Williamson, 2 Maul & S. 408.

[48]Hovey v. Page, 55 Maine 142; Lattimore v. Simmons, 13 Serg. L. R. (Pa.) 183. The following have been held not to be substantive causes of action and therefore will not survive the death of the promisor: (1) A certain sum promised plaintiff by the deceased, as the estimated cost of two years' instruction, in consideration of her contracting an engagement of marriage with him; (2) the amount expended by her at his request in the usual preparations to be married and the extraordinary expense by her incurred, at his request, to take her father, mother and uncle to the place of the marriage ceremony as guests;

Special damages are damages to the property, and not to the person of the promisee, and as such must be within contemplation of both parties at the date of promise.[49] An averment that the deceased promisee had a child born to her out of wedlock, and the promisor was the father of such a child, is not an allegation of special damages to the property such as would cause the action to survive.[50]

An action for a breach of the contract to marry does not survive against the administrator of the promisor under a statute providing that "no civil action commenced, except actions for wrongs affecting the character of the plaintiff, shall abate by the death of either party;"[51] nor under a statute providing "a personal representative may sue or be sued *** on any contract of or with his deceased," and this applies both to the promisor and promisee;[52] nor under a statute allowing an action for "trespass to the person or property" to be maintained against the personal representatives of the trespasser,[53] nor under a statute allowing revival of actions "upon contracts" and "for wrongs to property rights or interest."[54] But in New Hampshire both the action for breach of promise of marriage, and judgment recovered therein, survive by statute, and may be assigned.[55] Likewise in Louisiana under the Civil Code the heirs of a decedent are liable for compensatory damages for his breach of a promise to marry, where the obligor has been put in default as provided by law, but they are not liable for exemplary damages.[56]

(3) the amount of expense incurred by her, in twice sending messengers to deceased at his request to arrange the time and etc., of the wedding; (4) for eight entire months of her time, devoted, at his request, for the preparation for her expected marriage. Smith v. Sherman, 4 Cush. (Mass.), 408.

[49]Finlay v. Chirney, 20 Q. B. Div. 494.

[50]Hovey v. Page, 55 Maine 142.

[51]Hullett v. Baker, 102 Tenn. 689, 49 S. W. 757; Weeks v. Mays, 87 Tenn. 442, 10 S. W. 771, 3 L. R. A. 212.

[52]Grubbs v. Sult, 32 Gratt. (Va.) 203, 34 Am. Rep. 765.

[53]Hayden v. Vreeland, 37 N. J. L. 372, 18 Am. Rep. 723.

[54]Wade v. Kalbfleisch, 58 N. Y. 282, 16 Abb. Prac. [N. S.] 104, 72 Am. Rep. 250.

[55]Stewart v. Lee, 70 N. H. 181, 46 Atl. 31; Hilliard v. Beattie, 67 N. H. 571, 39 Atl. 897; Jordan v. Gillon, 44 N. H. 424.

[56]The estate of a decedent is liable for damages for breach of contract to marry, notwithstanding the plaintiff's father after discovery of her pregnancy, killed the decedent on his refusal to carry out his promise to marry. Johnson v. Levy, 122 La. 118, 47 So. 422, 16 Ann. Cas. 978.

If the defendant dies after verdict, a judgment may be entered against his personal representative.[57]

Of course the action will abate upon the marriage of the parties, and the counsel for the plaintiff can not prosecute it under a statute giving him a lien for fees.[58]

§ 26. **Limitation of actions.**—The statute of limitations runs against this action from the time of the breach and not from the time of the contract.[59] Where the parties, through a period of many years treat their contract to marry as a continued one by recognizing its existence and promises of its fulfillment the statute of limitations will not begin to run until one party has broken the engagement or until notice is given of the termination of the agreement.[60] A new and independent promise having the same character of consideration as a previous broken one may be considered for the purpose of avoiding the statute of limitations.[61]

§ 27. **Attachment and arrest.**—Unless an attachment for damages arising ex delicto is permitted by statute, an attachment

[57]Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336.

[58]Harris v. Tison, 63 Ga. 629, 36 Am. Rep. 126. The surviving promisee of a contract to marry is not thereby a creditor so that he or she may be appointed administrator of the estate of the deceased party. Smith v. Sherman, 4 Cush. (Mass.) 408. The obligation resulting from a marriage engagement, or promise of marriage is personal, and not heritable, because no one but the obligee can enforce its performance and it can be enforced against no one but the obligor. So that if the obligor die before compliance and before he is put in default, no action will lie to enforce compliance or to recover damages for non-compliance. But where the obligor was put in default, that is to say, that a demand was made upon him, as provided by law, to comply with his engagement to marry her and that he refused to so comply his right to fulfill his engagement is thereby forfeited, and his obligation in the premises is merged in his obligation to respond in damages, which latter obligation thereby acquires an independent status, becomes heritable, and may be enforced against heirs of the obligor. Johnson v. Levy, 118 La. 447, 43 So. 46, 9 L. R. A. (N. S.) 1020, 118 Am. St. 378, 10 Ann. Cas. 722.

[59]Buelna v. Rhyne, 139 Cal. 630, 73 Pac. 466; Crossett v. Brackett, 79 N. H. 102, 105 Atl. 5; Dyer v. Lalor, 94 Vt. 103, 109 Atl. 30.

[60]Blackburn v. Mann, 85 Ill. 222. In Smith v. McPherson, 176 Cal. 144, 167 Pac. 875, it is held that a statute of limitations providing that no acknowledgment or promise is sufficient evidence of a new or continuing contract, unless the same is contained in some writing signed by the party to be charged thereby, has no application, in view of another statute providing that a contract with mutual promises to marry may be oral, especially where the original promise is often repeated, and the defendant thereby secures sexual intercourse with the woman.

[61]Pyle v. Piercy, 122 Cal. 383, 55 Pac. 141.

for a breach of contract of marriage will generally be denied; and if an attachment has issued in such a case, it will be set aside.[62]

A promise of marriage, accepted, is a contract, on breach of which the defendant can not be arrested without proof of fraud, either in contracting the obligation, or in his subsequent conduct to avoid responsibility.[63] So it has been held where a man promised to marry a woman, and at the same time, or afterwards, seduced her, by the influence of such promises and then sought to avoid the performance, by attempting to run away, with intent to abandon her, and refused to marry her, this made his original promise a fraud, and it was proper to hold him to bail.[64]

A statute classing an action for a breach of promise with torts does not, however, authorize imprisonment of a defendant on a judgment for breach of such promise as a tort debtor.[65]

§ 28. **Defenses in general.**—Generally speaking the fact that the character of the woman turns out to be different from what he had reason to believe it, or that she is subject to an infirmity either mental or bodily, which will prevent a proper fulfillment of the marriage agreement, may be urged as a defense.[66] Although it is the policy of the law to encourage marriage, it is not its policy to encourage unhappy marriages,[67] for it would be most mischievous to compel parties to marry who could never live happily together.[68] But the fact of the possession of undesirable traits or objectionable characteristics by the plaintiff will not ordinarily constitute a defense.[69]

A false and fraudulent representation by one of the parties in regard to his or her wealth, rank, or social position is generally considered a sufficient ground for a breach of the contract and a good defense to a claim for damages. But such representations would not affect the legality of the marriage. The Supreme Court of Massachusetts says: "We think that it is well settled that fraud of such kind in its essential elements as would invali-

[62]Barnes v. Buck, 1 Lans. (N. Y.) 268; Price v. Cox, 83 N. Car. 261; Mainz v. Lederer, 24 R. I. 23, 51 Atl. 1044, 59 L. R. A. 954, 96 Am. St. 702.

[63]Perry v. Orr, 35 N. J. L. 295.

[64]Perry v. Orr, 35 N. J. L. 295; Hood v. Sudderth, 111 N. Car. 215, 16 S. E. 397.

[65]Dewey v. Merrill (R. I.), 36 Atl. 835.

[66]Foulkes v. Sellway, 3 Esp. 236.

[67]Goddard v. Westcott, 82 Mich 180, 46 N. W. 242.

[68]Atchison v. Baker, Peake's Add. Cas. 103.

[69]Gross v. Hochstim, 72 Misc. 343, 130 N. Y. S. 315.

date an ordinary contract, is a good defense to an action upon a contract to marry."[70] The fact that the plaintiff was engaged to marry another at the time of her promise to defendant is not a good ground of defense.[71] Infancy is a defense open to the infant only.[72]

An agreement between a man and woman, the purpose of which is to forestall any accusation of subsequent impropriety between them is void as against public policy, and will not bar her action for breach of promise,[73] and similarly there is no bar to the action by an agreement to settle a breach of promise to marry by the payment of a certain sum in the future if the woman had not in the meantime married. The agreement is invalid as in restraint of marriage.[74] Although it is alleged in an action for seduction that it was procured under a promise of marriage, an adjudication therein in favor of defendant does not bar an action for breach of such promise.[75]

Where a statute prohibits a relationship between parties of certain degrees of kinship, it constitutes a complete defense to an action for the breach of a contract to marry by parties within the prohibited degrees.[76] And if such contract is void under the law of the state where it is made, the relationship is a defense, although the marriage is not prohibited by the law of the place where it is to be performed.[77]

§ 29. **Defenses—Diseases and impediments.**—A contract to marry calls for the highest degree of good faith on both sides, and neither party has the right to enforce it against the other, if

[70]Colburn v. Marble, 196 Mass. 376, 82 N. E. 28, 124 Am. St. 561; Smith v. Smith, 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 Am. St. 440; Van Houten v. Morse, 162 Mass. 414, 38 N. E. 705, 26 L. R. A. 430, 44 Am. St. 373; Willard v. Stone, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496; Grover v. Zook, 44 Wash. 489, 87 Pac. 638, 7 L. R. A. (N. S.) 582, 120 Am. St. 1012, 12 Ann. Cas. 192. Notes, 13 L. R. A. (N. S.) 998; 5 A. L. R. 1023; 11 A. L. R. 934; (annulment of marriage on ground of venereal disease undisclosed at time of marriage).

[71]Dubet v. Kirkland, 13 Ill. App. 622; Roper v. Clay, 18 Mo. 383, 59 Am. Dec. 314.

[72]Cannon v. Alsbury, 1 Marsh. (Ky.) 76, 10 Am. Dec. 709; Hunt v. Peake, 5 Cow. (N. Y.) 475, 15 Am. Dec. 475.

[73]Lauer v. Banning, 152 Iowa 99, 131 N. W. 783.

[74]McCoy v. Flinn, 169 Iowa 622, 151 N. W. 465, L. R. A. 1915D, 1064.

[75]Ireland v. Emerson, 93 Ind. 1.

[76]Campbell v. Crampton, 2 Fed. 417, 18 Blatchf. 150, 8 Abb. N. C. 363; Reed v. Reed, 49 Ohio St. 654, 32 N. E. 750.

[77]Campbell v. Crampton, 2 Fed. 417, 18 Blatchf. 150, 8 Abb. N. C. 363.

he or she is incapable of performing the full marital duties.[78] The contract to marry implies that the contracting parties know of no legal or physical impediment to the contractual relations and its consequences.[79] The contract carries the further implied condition that both of the parties shall remain in the enjoyment of life and health, and if the condition of the parties has so changed after the engagement that the marriage state would endanger the life and health of either a breach of the contract is justified.[80]

Generally speaking, when one has the moral and legal duty to decline to carry out an agreement he can not be held responsible in damages for so doing.[81] So where the defendant, after promise, contracts or develops a disease, without fault on his part, which renders it unsafe and dangerous to his health or life to perform his contract, it will constitute a defense to an action against him.[82] But nothing will excuse the defendant for the breach of his promise, except such a disease or complication of diseases as renders the making of the marriage contract, and the consummation of the marriage by marital intercourse impossible.[83]

That plaintiff was, to defendant's knowledge, in ill health at

[78]In re Oldfield's Estate, 175 Iowa 118, 156 N. W. 977, L. R. A. 1916D, 1260, Ann. Cas. 1917D, 1067; Gring v. Lerch, 112 Pa. 246, 3 Atl. 841, 56 Am. Rep. 814; Grover v. Zook, 44 Wash. 489, 87 Pac. 638, 7 L. R. A. (N. S.) 582, 120 Am. St. 1012, 12 Ann. Cas. 192.

[79]Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. 302.

[80]Shackelford v. Hamilton, 93 Ky. 80, 19 S. W. 5, 15 L. R. A. 531, 40 Am. St. 166; Wanecek v. Kratky, 69 Nebr. 770, 96 N. W. 651, 66 L. R. A. 798; Allen v. Baker, 86 N. Car. 91, 41 Am. Rep. 444; Sanders v. Coleman, 97 Va. 690, 34 S. E. 621, 47 L. R. A. 581; Grover v. Zook, 44 Wash. 489, 87 Pac. 638, 7 L. R. A. (N. S.) 582, 120 Am. St. 1012, 12 Ann. Cas. 192. Bishop on Marriage and Divorce, Vol. 1, §219.

[81]Grover v. Zook, 44 Wash. 489, 87 Pac. 638, 7 L. R. A. (N. S.) 582, 120 Am. St. 1012, 12 Ann. Cas. 192.

[82]Sanders v. Coleman, 97 Va. 690, 34 S. E. 621, 47 L. R. A. 581.

[83]Bowman v. Bowman, 153 Ind. 498, 55 N. E. 422; Vierling v. Binder, 113 Iowa 337, 85 N. W. 621; Rime v. Rater, 108 Iowa 61, 68 N. W. 835; Smith v. Compton, 67 N. J. L. 548, 52 Atl. 386, 58 L. R. A. 480; Lohner v. Coldwell, 15 Tex. Civ. App. 444, 39 S. W. 591; Alberts v. Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584. This is on the ground that although a man may be in a bad state of health, he may, nevertheless, perform his contract to marry, and so give the woman the benefit of social position, and of his estate so far as in his power, although he may be unable to fulfil all the obligations of the married state; and it rests with the woman to say whether she will enforce or renounce the contract. Boast v. Firth, L. R. 4 C. P. 8; Hall v. Wright, 96 Eng. C. L. Rep. 746.

the time the promise was made, is no defense.[84] Where the policy of a state, as evidenced by its statutes, is to prevent the spread of pulmonary tuberculosis, a breach of a marriage promise is excusable where the woman is suffering from such disease although the man knew she had the disease at the time of the engagement.[85] So there was not an actionable breach of marriage contract where the plaintiff was affected with pulmonary tuberculosis and there was also a taint of the disease in the defendant.[86]

The fact that the defendant was ill or unable to marry at the particular time will not ordinarily show a breach, but it may excuse delay.[87] If the defendant failed to fulfill his contract upon the ground that he was afflicted with a venereal disease which rendered him unfit for the marriage state, he will be responsible in damages if the disease was contracted subsequent to the time of making the promise, or, if before and he knew it was incurable; but if it was contracted prior to the promise and he had reason to believe it was temporary only, he would be excused,[88] or similarly, if he believed himself to be cured, he may break the engagement, if the disease afterward reappears, with no new fault on his part, without rendering himself liable to damages.[89] But the defendant will not be permitted to take advantage of his

[84]Walker v. Johnson, 6 Ind. App. 600, 33 N. E. 267, 34 N. E. 100; Lemke v. Franzenburg, 159 Iowa 466, 141 N. W. 332; Gring v. Lerch, 112 Pa. 244, 3 Atl. 841, 56 Am. Rep. 314.

[85]Grover v. Zook, 44 Wash. 489, 87 Pac. 638, 7 L. R. A. (N. S.) 582, 120 Am. St. 1012, 12 Ann. Cas. 192.

[86]Grover v. Zook, 44 Wash. 489, 7 L. R. A. (N. S.) 582, 120 Am. St. 1012, 12 Ann. Cas. 192.

[87]Smith v. Compton, 67 N. J. L. 548, 52 Atl. 386, 58 L. R. A. 480; Campbell v. Arbuckle, 51 Hun (N. Y.) 641, 4 N. Y. S. 29; Alberts v. Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 484; Hall v. Wright, El. Bl. & El. 746. See also Coolidge v. Neat, 129 Mass. 146; note, 63 Am. Dec. 544, 545.

[88]Allen v. Baker, 86 N. Car. 91, 41 Am. Rep. 444. See also Shackleford v. Hamilton, 93 Ky. 80, 19 S. W. 5, 15 L. R. A. 531, 40 Am. St. 166; Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854; Gring v. Lerch, 112 Pa. St. 244, 3 Atl. 841, 56 Am. Rep. 314; Sanders v. Coleman, 97 Va. 690, 34 S. E. 621, 47 L. R. A. 581; Travis v. Schnebly, 68 Wash. 1, 122 Pac. 316, 40 L. R. A. (N. S.) 585; Grover v. Zook, 44 Wash. 489, 87 Pac. 638, 7 L. R. A. (N. S.) 582, 120 Am. St. 1012, 12 Ann. Cas. 192; notes, 63 Am. Dec. 536, 40 Am. St. 174, 15 L. R. A. 531, 7 L. R. A. (N. S.) 586.

[89]Shackleford v. Hamilton, 93 Ky. 80, 19 S. W. 5, 15 L. R. A. 531, 40 Am. St. 166; Gardener v. Arnett, 21 Ky. L. 1, 50 S. W. 840; Allen v. Baker, 86 N. Car. 91, 41 Am. Rep. 444. An action for breach of the marriage contract differs, in some respects, from other actions ex contractu. Hayden v. Vreeland, 37 N.

own misdeeds which result in his incapacity to perform his contract.[90]

Supervening insanity is a good defense to an action for a breach of marriage promise.[91] But it has been held no defense that the plaintiff had been insane and confined in an asylum before the promise, if she was sane at the time of the promise.[92]

To be a defense in this action the impediment need not be of such a nature as to be a ground of divorce after marriage.[93] The structural malformation of a woman preventing sexual intercourse, which she promised to have remedied by surgical operation, and did not do so before the time fixed for the marriage, absolved the man from his promise to marry her,[94] and this is so, even though the impediment might be remedied after marriage, and would not therefore be a ground of divorce.[95] The repudiation has been held justified in a case where the defendant was sexually impotent, owing to a surgical operation, and such infirmity was known to the plaintiff at the time of the promise.[96] The voluntary submission to an unnecessary surgical operation by a woman which renders her incapable of procreation is a good defense to the action.[97]

§ 30. **Defenses—Unchastity of plaintiff.**—The law, through implication, reads into the promise of either party to the engagement, the representation of chastity and a misrepresentation as to this attribute will constitute such fraud as to vitiate the whole contract.[98] Unchastity in the woman, known to the man at the time

J. L. 372, 18 Am. Rep. 723. Jordan v. Missouri & Kansas Tel. Co., 136 Mo. App. 192, 116 S. W. 432. The fraud claimed was the concealment of a loathsome disease. Note the discussion of the difference between void and voidable contracts. This one was voidable and, therefore, rescission of the marriage should have been pronounced by a competent court.

[90]Smith v. Hall, 69 Conn. 651, 38 Atl. 386; Smith v. Compton, 67 N. J. L. 548, 52 Atl. 386, 58 L. R. A. 480; Allen v. Baker, 86 N. Car. 91, 41 Am. Rep. 444; Beachey v. Brown, E. B. & E. 769.

[91]Liddell v. Easton, [1907] S. C. 154 Ct. of Sess.

[92]Baker v. Cartwright, 10 C. B., N. S. 124, S. C. 30, 30 L. J. C. P. 364, 7 Juris. N. S. 1247.

[93]Gring v. Lerch, 112 Pa. St. 244, 3 Atl. 841, 56 Am. Rep. 314.

[94]Gring v. Lerch, 112 Pa. St. 244, 3 Atl. 841, 56 Am. Rep. 314.

[95]Gring v. Lerch, 112 Pa. St. 244, 3 Atl. 841, 56 Am. Rep. 314.

[96]Gulick v. Gulick, 41 N. J. L. 13.

[97]Edmonds v. Hughes, 115 Ky. 561, 74 S. W. 283.

[98]Espy v. Jones, 37 Ala. 379; Woodard v. Bellamy, 2 Root (Conn.) 354; Edmonds v. Hughes,

of his promise constitutes no defense,[99] but if such unchastity was unknown to him when the promise was made, or she subsequently becomes unchaste, except with himself, a breach of his promise is justified,[1] unless he has waived the objection.[2] And this rule applies when either party is guilty of acts of unchastity subsequent to the engagement, whether such subsequent acts be known to the latter or not.[3] The principle does not apply to conduct merely immodest and indecent, falling short of actual unchastity.[4]

115 Ky. 561, 74 S. W. 283; Snowman v. Wardwell, 32 Maine 275; Colburn v. Marble, 196 Mass. 376, 82 N. E. 28, 124 Am. St. 561; Boynton v. Kellogg, 3 Mass. 189, 3 Am. Dec. 122; Goddard v. Westcott, 82 Mich. 180, 46 N. W. 242; Sheahan v. Barry, 27 Mich. 217; Budd v. Crea, 6 N. J. L. 370; Kniffen v. McConnell, 30 N. Y. 285; Palmer v. Andrews, 7 Wend. (N. Y.) 142; Lynch v. Figge, 200 App. Div. 92, 192 N. Y. S. 873. Gaskill v. Dixon, 3 N. Car. 350; Foster v. Hanchett, 68 Vt. 319, 35 Atl. 316, 54 Am. St. 886; Young v. Murphy, 3 Bing. N. C. 54, 32 E. C. L. 35, 132 Reprint 329.

[99]Houser v. Carmody, 173 Mich. 121, 139 N. W. 9; Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024; Alberts v. Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584.

[1]Espy v. Jones, 37 Ala. 379; Woodard v. Bellamy, 2 Root (Conn.) 354; Sprague v. Craig, 51 Ill. 288; Burnett v. Simpkins, 24 Ill. 264; Butler v. Eschleman, 18 Ill. 44; La Porte v. Wallace, 89 Ill. App. 517; Kantzler v. Grant, 2 Ill. App. 236; Bowman v. Bowman, 153 Ind. 498, 55 N. E. 422; Hunter v. Hatfield, 68 Ind. 416; Bell v. Eaton, 28 Ind. 468, 92 Am. Dec. 329; Guptill v. Verback, 58 Iowa 98, 12 N. W. 125; Denslow v. Van Horn, 16 Iowa 476; Edmonds v. Hughes, 115 Ky. 561, 74 S. W. 283; Wills v. Myers, 4 Ky. L. 839; Morgan v. Yarborough, 5 La. Ann. 316; Berry v. Bakeman, 44 Maine, 164; Snowman v. Wardwell, 32 Maine 275; Colburn v. Marble, 196 Mass. 376, 82 N. E. 28, 124 Am St. 561; Sheahan v. Barry, 27 Mich. 217; Cox v. Edwards, 120 Minn. 512, 139 N. W. 1070; Markham v. Herrick, 82 Mo. App. 327; Budd v. Crea, 6 N. J. L. 370; McKee v. Nelson, 4 Cow. (N. Y.) 355, 15 Am. Dec. 384; Tompkins v. Wadley, 3 Thomp. & C. (N. Y.) 424; Palmer v. Andrews, 7 Wend. (N. Y.) 142; Rich v. Mayer, 7 N. Y. S. 69, 26 N. Y. St. Rep. 107; Gaskill v. Dixon, 3 N. Car. (2 Hayw.) 350; Kelley v. Highfield, 15 Ore. 277, 14 Pac. 744; Von Storch v. Griffin, 71 Pa. 240; Capehart v. Carradine, 4 Strob. (S. Car.) 42; Goodall v. Thurman, 1 Head, (Tenn.) 209; Williams v. Hollingsworth, 6 Baxt. (Tenn.) 12; Foster v. Hanchett, 68 Vt. 319, 35 Atl. 316, 54 Am. St. 886; Young v. Murphy, 3 Bing. N. C. 54; Irving v. Greenwood, 1 Car. & P. 350; Bench v. Merrick, 1 Car. & K. 463.

[2]Sprague v. Craig, 51 Ill. 289; Snowman v. Wardwell, 32 Maine 275; Colburn v. Marble, 196 Mass. 376, 82 N. E. 28, 124 Am. St. 561; Foster v. Hanchett, 68 Vt. 319, 35 Atl. 316, 54 Am. St. 886; Young v. Murphy, 3 Bing. N. C. 54; Irving v. Greenwood, 1 R. & P. 350.

[3]Sprague v. Craig, 51 Ill. 289.

[4]Colburn v. Marble, 196 Mass. 376, 82 N. E. 28, 124 Am. St. 561.

and where the contract has not been breached by the defendant on account of the plaintiff's unchastity unknown to him, or where he has himself seduced her, under promise of marriage her unchastity prior to the contract is no defense to the action.[5]

Neither will a breach be justified where the man knowingly enters into a marriage contract with a lewd woman,[6] or where, after knowledge of her unchastity he renews the promise,[7] or the unchaste acts with other persons after the promise, is with his consent or connivance,[8] or the unchaste acts are committed with the defendant himself.[9] On this issue it may be shown that she concealed from him the fact of the birth of a bastard child,[10] or that she had procured an abortion,[11] or was afflicted with a loathesome disease due to lewdness, and unknown to him when he made the promise.[12] It is also a good defense to the action that the plaintiff has brought criminal proceedings in another state against a third party for seduction.[13]

In an action for damages for the breach of a promise to marry the character of the plaintiff is in issue,[14] and it may be shown that the character or reputation of the plaintiff for chastity is bad.[15] That is to say evidence of particular instances of unchastity may be followed by evidence of general bad character on that subject,[16] but to justify a breach the proof must be that the plaintiff is, in fact, unchaste. Her general bad character for chastity

[5]Sheahan v. Barry, 27 Mich. 217, Houser v. Carmody, 173 Mich. 121, 139 N. W. 9.

[6]Espy v. Jones, 37 Ala. 379; Clark v. Reese, 35 Cal. 89; Butler v. Eschleman, 18 Ill. 44; Burnett v. Simpkins, 24 Ill. 264; Bell v. Eaton, 28 Ind. 468, 92 Am. Dec. 329; Berry v. Bakeman, 44 Maine 164; Kelley v. Highfield, 15 Ore. 277, 14 Pac. 755.

[7]Garmong v. Henderson, 115 Maine 422, 99 Atl. 177; Snowman v. Wardwell, 32 Maine 275.

[8]Johnson v. Smith, 3 Pittsb. 184.

[9]Johnson v. Smith, 3 Pittsb. 184.

[10]Bowman v. Bowman, 153 Ind. 498, 55 N. E. 422; Bell v. Eaton, 28 Ind. 468, 92 Am. Dec. 329; Denslow v. Van Horn, 16 Iowa 476.

[11]Sprague v. Craig, 51 Ill. 288. See also Lynch v. Figge, 194 App. Div. 126, 185 N. Y. S. 777.

[12]Kantzler v. Grant, 2 Ill. App. 236.

[13]Garmong v. Henderson, 114 Maine 75, 95 Atl. 409.

[14]Denslow v. Van Horn, 16 Iowa 476; Foulkes v. Selway, 3 Esp. 236.

[15]Fidler v. McKinley, 21 Ill. 308; Butler v. Eschleman, 18 Ill. 44; Denslow v. Van Horn, 16 Iowa 276; Cole v. Holliday, 4 Mo. App. 94; Brisack v. King, 199 App. Div. 213, 191 N. Y. S. 477; Kelley v. Highfield, 15 Ore. 277, 14 Pac. 744; Von Storch v. Griffin, 71 Pa. St. 240; Williams v. Hollingsworth, 6 Baxt. (Tenn.) 12.

[16]Woodard v. Bellamy, 2 Root (Conn.) 354; Butler v. Eschleman, 18 Ill. 44; Haymond v. Saucer, 84 Ind. 3; Boynton v. Kellogg, 3 Mass. 189, 3 Am. Dec. 122.

will not suffice,[17] and where the defendant introduces evidence of specific acts of unchastity the plaintiff may rebut such evidence by evidence of her general good reputation for chastity.[18] On the other hand, it has been held, the issue of the plaintiff's good reputation for chastity is not raised where the defendant merely attempts to show specific acts of unchastity, and therefore, she can not give, in rebuttal, evidence of her good reputation.[19] Evidence of her general character for virtue prior to the seduction is admissible.[20] Where seduction occurs, the defendant can not give evidence of the plaintiff's general bad character between the time of the promise and the breach, in mitigation of damages.[21] The plaintiff may introduce in the first instance general evidence of her good character where the defendant has pleaded her immodest conduct and carnal knowledge with other men as defenses,[22] and testimony by defendant of having heard rumors and reports calculated to show the plaintiff in disrepute may be rebutted by showing her reputation for virtue and chastity among the people of the community.[23] The injurious reports or rumors must be shown to have a reasonable foundation.[24] Evidence of the general reputation for chastity, virtue, and morality of the plaintiff will generally be received where, in her cross examination, testimony was elicited tending to show illicit relations and resulting

[17]Butler v. Eschleman, 18 Ill. 44; Colburn v. Marble, 196 Mass. 376, 82 N. E. 28, 124 Am. St. 561; Foster v. Hanchett, 68 Vt. 319, 35 Atl. 316, 54 Am. St. 886.

[18]Smith v. Hall, 69 Conn. 651, 38 Atl. 386; Sprague v. Craig, 51 Ill. 288; Jones v. Layman, 123 Ind. 569, 24 N. E. 363; Haymond v. Saucer, 84 Ind. 3. In re Darrow (Ind. App.), 83 N. E. 1026; Wills v. Myers, 4 Ky. L. 839; Duvall v. Thurman, 2 Ohio Cir. D. C. 171, 3 Ohio Cir. Ct. 305; Leckey v. Bloser, 24 Pa. St. 401; Weeks v. Maize, 87 Tenn. 442, 10 S. W. 771, 3 L. R. A. 212; Dent v. Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. 921.

[19]Colburn v. Marble, 196 Mass. 376, 82 N. E. 28, 124 Am. St. 561; McKane v. Howard, 202 N. Y. 181, 95 N. E. 642, Ann. Cas. 1912D, 960; Leckey v. Bloser, 24 Pa. St. 401.

[20]Green v. Spencer, 3 Mo. 318, 26 Am. Dec. 672.

[21]Boynton v. Kellogg, 3 Mass. 189, 3 Am. Dec. 122.

[22]Jones v. James, 18 L. T. N. S. (Eng.) 243, 16 W. R. 762.

[23]Smith v. Hall, 69 Conn. 651, 38 Atl. 386; Jones v. Layman, 123 Ind. 569, 24 N. E. 363; In re Darrow (Ind. App.), 83 N. E. 1026.

[24]Coggins v. Cannon (S. Car.), 99 S. E. 823; Capehart v. Carradine, 4 Strob. (S. Car.) 42.

pregnancy.[25] The reputation of the plaintiff acquired after the commencement of the action may not be shown.[26]

§ 31. **Defenses—Offer to marry.**—If after the failure to marry on the appointed day an offer is made in good faith, and before the other party has signified her determination to end the matter, such an offer is a full defense to a suit for a breach of the contract.[27] And this is so, although the defendant may have been guilty of conduct that would warrant the plaintiff in declaring the engagement at an end.[28] An offer of performance after the injured party has signified an intention to terminate it, will constitute no defense,[29] but may, according to some authorities, be considered in mitigation of damages.[30] After demand upon the promisor to carry out his agreement and his refusal his obligation becomes absolute and his offer then to execute it can not be listened to.[31]

§ 32. **Defenses—Release.**—There is, of course, no liability where there has been a clear release of the party from the engagement. There was such a case where the defendant ceased his visits after being told by the plaintiff "that if he desired a change he could take it and end the matter."[32] But an agreement to release a marriage contract for a consideration, part only of which is paid down, the remainder to be paid in the future, has been held not binding since both accord and satisfaction must enter into the agreement to bar the cause of action.[33] It must appear from such

[25]Hughes v. Nolte, 7 Ind. App. 526; McKane v. Howard, 138 App. Div. 680, 123 N. Y. S. 632; Burke v. Scribner, 16 N. Bruns. 652; Jones v. James, 18 L. T. N. S. 243, 16 W. R. 762.

[26]Capehart v. Carradine, 4 Strob. (S. Car.) 42.

[27]Falk v. Burke, 93 Kans. 93, 143 Pac. 498, L. R. A. 1915B, 279; Chapman v. Brown, 192 Mo. App. 86, 179 S. W. 774; Southard v. Rexford, 6 Cow. (N. Y.) 254.

[28]Kelly v. Renfro, 9 Ala. 325, 44 Am. Dec. 441.

[29]Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; Southard v. Rexford, 6 Cow. (N. Y.) 254; Vogt v. Guidry, (Tex. Civ. App.) 220 S. W. 343; Kendall v. Dunn, 71 W. Va. 262, 76 S. E. 454, 43 L. R. A. (N. S.) 556; Connolly v. Bollinger, 67 W. Va. 30, 67 S. E. 71, 20 Ann. Cas. 1350.

[30]McCarty v. Heryford, 125 Fed. 46; Stacey v. Dolan, 88 Vt. 369, 92 Atl. 453 Ann. Cas. 1917A, 650.

[31]Johnson v. Levy, 118 La. 447, 43 So. 46, 9 L. R. A. (N. S.) 1020, 118 Am. St. 378, 10 Ann. Cas. 722.

[32]Kellett v. Robie, 99 Wis. 303, 74 N. W. 781.

[33]Erwin v. Jones, 192 Mo. App. 326, 180 S. W. 428.

an agreement that the plaintiff yielded up some advantage.[34] The plaintiff's answer to the defendant's announcement to her that he was about to marry another, that she would forgive him but it was hard to do so after waiting such long years, and that she wished him no bad luck has been held not to amount to a release.[35] The rule was the same where she wrote him, stating that his visits were not as agreeable as formerly, and that she had no expectation of seeing him again,[36] and where she wrote in answer to a blunt demand for the return of the engagement ring: "But as I see that you do not care for me, and want to call it off, you may. I do not want to thrust myself on anyone."[37] A return of ring and letters does not, as a matter of law, show a release,[38] even though the defendant had told the plaintiff that he no longer loved her, and would not marry her.[39]

A release by a woman induced by fraud of a third person, and received and acted upon by the man in good faith, is binding upon her if he had no knowledge of the fraud.[40]

A female infant authorized to enter into a contract of marriage, may release the other party from such contract.[41]

The general rule requires the release to be specially pleaded when relied on,[42] but it has been held that any evidence of a mutual rescission before the alleged breach, is admissible under the general denial.[43]

Where the defendant claims a release from the contract to marry the burden of proof is on him to show he is entitled to a release.[44] Where, however, the release is admitted, and is sought to be avoided on the ground that it was obtained by fraud and duress, the burden of so showing rests upon the plaintiff.[45]

[34]Conrad v. Bare, 29 Iowa Cir. Ct. Rep. 153.

[35]Folz v. Wagner, 24 Ind. App. 694.

[36]Homan v. Earle, 53 N. Y. 267.

[37]Nightingale v. Leith, 120 Maine 501, 115 Atl. 265.

[38]Ortiz v. Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581.

[39]Kraxberger v. Roiter, 91 Mo. 404, 3 S. W. 872, 60 Am. Rep. 262; Ortiz v. Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581.

[40]Allard v. Smith, 59 Ky. (2 Metc.) 297.

[41]Whittem v. State, 36 Ind. 196; Alexander v. Frary, 9 Ind. 481; Gavin v. Burton, 8 Ind. 69; Develin v. Riggsbee, 4 Ind. 464.

[42]Storer v. Markley, 164 Ind. 535, 73 N. E. 1081; Mabin v. Webster, 129 Ind. 430, 28 N. E. 863, 28 Am. St. 199; Kraxberger v. Roiter, 91 Mo. 404, 3 S. W. 872, 60 Am. Rep. 262; Salchert v. Reinig, 135 Wis. 194, 115 N. W. 132.

[43]Shellenbarger v. Blake, 67 Ind. 75.

[44]Kuhn v. Marquart, 45 N. Dak. 482, 178 N. W. 428.

[45]Cox v. Edwards, 120 Minn. 512, 39 N. W. 1070.

§ 33. **Pleading in general.**—In an action for breach of promise to marry, the petition, complaint, or declaration should state necessary jurisdictional facts, the mutual contract to marry, the breach thereof without fault of the plaintiff, the request or demand by the plaintiff upon the defendant to fulfill his promise, or an equivalent averment, and the damages resulting to the plaintiff by reason of such breach.[46] Both the promise[47] and the breach[48] must be directly and positively alleged, but it is not required that these matters be alleged in any particular form of words.[49] An objection that the complaint in stating the mutual promise alleges that the defendant's promise was made in consideration that the plaintiff "would" promise to marry him and not that she "did" promise, was cured by the verdict.[50] So a complaint is good after verdict, though it fails to allege that the plaintiff continues ready and willing to marry the defendant.[51]

[46]Graves v. Rivers, 123 Ga. 224, 51 S. E. 318; Waddell v. Wallace, 32 Okla. 140, 121 Pac. 245, Ann. Cas. 1914A, 692; Daggett v. Wallace, 75 Tex. 352, 13 S. W. 49, 16 Am. St. 908. An allegation that "it was agreed by, and between parties that they would get married" is an averment of a mutual promise. Cates v. McKinney, 48 Ind. 562, 17 Am. Rep. 768. An averment in a complaint in an action for the breach of a marriage contract that "defendant, in consideration of the agreement and promise of the plaintiff to marry him on request, promised and agreed to marry this plaintiff," does not amount to an allegation that the man promised to marry the woman on request, but that he promised to marry her in consideration of her promise to marry him on request, and it was not necessary to aver in the complaint a request to marry on the part of plaintiff. Folz v. Wagner, 24 Ind. App. 694, 57 N. E. 564. Mutuality of promise sufficiently alleged by averment that defendant asked plaintiff "to marry him within a reasonable time thereafter, and that plaintiff then agreed to marry said defendant within a reasonable time thereafter." Lainfiesta v. Sturges, 107 Misc. 458, 176 N. Y. S. 577. The cause of action is transitory and where the declaration sets up a contract made in Italy to be performed and broken there, a failure to allege a right of action under the Italian law did not go to the jurisdiction of the subject matter, but only to the sufficiency of the declaration. Massuco v. Tomassi, 80 Vt. 186, 67 Atl. 551.

[47]Garmong v. Henderson, 112 Maine 383, 92 Atl. 322; Roper v. Clay, 18 Mo. 383, 59 Am. Dec. 314; Connolly v. Bollinger, 67 W. Va. 30, 67 S. E. 71, 20 Ann. Cas. 1350.

[48]Garmong v. Henderson, 112 Maine 383, 92 Atl. 322.

[49]Nelson v. Sutton, 42 S. Dak. 124, 173 N. W. 158.

[50]Felger v. Etzell, 75 Ind. 417.

[51]Buelna v. Ryan, 139 Cal. 630, 73 Pac. 466; Hunter v. Hatfield, 68 Ind. 416; Schellenbarger v. Blake, 67 Ind. 75; Graham v. Martin, 64 Ind. 567; Eigenmann v. Backof, 56 Ind. 594.

A complaint which avers a promise made while one of the parties was married, but also averring a renewal thereof after such party was divorced, should be construed as based on the subsequent promise.[52]

The complaint need not aver that the parties were of marriageable age, when the contract was made, as that is presumed as to all contracts.[53] Nor need an infant plaintiff allege the consent of the parents or guardian to marriage as such consent affects only solemnization.[54]

The rule that ordinarily, the date of the contract or its breach on which the action is based is not material, applies to actions of this kind;[55] nor need it be laid under a videlicet in order to prove another time.[56] And although the day, month, and year of the promise should be alleged in the declaration, the plaintiff is not confined to proving the date alleged;[57] the time of performance is alleged with sufficient definiteness in stating it was to be performed when defendant built an addition to his place of business, or when plaintiff should give up her business and move into defendant's house,[58] but an allegation of a promise to marry upon plaintiff's request and proof that the marriage was to take place upon her mother's death, has been held a fatal variance.[59] That the plaintiff was ready to perform and fulfill the contract on her part is a material averment where no time of performance is alleged,[60] or if the promise alleged is to marry within a reasonable time.[61] In such case a request and an offer, or their equivalent must be averred, that the plaintiff is ready and willing is not sufficient.[62]

[52]Leaman v. Thompson, 43 Wash. 579, 86 Pac. 926.

[53]Tucker v. Hyatt, 144 Ind. 635; Jones v. Layman, 123 Ind. 569, 24 N. E. 363; Glascock v. Shell, 57 Tex. 215.

[54]Cannon v. Alsbury, 8 Ky. (1 A. K. Marsh.) 76, 10 Am. Dec. 709.

[55]Bogue v. Maurer (Cal. App.), 205 Pac. 56; Connolly v. Bollinger, 67 W. Va. 30, 67 S. E. 71.

[56]Heggie v. Hayes, 141 Tenn. 219, 208 S. W. 625, 3 A. L. R. 150; Dyer v. Lalor, 94 Vt. 103, 109 Atl. 30.

[57]Garmong v. Henderson, 112 Maine 383, 92 Atl. 322; Gilmore v. Mathews, 67 Maine 517; Platt v. Jones, 59 Maine 232; Heggie v. Hayes, 141 Tenn. 219, 208 S. W. 605, 3 A. L. R. 150.

[58]Clark v. Reese, 26 Tex. Civ. App. 619, 64 S. W. 783.

[59]Bailey v. Brown, 4 Cal. App. 515, 88 Pac. 518.

[60]Clements v. Moore, 11 Ala. 35; Graham v. Martin, 64 Ind. 567; Burks v. Shain, 2 Bibb. (Ky.) 341, 5 Am. Dec. 616; Garmong v. Henderson, 112 Maine 383, 92 Atl. 322; Hook v. George, 108 Mass. 324.

[61]Turner v. Baskin, 2 Ohio Dec. 224.

[62]Martin v. Patton, 11 Ky. (1 Litt.) 233; Fible v. Caplinger, 13 B. Mon. (Ky.) 464; Burnham v. Cornwell, 16 B. Mon. (Ky.) 284, 63 Am.

If the promise alleged is to marry on request, a special request should be averred,[63] but not where the promise is to marry on a certain day.[64] No request by the plaintiff need be averred where the breach is by the defendant's marriage to another.[65]

Where a count for breach of a marriage promise was joined to a count for services rendered the defendant in consideration of such promise, recovery could not be had under both counts.[66] In Rhode Island where the action for breach of promise of marriage is in assumpsit, a count thereon may be joined with one on a note.[67]

§ 34. **Pleading damages.**—As a general rule the damages that follow as a natural or proximate result of a breach of the contract need not be specifically alleged.[68] Accordingly, under a general allegation of damages, there may be a recovery not only of indemnity for pecuniary loss and disappointment, for reasonable expectation of an advantageous settlement in life, but also compensation for injury to feelings and affections and the mortification undergone by the plaintiff.[69] Compensatory damages may be recovered under a general allegation for mental suffering and injury to feelings and health,[70] but in Maine damages for loss of

Dec. 529; Grubbs v. Pence (Ky.), 73 S. W. 785. An averment in the complaint that the plaintiff was present at the time and place appointed for the marriage, and was willing and ready to perform her part, and that the defendant was absent and refused to perform his part of the engagement, is equivalent to a request and an offer. Burks v. Shain, 2 Bibb. (Ky.) 341, 5 Am. Dec. 616.

[63]Martin v. Patton, 11 Ky. (1 Litt.) 233; Turner v. Baskin, 2 Ohio Dec. 224.

[64]Graham v. Martin, 64 Ind. 567.

[65]Clements v. Moore, 11 Ala. 35; Hunter v. Hatfield, 68 Ind. 416; Graham v. Martin, 64 Ind. 567; King v. Kersey, 2 Ind. 402; Folz v. Wagner, 24 Ind. App. 694, 57 N. E. 564; Killion v. Hulen, 8 Ind. App. 494, 36 N. E. 49; Sheahan v. Barry, 27 Mich. 217; Nelson v. Sutton, 42 S. Dak. 124, 173 N. W. 158.

[66]Smith v. Hall, 69 Conn. 651, 38 Atl. 386.

[67]Dewey v. Merrill (R. I.), 36 Atl. 835.

[68]Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024.

[69]Waddell v. Wallace, 32 Okla. 140, 121 Pac. 245. Injury to affections may be evidenced. Dupont v. McAdow, 6 Mont. 226, 9 Pac. 925. Where plaintiff had deposited with defendant $500 in further consideration of the contract, it was not necessary that such fact should be pleaded, as it was part of the res gestae. Finkelstein v. Barnett, 17 Misc. 564, 40 N. Y. S. 694, 75 N. Y. St. 99.

[70]Houser v. Carmody, 173 Mich. 121, 139 N. W. 9; Hiveley v. Golnick, 123 Minn. 498, 144 N. W. 213, 49 L. R. A. (N. S.) 757, Ann. Cas. 1915A, 295.

health resulting from the breach are only recoverable if specially pleaded, and where distinguishable from those resulting from seduction and pregnancy.[71]

To authorize a recovery of exemplary punitive damages there must be appropriate allegation of malice, wantonness or recklessness in the complaint.[72] There was such an allegation where it was set out that the breach "had been wantonly, maliciously, and wilfully done for the purpose and intent of scandalizing, humiliating and seducing the plaintiff."[73] It has been held, however, that exemplary damages arising out of improper motives in entering into the contract, or any refusal to comply therewith, need not be specially pleaded.[74]

There is a conflict in the decisions as to whether damages in aggravation should be awarded for seduction, or where that is permitted, to go beyond it and allow damages for seduction, pregnancy and childbirth. So when we come to the question of pleading we find, even among the jurisdictions where such damages are allowed, there is an irreconcilable conflict as to whether the complaint or declaration should allege seduction, pregnancy and childbirth as the foundation for the introduction of evidence of those facts. Courts of very high authority hold that they should be pleaded specially;[75] other courts of equal respectability, however, sustain the contrary doctrine and hold that such damages may be given in evidence under a general allegation of a breach

[71]Tyler v. Sally, 82 Maine 128, 19 Atl. 107.

[72]Hively v. Golnick, 123 Minn. 498, 144 N. W. 213; Vine v. Casmey, 86 Minn. 74, 90 N. W. 158.

[73]Clark v. Reese, 26 Tex. Civ. App. 619, 64 S. W. 783.

[74]Jacoby v. Stark, 205 Ill. 34, 68 N. E. 557.

[75]Espy v. Jones, 37 Ala. 379; Smith v. McPherson, 176 Cal. 144, 167 Pac. 875, Ann. Cas. 1918B, 66; Hendry v. Ellis, 61 Fla. 277, 54 So. 797, 33 L. R. A. (N. S.) 702; Anderson v. Kirby, 125 Ga. 62, 54 S. E. 197, 114 Am. St. 185, 5 Ann. Cas. 103; Gunder v. Tibbetts, 153 Ind. 591, 55 N. E. 762; Haymond v. Saucer, 84 Ind. 9; Felger v. Etzell, 73 Ind. 417; Cates v. McKinney, 48 Ind. 562, 17 Am. Rep. 768; Lauer v. Banning, 140 Iowa 319, 118 N. W. 446; Herriman v. Layman, 118 Iowa 590, 92 N. W. 710; Geiger v. Payne, 102 Iowa 581, 69 N. W. 554, 71 N. W. 571; Bowes v. Sly, 96 Kans. 388, 152 Pac. 17; Burks v. Shain, 2 Bibb. (Ky.) 341, 5 Am. Dec. 616; Burnham v. Cornwell, 16 B. Mon. (Ky.) 284, 63 Am. Dec. 529; Hickey v. Kimball, 109 Maine 433, 84 Atl. 943; Tyler v. Salley, 82 Maine 128, 19 Atl. 107; Dupont v. McAdow, 6 Mont. 226, 9 Pac. 925; Baldy v. Straton, 11 Pa. St. 316; Weaver v. Bachert, 2 Pa. St. 80, 44 Am. Dec. 159; Daggett v. Wallace, 75 Tex. 352, 13 S. W. 49, 16 Am. St. 908; Dent v. Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. 921; Leavitt v. Cutler, 37

of the promise.[76] We shall not here venture an opinion as to which side of the question the weight of authority bears upon, although courts and law writers have both made that venture, but have not always been in harmony, even with themselves.[77] The reason urged for the introduction of such evidence without a special averment is, that when a contract for future marriage has been entered into, the relation between the parties is in the nature of a trust, and that the seduction of the female while thus engaged, is in itself a breach of the promise of marriage, which embraces an obligation and undertaking of protection and respect until the marriage is lawfully consummated.[78] The reasons for the rule requiring a special averment of the seduction, pregnancy and childbirth are upon the well settled doctrine that two causes of action can not be combined and prosecuted in one suit, and that any special circumstances in the aggravation of damages should be alleged in the declaration.[79] Furthermore, in this

Wis. 46; Klopfer v. Bromme, 26 Wis. 372. It is stated in Cates v. McKinney, supra, that earlier cases in that state of Whalen v. Layman, 2 Blackf. (Ind.) 194, 18 Am. Dec. 157, and King v. Kersey, 2 Ind. 402, where such evidence was introduced that it did not appear whether seduction had been pleaded or not, and moreover, when those cases were decided a woman could not prosecute an action for her own seduction. Fidler v. McKinley, 21 Ill. 308; Klopfer v. Bromme, 26 Wis. 372.

[76]Poehlmann v. Kertz, 204 Ill. 418, 68 N. E. 467, affirming 105 Ill. App. 249; Churan v. Sebesta, 131 Ill. App. 330; Logan v. Morrison, 36 Ill. App. 495; Sauer v. Schulenberg, 33 Md. 288, 3 Am. Rep. 174; Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336; Sherman v. Rawson, 102 Mass. 395; Coil v. Wallace, 24 N. J. L. 291; Jennette v. Sullivan, 63 Hun. 361, 18 N. Y. Supp. 266; Mainz v. Lederer, 21 R. I. 370, 43 Atl. 876; Coggins v. Cannon, 112 S. Car. 225, 99 S. E. 823; Williams v. Hollingsworth, 6 Baxt. (Tenn.) 12; Dent v. Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. 921. Evidence of seduction was admitted in the following cases where it is very probable there was no special averment, although that does not affirmatively appear. Berry v. De Costa, L. R. I. C. P. 331, 12 Jur. N. S. 588, 1 Harrison & K. 291, 35 L. J. C. P. N. S. 191, 14 Week. Rep. 279; Tubbs v. Van Kleek, 12 Ill. 446; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; Bennett v. Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442; Bird v. Thompson, 96 Mo. 424, 9 S. W. 788; Kniffen v. McConnell, 30 N. Y. 285; Conn v. Wilson, 2 Overt (Tenn.) 233, 5 Am. Dec. 663; Goodall v. Thurman, 1 Head. (Tenn.) 209.

[77]Dent v. Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. 921.

[78]Dent v. Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. 921, citing 3 Suth. Dam. pp. 316, 317; 2 Cedg. Dam. 147.

[79]Dent v. Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. 921. See also Haymond v. Saucer, 84 Ind. 3.

view, these matters in aggravation of damages ought to be stated in the complaint, so that the defendant may be apprised that they will be relied upon for that purpose, and therefore may be prepared to meet them.[80] It must be admitted that this is in line with the correct principles of pleading, for special damages which are not the natural and usual result of the acts complained of, should be alleged and proved;[81] and it can not be contended that seduction and the birth of a bastard child are the direct, natural, and usual results of the contract to marry or the breach of it.[82] But where the defendant has pleaded as a defense the unchastity of the plaintiff it would be proper to allow her to show pregnancy and childbirth by defendant without having pleaded special damages.[83] In some states giving the woman a right of action for her own seduction, it may be pleaded as an element of damages in an action for breach of a marriage promise.[84] Other states deny this right.[85]

In a case where the complaint contained no allegation of illicit intercourse between the parties and no answer was filed, it was held that evidence of such illicit intercourse was incompetent to prove a promise to marry or enhance the damages or for any other purpose.[86]

A claim for the loss of a right of dower in specific property must be pleaded.[87]

§ 35. **Pleading defenses.**—Non assumpsit or the general denial, and not "not guilty" is the proper general plea to this action.[88]

[80]Hendry v. Ellis, 61 Fla. 277, 54 So. 797; Klopfer v. Bomme, 26 Wis. 372.

[81]Hendry v. Ellis, 61 Fla. 277, 54 So. 797; Moses v. Autuono, 56 Fla. 499, 47 So. 925, 20 L. R. A. (N. S.) 350.

[82]Hendry v. Ellis, 61 Fla. 277, 54 So. 797; Giese v. Schultz, 53 Wis. 462, 10 N. W. 598.

[83]Clark v. Phillips, 4 Ky. L. 826.

[84]Lanigan v. Neely (Cal.), 89 Pac. 441; Cates v. McKinney, 48 Ind. 562, 17 Am. Rep. 768; King v. Kersey, 2 Ind. 402.

[85]Gring v. Lerch, 112 Pa. 244, 3 Atl. 841, 56 Am. Rep. 314; Weaver v. Bachert, 2 Pa. St. 80, 44 Am. Dec. 159; Perkins v. Hersey, 1 R. I. 493. Conn v. Wilson, 2 Overt (Tenn.), 233, 5 Am. Dec. 663.

[86]Felger v. Etzell, 75 Ind. 417.

[87]Smith v. Compton, 67 N. J. L. 548, 52 Atl. 386, 58 L. R. A. 480.

[88]Wilkinson v. Pomeroy, Fed. Cas. 17675, 10 Blackf. 524.

Matters in bar[89] as well as matters in mitigation,[90] in most jurisdictions, should be specially pleaded. Among other things the cases hold that defendant should specially plead such matters as undesirable traits or objectional characteristics of the plaintiff,[91] immoral or unchaste character of plaintiff;[92] diseases with which plaintiff is affected;[93] the ill health of the defendant;[94] fraud in obtaining the marriage promise;[95] release by plaintiff from the contract to marry;[96] a rescission or abandonment of the contract to marry;[97] and the legal incapacity of the plaintiff[98] or defendant[99] to enter into the contract.

[89]Kantzler v. Grant, 2 Ill. App. 236; Tucker v. Hyatt, 144 Ind. 635, 41 N. E. 1047, 43 N. E. 872; Maben v. Webster, 129 Ind. 430, 28 N. E. 863, 28 Am. St. 199; Walker v. Johnson, 6 Ind. App. 600, 33 N. E. 267, 34 N. E. 100; Goddard v. Westcott, 82 Mich. 180, 46 N. W. 242; Kniffen v. McConnell, 30 N. Y. 285; Thompkins v. Wadley, 3 Thomp. & C. 424.

[90]Vierling v. Binder, 113 Iowa 337, 85 N. W. 621, citing Pom. Rem. §695.

[91]Gross v. Hochstim, 72 Misc. 343, 130 N. Y. S. 315.

[92]Bowman v. Bowman, 153 Ind. 498, 55 N. E. 422; Hunter v. Hatfield, 68 Ind. 416; Herrimann v. Layman, 118 Iowa 590, 92 N. W. 710; Cox v. Edwards, 120 Minn. 512, 139 N. W. 1070; Kniffen v. McConnell, 30 N. Y. 285; Freeman v. Bennett (Tex. Civ. App.), 195 S. W. 238; Elliott on Evidence §1882. But see Herriman v. Layman, 118 Iowa 590, 92 N. W. 710; Royal v. Smith, 40 Iowa 615; Denslow v. Van Horn, 16 Iowa 476; Von Storch v. Griffin, 77 Pa. St. 504; Foster v. Hanchett, 68 Vt. 319, 35 Atl. 316, 54 Am. St. 886.

[93]Vierling v. Binder, 113 Iowa 337, 85 N. W. 621; Welker v. Wallace, 117 Wash. 52, 200 Pac. 561. That plaintiff was subject to venereal diseases is a matter in bar and need not be specially pleaded. Kantzler v. Grant, 2 Ill. App. 236.

[94]Edge v. Griffin (Tex. Civ. App.), 63 S. W. 148.

[95]Anderson v. Kirby, 125 Ga. 62, 54 S. E. 197, 5 Ann. Cas. 103, 114 Am. St. 185; Leavitt v. Cutler, 37 Wis. 46; Klopfer v. Bromme, 26 Wis. 372.

[96]Storer v. Markley, 164 Ind. 535, 73 N. E. 1081; Mabin v. Webster, 129 Ind. 430, 28 N. E. 863, 28 Am. St. 199; Kraxberger v. Roiter, 91 Mo. 404, 3 S. W. 872, 60 Am. Rep. 262; Salchert v. Reinig, 135 Wis. 194, 115 N. W. 132.

[97]Storer v. Markley, 164 Ind. 535, 73 N. E. 1081, citing Jordan v. Indianapolis Water Co., 159 Ind. 337, 64 N. E. 680; Mabin v. Webster, 129 Ind. 430, 28 N. E. 863, 28 Am. St. 199; McKyring v. Bull, 16 N. Y. 297, 69 Am. Dec. 696; Schaus v. Manhattan Gas Co., 14 Abb. Prac. (N. S.) 371; Salchert v. Reinig, 135 Wis. 194, 115 N. W. 132; Bliss, Code Pl. §§ 327, 352. But see Shellenbarger v. Blake, 67 Ind. 75.

[98]Tucker v. Hyatt, 144 Ind. 635, 41 N. E. 1047, 43 N. E. 872; Walker v. Johnson, 6 Ind. App. 600, 33 N. E. 267, 34 N. E. 100; Chapman v. Brown, 192 Mo. App. 78, 179 S. W. 774.

[99]Rush v. Wick, 31 Ohio St. 521, 27 Am. Rep. 523

A plea alleging that the plaintiff conspired with another to defraud the defendant by setting up a false claim that the latter had promised to marry should state the facts which induced the promise.[1] A cause of action for fraud inducing a marriage promise is a proper subject of counterclaim in an action for breach of marriage promise.[2]

Where seduction is alleged in aggravation of damages a plea of previous unchastity must aver that this fact was not known to the defendant when the promise was made.[3]

§ 36. **Evidence—Burden of proof.**—The burden of proof is upon the plaintiff to show a mutual promise,[4] that is, an offer and acceptance.[5] The plaintiff must further show the breach,[6] the readiness of the plaintiff to perform, or request of the defendant to fulfil his promise[7] and the damages resulting from the breach.[8] If, however, the defendant wishes to take advantage of a special matter by way of defense, the burden of producing evidence may be upon him as to such matter.[9] Thus under a claim of release from the contract, the burden of proof is upon the defendant who urges it,[10] unless it is admitted and sought to be voided on the ground of fraud, in which event the burden is cast upon the plaintiff.[11]

[1]Coble v. Eltzroth, 125 Ind. 429, 25 N. E. 544.

[2]Gross v. Hochstim, 72 Misc. 343, 130 N. Y. S. 315.

[3]Bowman v. Bowman, 153 Ind. 498, 55 N. E. 422.

[4]Garmong v. Henderson, 115 Maine 422, 99 Atl. 177; Hook v. George, 108 Mass. 324; Lynch v. Figge, 200 App. Div. 92, 192 N. Y. S. 873; Bleiler v. Koons, 132 Pa. St. 401, 19 Atl. 140.

[5]Lewis v. Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385; Ellis v. Guggenheim, 20 Pa. St. 287.

[6]Folz v. Wagner, 24 Ind. App. 694, 57 N. E. 564; Hook v. George, 108 Mass. 324; Olson v. Saxton, 86 Ore. 670, 169 Pac. 119.

[7]Rime v. Rater, 108 Iowa 61, 78 N. W. 835; Burke v. Shaver, 92 Va. 345, 23 S. E. 749; Olson v. Solverson, 71 Wis. 663, 38 N. W. 329.

[8]Rime v. Rater, 108 Iowa 61, 78 N. W. 835; Hook v. George, 108 Mass. 324; Kniffen v. McConnell, 30 N. Y. 285; Glascock v. Shell, 57 Tex. 215; Giese v. Schultz, 53 Wis. 462, 10 N. W. 598.

[9]Bowman v. Bowman, 153 Ind. 498, 55 N. E. 422; Bell v. Eaton, 28 Ind. 468, 92 Am. Dec. 329; Johnson v. Travis, 33 Minn. 231, 22 N. W. 624; Liese v. Meyer, 143 Mo. 547, 45 S. W. 282; Kelley v. Highfield, 15 Ore. 277, 14 Pac. 744; Gring v. Lerch, 112 Pa. St. 244, 3 Atl. 841, 56 Am. Rep. 314; Foster v. Hanchett, 68 Vt. 319, 35 Atl. 316, 54 Am. St. 886.

[10]Kuhn v. Marquart, 45 N. Dak. 482, 178 N. W. 428.

[11]Cox v. Edwards, 120 Minn. 512, 139 N. W. 1070.

§ 37. **Evidence of contract.**—In determining whether there was a promise of marriage, consideration may be given to the conduct and behavior of the parties, as contracting parties are always presumed to intend what their conduct fairly indicates.[12] The existence of the engagement may be proved either by direct evidence of an express promise, or by evidence of such facts and circumstances as will lead to a reasonable inference of such engagement.[13] The courts are inclined to permit a wide range of inquiry as to the conduct of the parties.[14] The contract is evidenced ordinarily by many promises made at many different times, but there is only one contract.[15] No particular form of words is necessary to constitute the contract, it is sufficient if such language is used as shows that the minds of the parties met.[16]

The existence of the contract may be implied from the conduct and deportment of the parties toward each other;[17] from their social relations, extending through a period of many years;[18] and from such conduct and behavior as are customary of persons under contract of marriage.[19] But mere attention paid by a man

[12]Smith v. McPherson, 176 Cal. 144, 167 Pac. 875; Vaughan v. Smith, 177 Ind. 111, 96 N. E. 594, Ann. Cas. 1914C, 1092; Adams v. Byerly, 123 Ind. 368, 24 N. E. 130; Dean v. Skiff, 128 Mass. 174; Kelley v. Riley, 106 Mass. 339, 8 Am. Dec. 336; Wightman v. Coates, 15 Mass. 1, 8 Am. Dec. 77; Ray v. Smith, 9 Gray (Mass.) 141; Hoitt v. Moulton, 21 N. H. 586; Corduan v. McCloud, 87 N. J. L. 143, 93 Atl. 724, L. R. A. 1915D, 1190; Jacob's Adm'r. v. Canine, 7 Ohio App. 268; Wagenseller v. Simmers, 97 Pa. St. 465; Whitcomb v. Wolcott, 21 Vt. 368. See notes, 36 L. R. A. (N. S.) 390 (seduction in aggravation of damages); L. R. A. 1918B, 68. Any representations which the defendant may have made to the plaintiff concerning his wealth, whether true or false, would be admissible for the purpose of explaining the situation, surroundings, acts, conduct, and the relation of the parties towards each other at the time the marriage contract was made. Humphrey v. Brown, 89 Fed. 640. Jury may consider fact that he addressed as "mother" the mother of plaintiff and helped in selecting her clothes for the wedding. Dyer v. Lalor, 94 Vt. 103, 109 Atl. 30.

[13]Smillie v. Mendoza, 68 Colo. 461, 190 Pac. 533; Morgan v. Muench 181 Iowa 719, 156 N. W. 819; Garmong v. Henderson, 115 Maine 422, 99 Atl. 177; Booren v. McWilliams, 34 N. Dak. 74, 157 N. W. 698; Dyer v. Lalor, 94 Vt. 103, 109 Atl. 30.

[14]Bischoff v. Harris, 198 Mich. 198, 164 N. W. 389.

[15]Garmong v. Henderson, 112 Maine 383, 92 Atl. 322.

[16]Walters v. Stockberger, 20 Ind. App. 277, 50 N. E. 763; Hinckley v. Jewett, 86 Nebr. 464, 125 N. W. 1086; Homan v. Earle, 53 N. Y. 267.

[17]Russell v. Cowles, 81 Mass. (15 Gray) 391, 77 Am. Dec. 391.

[18]Blackburn v. Mann, 85 Ill. 222.

[19]Johnson v. Levy, 122 La. 118, 47 So. 422, 16 Ann. Cas. 978.

to a woman although exclusive and long continuing will not warrant the presumption of a marriage promise,[20] and the same is true of professions of attachment by the defendant,[21] and of declarations of readiness to marry the plaintiff not made in her presence,[22] though with other facts these may be evidences of the promise.[23]

Vague admissions by defendant are not evidence of promise of marriage where it is not clear that they refer to such a promise.[24] So declarations by the defendant's mother made to the plaintiff in the defendant's absence and not communicated to him, are inadmissible to prove the promise.[25] While courtship alone is not evidence of a promise to marry,[26] it is a most material fact on the question as to whether a mutual promise has been made.[27]

If a man by his acts and declarations induces a woman to believe that a marriage engagement exists between them, which belief she acts upon, and he, after knowing this, still continues, a presumption of a contract is raised which is binding upon him.[28] Where evidence of the conduct and language of the parties are such as clearly to indicate a mutual engagement and understanding to marry either on a day fixed or within a reasonable time, the contract is sufficiently established.[29]

While evidence that the defendant had raped the plaintiff is admissible as part of the history of the case, it is inadmissible to corroborate a claim that a promise of marriage had been made and accepted.[30]

A previous contract to marry may be shown where a renewal

[20]Munsen v. Hastings, 12 Vt. 346, 36 Am. Dec. 345.

[21]Weaver v. Bachert, 2 Penn. 80, 44 Am. Dec. 159.

[22]Cole v. Cottingham, 8 Car. & P. 75; Russell v. Cowles, 81 Mass. (15 Gray), 391.

[23]Burnham v. Cornwell, 16 B. Mon. (Ky.) 284, 63 Am. Dec. 529.

[24]Weaver v. Bachert, 2 Penn. 80, 44 Am. Dec. 159.

[25]Lawrence v. Cooke, 56 Maine 187, 96 Am. Dec. 443.

[26]Burnham v. Cornwell, 16 B. Mon. (Ky.) 284, 63 Am. Dec. 520.

[27]Homan v. Earle, 53 N. Y. 267.

[28]Homan v. Earle, 53 N. Y. 267; Perkins v. Hersey, 1 R. I. 493.

[29]Adams v. Byerly, 123 Ind. 368, 24 N. E. 130; Haymond v. Saucer, 84 Ind. 3; Homan v. Earle, 53 N. Y. 267; Southard v. Rexford, 20 Wkly. Rep. 752, 6 Cow. (N. Y.) 254; Hutton v. McAnsett, 6 Mod. 172.

[30]Lauer v. Banning, 140 Iowa 319, 118 N. W. 446.

thereof is relied upon by the plaintiff.[31] Corroboration of the testimony of the plaintiff is not demanded.[32]

A resolution by a fraternal lodge of which both parties were members congratulating them upon their supposed marriage was held properly admitted in evidence as tending to show the close relations of the parties.[33]

Very generally, where the parties themselves are upon the stand and state all that was said and done, there is not much room for inference that something else was said or done but the question is whether the facts proved are sufficient to constitute a contract.[34]

§ 38. **Evidence of contract—Letters.**—Correspondence between the parties about the time of the alleged engagement and containing matter from which the existence of the engagement contract may be inferred are clearly admissible.[35] Letters in the possession of the plaintiff may be presumed to have been written to plaintiff, and it is said to be the duty of the defendant, if he acknowledges the letters to prove they were intended for another, when he disputes the rightful possession of the letters by plaintiff.[36] Where letters are placed in evidence the replies may also be used in rebuttal.[37] Where the plaintiff introduces the defendant's letters, there is no presumption against defendant for his failure to produce plaintiff's letters in reply, for they are at best, only her declaration and a party is not bound to produce the declarations of his adversary.[38]

The contents of letters may be shown where the letters themselves can not be produced, after laying the proper foundation, even, in some instances it has been so held, when the party wish-

[31]McKee v. Mouser, 131 Iowa 203, 108 N. W. 228. A mere rehearsal of the terms of the previous contract will not constitute a new promise, and a conversation which does nothing more than go over the substance of a previous understanding, for the purpose of seeing if it is still satisfactory, will not create a new engagement. Parrish v. Parrish, 67 Kans. 323, 72 Pac. 844; Odell v. Webendorfer, 50 App. Div. 579, 64 N. Y. S. 451.

[32]Thompson v. Scott, 34 N. Dak. 503, 159 N. W. 21.

[33]Osmun v. Winters, 30 Ore. 177, 46 Pac. 780.

[34]Homan v. Earle, 53 N. Y. 267.

[35]Smillie v. Mendoza, 68 Colo. 461, 190 Pac. 533; Judy v. Sterrett, 52 Ill. App. 565, affd. 153 Ill. 94, 38 N. E. 633; Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936; Tefft v. Marsh, 1 W. Va. 38.

[36]Tefft v. Marsh, 1 W. Va. 38.

[37]Richmond v. Roberts, 98 Ill. 472; Vanderpool v. Richardson, 52 Mich. 338, 17 N. W. 936.

[38]Law v. Woodruff, 48 Ill. 399.

ing to show the contents destroyed the letters,[39] but this is not always so.[40] The letters are, of course, the best evidence of their contents. Even where the plaintiff had been in possession of all the correspondence between the parties, and had destroyed or refused to produce a portion of them, it was held that she might give in evidence, any letters of defendant containing admissions of the existence of the contract, and of its breach by him. She might even give in evidence a letter replying to one which was destroyed or not produced. She is not, however, bound to do so, but may leave it to the defendant upon cross examination or otherwise, to offer any competent evidence of them, or of their contents if he wishes.[41] Before the secondary evidence of the contents of letters lost or destroyed may be introduced it is for the court in the first place to determine whether such letters have been lost or destroyed, and it is then for the court to determine from the evidence, whether or not such loss and destruction was for a dishonest purpose.[42]

The plaintiff may prove by parol that letters have passed between the parties,[43] and this, even without producing them.[44] Love letters written by the plaintiff to a third person after the breach may be received to show that her grief because of the breach had greatly abated.[45]

§ 39. **Evidence of contract—Opinions.**—While it is true, as a general rule, that witnesses may not give their opinions to a jury, there are exceptions and a breach of promise case is one of them. There are a thousand nameless things indicating the distance and degree of the tender passion which language can not specify. The opinion of witnesses on this subject, must be derived from a series of instances passing under their observation, which yet they could never detail to a jury.[46] The plaintiff's anxiety of mind, if produced by defendant's violation of his promise, is an element to be

[39]Shields v. Lewis, 20 Ky. L. 1601, 49 S. W. 803; Rutter v. Collins, 96 Mich. 510, 56 N. W. 93.

[40]Tobin v. Shaw, 45 Maine 331, 71 Am. Dec. 547.

[41]Stone v. Sanborn, 104 Mass. 319, 6 Am. Rep. 238.

[42]Tobin v. Shaw, 45 Maine 331, 71 Am. Dec. 547.

[43]Conaway v. Shelton, 3 Ind. 334; in note Rutter v. Collins, 96 Mich. 510, 56 N. W. 93, holding that plaintiff may introduce copies of letters sent in reply to defendant's, where defendant says the letters are destroyed.

[44]Conaway v. Shelton, 3 Ind. 334; Geiger v. Payne, 102 Iowa 581, 69 N. W. 554, 71 N. W. 571; Stone v. Sanborn, 104 Mass. 319, 6 Am. Rep. 238.

[45]Coleman v. McIntosh, 184 Ky. 370, 211 S. W. 872.

[46]McKee v. Nelson, 4 Cow. (N. Y.) 355, 15 Am. Dec. 384.

considered; and in pursuance thereof the testimony of a witness as to the mental difference he observed in the plaintiff after defendant ceased to visit her, is admissible.[47] The declarations and manifestations of grief by the bride in the presence of her mother and guests assembled, on the failure of the bridegroom, the defendant, to appear at the time and place appointed for the wedding may be testified to by witnesses.[48] Opinion evidence is admissible to prove whether or not the plaintiff was attached to the defendant, and the like.[49] Witnesses may testify that the plaintiff was down-hearted, after receiving information that the party to whom she was engaged had married another woman.[50]

The plaintiff's neighbors and intimate friends may testify as to their opinion of the amount of damages she has sustained.[51]

§ 40. **Questions for court and jury.**—In an action for breach of promise to marry, whether the facts sworn to constitute a contract to marry, is a matter of law for the court;[52] but whether the contract has been made is a jury question to be determined from all the testimony adduced.[53]

§ 41. **Damages in general.**—Although in form actions for breach of contract to marry are in assumpsit, yet when treating the question of damages the court have from the beginning dealt with the cause as if it had been an action in tort.[54] Damages are fixed, as in other tort cases, by the jury, subject to the same general restrictions.[55] In fixing these damages the jury may take

[47]Tobin v. Shaw, 45 Maine 331, 71 Am. Dec. 547.

[48]Wilson v. Smelser, 13 Ind. App. 31, 41 N. E. 76; Hughes v. Nolte, 7 Ind. App. 526. See also South & N. Ala. R. Co. v. McLendon, 63 Ala. 266; Chicago & E. I. R. Co. v. Randolph, 199 Ill. 126, 65 N. E. 142; Isherwood v. H. L. Jenkins Lumber Co., 87 Minn. 388, 92 N. W. 230; Werner v. Chicago & N. W. R. Co., 105 Wis. 300, 81 N. W. 416; Wright v. Fort Howard, 60 Wis. 119, 18 N. W. 750, 50 Am. Rep. 350.

[49]Jones v. Fuller, 19 S. Car. 66, 45 Am. Rep. 761.

[50]Robertson v. Craver, 88 Iowa 381, 55 N. W. 492.

[51]Jones v. Fuller, 19 S. Car. 66, 45 Am. Rep. 761.

[52]Yale v. Curtis, 151 N. Y. 598, 45 N. E. 1125.

[53]Fletcher v. Ketcham, 160 Iowa 364, 141 N. W. 916.

[54]Perry v. Orr, 35 N. J. L. 295; McKane v. Howard, 202 N. Y. 181, 95 N. E. 642; Thorn v. Knapp, 42 N. Y. 474, 1 Am. Rep. 561; Mainz v. Lederer, 24 R. I. 23, 51 Atl. 1044; Drury v. Merrill, 20 R. I. 2, 36 Atl. 835; Malone v. Ryan, 14 R. I. 614; notes, 3 L. R. A. 213, 5 Ann. Cas. 108.

[55]Smillie v. Mendoza, 68 Colo. 461, 190 Pac. 533; Johnson v. Levy, 122 La. 118, 47 So. 422, 16 Ann. Cas. 978; Hahn v. Bettingen, 81 Minn. 91, 83 N. W. 467, 50 L. R. A. 669; Chel-

into consideration all facts and circumstances of the case and the conduct of both parties toward each other, and particularly the conduct of the defendant in his whole intercourse with and treatment of the plaintiff, in connection with the making and breach of the contract, and afterwards up to and including the defense and trial of the action.[56]

No fair and reasonable estimate of the damages can be made without taking into consideration the circumstances under which the breach occurred, and the condition in which the woman was left in consequence.[57]

It may be said of this action, as has been said in regard to an action for seduction, that it is altogether anomalous in its character, and the ordinary rules of evidence can not in all their strictness be applied to it, without defeating its essential object.[58]

The plaintiff may show circumstances of contumely and aggravation attending the refusal to perform the contract of marriage though this may involve a slander, whether actionable or not.[59] Other cases, however, hold that slanderous words uttered by the defendant of the plaintiff, either before or after the beginning of the suit, may not be shown, but are the subject of a distinct and separate action.[60] The expense of supporting the child of the parties is not an element of damages in an action for breach of promise.[61] The amount of damages in any case is within the sound discretion of the jury within the limits of the testimony.[62]

§ 42. **Compensatory damages.**—Compensatory damages are the damages that proximately result from the breach of the

lis v. Chapman, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784; Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. 914; Daggett v. Wallace, 75 Tex. 352, 13 S. W. 49, 16 Am. St. 908; Fisher v. Kenyon, 56 Wash. 8, 104 Pac. 1127.

[56]Reed v. Clark, 47 Cal. 194; Tubbs v. Van Kleek, 12 Ill. 446; Lawrence v. Cooke, 56 Maine 187, 96 Am. Dec. 443; Grant v. Willey, 101 Mass. 356; Johnson v. Jenkins, 24 N. Y. 252; Kelly v. Highfield, 15 Ore. 277, 14 Pac. 744; Baldy v. Stratton, 11 Pa. St. 316; Mainz v. Lederer, 24, R. I. 23, 51 Atl. 1044. But see Dent v. Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. 921 (evidence as to matters occurring after commencement of action not admissible).

[57]Anderson v. Kirby, 125 Ga. 62, 54 S. E. 197; Parker v. Forehand, 99 Ga. 743, 28 S. E. 400.

[58]Stiles v. Tilford, 10 Wend. (N. Y.) 338.

[59]Lawrence v. Cooke, 56 Maine 187, 96 Am. Dec. 445; Chesley v. Chesley, 10 N. H. 327.

[60]Greenup v. Stoker, 2 Gillman 7 Ill. 688; Dunlap v. Clark, 25 Ill. App. 573.

[61]Johnson v. Levy, 122 La. 118, 47 So. 422, 16 Ann. Cas. 978; Smith v. Braun, 37 La. Ann. 225.

[62]Gerlinger v. Frank, 74 Ore. 517, 145 Pac. 1069.

promise of marriage.[63] They include among other things the plaintiff's pecuniary loss;[64] the injury to her prospects in life and reasonable expectation of an advantageous settlement in life;[65] the loss she will suffer in not coming into the property of the party with whom she contracted;[66] the loss of right of dower when properly pleaded;[67] the loss of opportunity, during the engagement, to contract a marriage with another;[68] the loss of time and expense incurred in preparation for marriage;[69] injury to

[63]Bickel v. Powers, 208 Ill. App. 490; Cimaran v. Seiversa, 131 Ill. App. 330; Bowes v. Sip, 96 Kans. 388, 152 Pac. 17; Duff v. Judson, 160 Mich. 396, 125 N. W. 371; Fisher v. Oliver, 172 Mo. App. 18, 154 S. W. 452; Kendall v. Dunn, 71 W. Va. 262, 76 S. E. 454.

[64]Schilling v. Ostem (Del. Super.), 108 Atl. 741; Lawrence v. Cooke, 56 Maine 187, 96 Am. Dec. 443 (loss of support); Coolidge v. Neat, 129 Mass. 146; Bennett v. Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442; Sheahan v. Barry, 27 Mich. 217; Hahn v. Bettingen, 81 Minn. 91, 83 N. W. 467, 50 L. R. A. 669; Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. Rep. [illegible]; [illegible] 129 Iowa 390, 105 N. W. 679, 72 Am. St. Rep. [illegible]; Daggett v. Wallace, 15 Iowa 114, 83 Am. Dec. 407; Am. St. Rep. [illegible]; Kendall v. Dunn, 71 W. Va. 262, 76 S. E. 454, 43 L. R. A. (N. S.) 556. See also James v. Biddington, 6 C. & P. 589; Berry v. Da Costa, L. R. 1 C. P. 331. [illegible] the evidence does not show the cost of a permanent home, the money value of such a home should not be included. Lawrence v. Clark, 25 Ill. App. 573.

[65]Thrash v. Pulliam, 191 Ind. 22, Brown v. Dill, 104 Tenn. 251, 56 S. W. 849, 52 L. R. A. 660; note 41 L. R. A. (N. S.) 483.

[66]Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336; Bennett v. Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442; Miller v. Rosier, 31 Mich. 478; Hahn v. Bettingen, 81 Minn. 91, 83 N. W. 467, 50 L. R. A. 669; Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854; Kendall v. Dunn, 71 W. Va. 262, 76 S. E. 454, 43 L. R. A. (N. S.) 556. See also James v. Biddington, 6 C. & P. 589; Berry v. DeCosta, L. R. 1 C. P. 331.

[67]Thrash v. Pulliam, 191 Ind. 22, [illegible] 129 N. W. 386, 31 L. R. A. (N. S.) 1202.

[68]Pearson v. Bateman, 55 Kans. 460, 85 Pac. 566; Hively v. Golnick, 123 Minn. 498, 144 N. W. 213, 49 L. R. A. (N. S.) 757, Ann. Cas. 1915A, 295; Klitzke v. Davis, 172 Wis. 425, 179 N. W. 586.

[69]Reed v. Clark, 47 Cal. 194; Fidler v. McKinney, 21 Ill. 308; Dunlap v. Clark, 25 Ill. App. 573; Coolidge v. Neat, 129 Mass. 146; Grant v. Wiley, 101 Mass. 356; Smith v. Sherman, 4 Cush. (Mass.) 408; Russell v. Cowles, 15 Gray (Mass.) 582; Hahn v. Bettingen, 81 Minn. 91, 83 N. W. 467, 50 L. R. A. 669; Yale v. Curtiss, 151 N. Y. 398, 45 N. E. 1125; Mainz v. Lederer, 24 R. I. 23, 51 Atl. 1044. May not recover entire amount where it is not shown that things purchased could not be used by plaintiff. Vogt v. Guidry (Tex. Civ. App.), 220 S. W. 343; notes, 63 Am. Dec. 545, 546; 41 L. R. A. (N. S.) 842. Houser v. Carmody, 173 Mich. 121, 139 N. W. 9.

health,[70] and seduction where that has occurred;[71] mental suffering and wounded feelings;[72] shock to nervous system;[73] injury to her affections and wounded pride or reputation;[74] the plaintiff's lack of independent means;[75] indignities,[76] and humiliation suffered by the plaintiff;[77] and ostracism as to her social position in her home and family due to the defendant's conduct.[78] Notwithstanding her second marriage to another substantive damages may be allowed.[79] But the breaking of an engagement by the plaintiff with a former fiancee at the solicitation of the defendant can not be considered in estimating her damages.[80] Neither may the jury consider possible gifts to the defendant

[70]Hahn v. Bettingen, 81 Minn. 91, 83 N. W. 467, 50 L. R. A. 669. Rubin v. Klemer (R. I.), 114 Atl. 131.

[71]Tyler v. Salley, 82 Maine 128, 19 Atl. 107; Wrynn v. Downey, 27 R. I. 454, 63 Atl. 401, 4 L. R. A. (N. S.) 615; Giese v. Shultz, 65 Wis. 487, 27 N. W. 353 See also Stewart v. Anderson, 111 Iowa 329, 82 N. W. 770.

[72]Anderson v. Kirby, 125 Ga. 62, 54 S. E. 197, 114 Am. St. 185, 5 Ann. Cas. 103; Parker v. Forehand, 99 Ga. 743, 28 S. E. 400; Churan v. Sebesta, 131 Ill. App. 330; Tobin v. Shaw, 45 Maine 331, 71 Am. Dec. 547; Sauer v. Schulenberg, 33 Md. 288, 3 Am. Rep. 174; Houser v. Carmody, 173 Mich. 121, 139 N. W. 9; Sheahan v. Barry, 27 Mich. 218; Bukowski v. Kuznia (Minn.), 186 N. W. 311; Liese v. Meyer, 143 Mo. 547, 45 S. W. 282; Wilbur v. Johnson, 58 Mo. 600; Wells v. Padgett, 8 Barb. (N. Y.) 323; Wadsworth v. Western Union Tel. Co., 86 Tenn. 695, 8 S. W. 574, 6 Am. St. 864; Ortiz v. Navarro, 10 Tex. Civ. App. 195, 30 S. W. 581; note, 41 L. R. A. (N. S.) 842.

[73]Dyer v. Lalor, 94 Vt. 103, 109 Atl. 30.

[74]Johnson v. Levy, 118 La. 447, 43 So. 46, 9 L. R. A. (N. S.) 1020, 118 Am. St. 328, 10 Ann. Cas. 722, Densmore v. Thurston, 114 Maine 554, 96 Atl. 1068; Sauer v. Schulenberg, 33 Md. 288, 3 Am. Rep. 174; Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936; Hahn v. Bettingen, 81 Minn. 91, 83 N. W. 467, 50 L. R. A. 667; Fisher v. Oliver, 172 Mo. App. 18, 154 S. W. 453; Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. 302; Brisack v. King, 199 App. Div. 213, 191 N. Y. S. 477; Greenberg v. Ergang, 179 N. Y. S. 647; Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. 914; Daggett v. Wallace, 75 Tex. 352, 13 S. W. 49, 16 Am. St. 908; Kendall v. Dunn, 71 W. Va. 262, 76 S. E. 454, 43 L. R. A. (N. S.) 556.

[75]Mainz v. Lederer, 24 R. I. 23, 51 Atl. 1044; Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936.

[76]Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936.

[77]Liebrandt v. Sorg, 133 Cal. 571, 65 Pac. 1098; Reed v. Clark, 47 Cal. 194; Haymond v. Saucer, 84 Ind. 3.

[78]Mainz v. Lederer, 52 R. I. 336, 51 Atl. 1044.

[79]Fisher v. Barber, 62 Tex. Civ. App. 34, 130 S. W. 871.

[80]Hahn v. Bettingen, 81 Minn. 91, 83 N. W. 467, 50 L. R. A. 669; Trammell v. Vaughan, 158 Mo. 1214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. 302.

by will.[81] Although the woman may enter into the marriage engagement for mercenary reasons only yet she may still recover, but her damages will be limited to her actual pecuniary loss,[83] and, likewise, the defendant will be liable in compensatory damages where he entered into the engagement with malice.[84] The depth of the devotion of plaintiff may be shown,[85] as, for example, that she had transferred her membership from her own church to that to which he belonged,[86] and in this connection the length of the engagement may be considered.[87]

Recovery of special damages has been held warranted where plaintiff abandoned a lucrative business and rendered services and incurred expenses while attending to defendant's business at his request and in reliance upon his promise to marry her.[88]

§ 43. **Mitigation of damages.**—The motives of the defendant if they can be ascertained from his declarations and conduct in breaching his promise to marry are always pertinent on the question of the measure of damages and, if such declarations and conduct show that his motives were wanton and ruthless the injury is aggravated and the damages are enhanced. On the other hand if his motives are consistent with a just appreciation of his duties and obligations, if they are not bad and if his conduct does not show that they were cruel and malicious they may go in mitigation of damages.[89]

Any conditions of mind or body which renders either party to the contract less fitted to fill the position of either husband or

[81]O'Brien v. Manning, 101 Misc. 123, 166 N. Y. S. 760.

[83]O'Brien v. Manning, 101 Misc. 123, 166 N. Y. S. 760; Wolters v. Shultz, 1 Misc. 196, 21 N. Y. S. 768.

[84]Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. 302, in which the court held that such motives were not a ground of exemplary damages, being only in aggravation increasing compensatory damages.

[85]Fisher v. Oliver (Mo. App.), 154 S. W. 453.

[86]MacElree v. Wolfersberger, 59 Kans. 105, 52 Pac. 69.

[87]Olmstead v. Hay, 112 Iowa, 349, 83 N. W. 1056; Lawrence v. Cooke, 56 Maine 187, 96 Am. Dec. 443; Fisher v. Oliver (Mo.), 154 S. W. 453; Mainz v. Lederer, 24 R. I. 23, 51 Atl. 1044, 59 L. R. A. 954, 96 Am. St. 702; Drury v. Merrill, 20 R. I. 2, 36 Atl. 835; Massucco v. Tomassi, 78 Vt. 188, 62 Atl. 57.

[88]Sanborn v. Bay, 194 Fed. 351.

[89]Thorn v. Knapp, 42 N. Y. 474, 1 Am. Rep. 561; Johnson v. Jenkins, 24 N. Y. 252. See also Kelly v. Renfro, 9 Ala. 325, 44 Am. Dec. 441; Mabin v. Webster, 129 Ind. 430, 28 N. E. 863, 28 Am. St. 199; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; note, 63 Am. Dec. 548.

wife is a mitigating fact.[90] The defendant may, among other things, show that the plaintiff does not care for him in the proper manner;[91] that she possesses undesirable traits or objectional characteristics;[92] that she has been abusive of his mother and sisters;[93] that plaintiff is given to indelicate, immodest or indecent conduct though not amounting to actual unchastity;[94] that she was unchaste and has been guilty of licentious or immoral conduct with others;[95] either before or subsequent to the breach;[96] that the woman freely and uninfluenced by fraudulent representations, continued her engagement with the defendant with knowledge that he was a married man;[97] that she has expressed dislike for his home or environment, and that she had intended to marry him only for his money or to spite his family;[98] that he is afflicted with an incurable disease;[99] that the family of plaintiff bears a

[90]Mabin v. Webster, 129 Ind. 430, 28 N. E. 863, 28 Am. St. 199; Walker v. Johnson, 6 Ind. App. 600, 33 N. E. 267, 34 N. E. 100; Miller v. Rosier, 31 Mich. 475; Smith v. Compton, 67 N. J. L. 548, 52 Atl. 386, 58 L. R. A. 480 (ill health); Sanders v. Coleman, 97 Va. 690, 34 S. E. 621, 47 L. R. A. 581.

[91]Robertson v. Craver, 88 Iowa 381, 55 N. W. 492; Hook v. George, 100 Mass. 331. The contract to marry is of little value to a person whose feelings toward the marriage are inconsistent with any purpose to fulfill the engagement in a spirit befitting the relation. Miller v. Rosier, 31 Mich. 475.

[92]Gross v. Hochstim, 130 N. Y. S. 315.

[93]Alberts v. Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584.

[94]Colburn v. Marble, 196 Mass. 376, 82 N. E. 28, 124 Am. St. 561; Sheahan v. Barry, 27 Mich. 217; Dupont v. McAdow, 6 Mont. 226, 9 Pac. 925; Stratton v. Dole, 45 Nebr. 472, 63 N. W. 875; Willard v. Stone, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496; Palmer v. Andrews, 7 Wend. (N. Y.) 142; Clark v. Reese, 26 Tex. Civ. App. 619, 64 S. W. 783; Stewart v. Smith, 92 Wis. 76, 65 N. W. 736.

[95]Houser v. Carmody, 173 Mich. 121, 139 N. W. 9; Goddard v. Westcott, 82 Mich. 180, 46 N. W. 242; Sheahan v. Barry, 27 Mich. 217; Dupont v. MacAdow, 6 Mont. 226, 9 Pac. 925 (plaintiff was living with another man in adultery); Brisack v. King, 199 App. Div. 213, 191 N. Y. S. 477; Johnson v. Caulkins, 1 Johns. Cas. (N. Y.) 116, 1 Am. Dec. 102; Willard v. Stone, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496; McKee v. Nelson, 4 Cow. (N. Y.) 355, 15 Am. Dec. 384; Kelley v. Highfield, 15 Ore. 277, 14 Pac. 744; Clark v. Reese, 26 Tex. Civ. App. 619, 64 S. W. 783.

[96]Willard v. Stone, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496.

[97]Cover v. Davenport, 1 Heisk. (Tenn.) 368, 2 Am. Rep. 706.

[98]Robertson v. Craver, 88 Iowa 381, 55 N. W. 492; Miller v. Hayes, 34 Iowa 496, 11 Am. Rep. 154; Hook v. George, 100 Mass. 331; Healey v. O'Sullivan, 6 Allen (Mass.) 114; Miller v. Rosier, 31 Mich. 475.

[99]Sprague v. Craig, 51 Ill. 288; Mabin v. Webster, 129 Ind. 430, 28 N. E. 863, 28 Ann. Cas. 199,

bad reputation;[1] that plaintiff is intemperate, unless the defendant connived at her intemperance;[2] and that certain members of her family are insane.[3]

On the other hand, defendant may not urge in mitigation of damages matters of misconduct of plaintiff known to him before he made the promise and which were encouraged and participated in by him.[4] Thus, for example, he may not give evidence of sexual intercourse he had with plaintiff either before or after the promise.[5] The defendant may not rely on his own loss of affection as mitigation.[6] It has been held in New York that rumors of improper conduct by the plaintiff may not be considered,[7] but in Illinois the holding is that the defendant may show a general rumor of the bad character of the plaintiff.[8] The fact that there was a previous and existing contract to marry between the plaintiff and a third person at the time of the promise can not be urged in mitigation of damages.[9] Neither is evidence admissible on the issue of mitigation that plaintiff had other suitors than the defendant, where no undue familiarity is shown,[10] nor may defendant mitigate his damages by evidence of his belief that plaintiff had been guilty of theft.[11]

On the question of whether a renewed offer of marriage made in good faith after a breach may go in mitigation of damages, the cases are divided and seem to be past reconciliation. In some jurisdictions such an offer even after the action was commenced may

[1]Thompson v. Clendening, 1 Head (Tenn.) 287; Spellings v. Parks, 104 Tenn. 351, 58 S. W. 126.

[2]Button v. McCauley, 1 Abb. Dec. (N. Y.) 282. But see Button v. McCauley, 38 Barb. (N. Y.) 413.

[3]Lohner v. Coldwell, 15 Tex. Civ. App. 444, 39 S. W. 591. But see Baker v. Cartwright, 10 C. B. N. S. 124, 7 Jur. N. S. 1247.

[4]Espy v. Jones, 37 Ala. 379; Fleetford v. Barnett, 11 Colo. App. 77, 52 Pac. 293; Butler v. Eschleman, 18 Ill. 44; Boynton v. Kellogg, 3 Mass. 189, 3 Am. Dec. 122; Sheahan v. Barry, 27 Mich. 217; Daggett v. Wallace, 75 Tex. 352, 13 S. W. 49, 16 Am. St. 908.

[5]Espy v. Jones, 37 Ala. 379; Fleetford v. Barnett, 11 Colo. App. 77, 52 Pac. 293; Butler v. Eschleman, 18 Ill. 44; Colburn v. Marble, 196 Mass. 376, 82 N. E. 28, 124 Am. St. 561; Boynton v. Kellogg, 3 Mass. 189, 3 Am. Dec. 122; Daggett v. Wallace, 75 Tex. 352, 13 S. W. 49, 16 Am. St. 908.

[6]Richmond v. Roberts, 98 Ill. 472; Piper v. Kingsbury, 48 Vt. 480.

[7]Willard v. Stone, 7 Cow. (N. Y.), 22, 17 Am. Dec. 496.

[8]Butler v. Eschleman, 18 Ill. 44, citing Badeley v. Mortlock, 1 Holt N. P. R. 151, 3 Esp. R. 236.

[9]Roper v. Clay, 18 Mo. 383, 59 Am. Dec. 314.

[10]Alberts v. Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584.

[11]Vogt v. Guidry (Tex. Civ. App.), 220 S. W. 343.

be considered by the jury in mitigation of damages.[12] In other jurisdictions the contrary rule is declared.[13] A conditional offer of marriage after the breach can not be considered in mitigation of damages.[14] If no evidence of any fact occurring after the suit commenced can be given to aggravate damages, it would seem very reasonable that no such evidence ought to be received to mitigate the damages.[15]

[12]McCarty v. Heryford, 125 Fed. 46; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275. The reason given for this rule is that the foundation of the action, is the loss of the benefit which the injured party might have derived from the union, if that had taken place, as well as compensation to her wounded feelings and character; and if the other party has honestly offered her all the advantages of his wealth and station in the proposal to make her his wife, we can perceive no reason why the jury could not consider it in mitigation of damages, especially if by this offer he has done much to relieve her character, if that was impaired by his conduct, and he salved at least her wounded pride.. Kelly v. Renfro, 9 Ala. 325, 44 Am. Dec. 441. Offer of marriage will not mitigate damages where defendant after breach entered into a life of debauchery. Bennett v. Beam, 42 Mich. 346, 4 N. 8, 36 Am. Rep. 442.

[13]Holloway v. Griffith, 32 Iowa 409, 7 Am. Rep. 208; Bennett v. Beam, 42 Mich. 346, 4 N. 8, 37 Am. Rep. 442; Southard v. Rexford, 6 Cow. (N. Y.) 254; Heasley v. Nichols, 38 Wash. 485, 80 Pac. 769; Kendall v. Dunn, 71 W. Va. 262, 76 S. E. 454, 43 L. R. A. (N. S.) 556. The reasoning on this side of the question (given in Bennett v. Beam) is that the principle which would permit such evidence in any case would admit is where a virtuous man of wealth, refinement and respectability, gains the affection of a young lady, and under a promise of marriage, accomplishes her ruin, and then abandons her, and enters upon a life of open and notorious profligacy and debauchery, and when sued, offers to carry out his agreement—offers himself in marriage, when any woman with even a spark of virtue or sensibility would shrink from his polluted touch. The vice of this reasoning is that it assumes that the jury must give the same consideration to the subsequent offer in all cases when it is the question for the jury in the particular case as to what allowance, if any, should be made because of the offer, says the court in McCarty v. Heryford, 125 Fed. 46. While it seems to us that the rule first stated in the text is supported by the better reasoning the contrary rule finds its support in the general principle that evidence of facts occurring after the beginning of a suit can not be given in aggravation or mitigation of damages. Kendall v. Dunn, 71 W. Va. 262, 76 S. E. 454, 43 L. R. A. (N. S.) 566; Dent v. Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. 921. However, in this class of actions many general rules have failed in application, and many new ones adopted in order that complete justice may be done, and adequate punishment visited upon the defendant.

[14]Chapman v. Brown, 192 Mo. App. 78, 179 S. W. 774.

[15]Miller v. Hayes, 34 Iowa 496, 11 Am. Rep. 154.

§ 44. **Aggravation of damages.**—Aggravated damages may be recovered whether compensatory for a special loss suffered by the plaintiff, or as a punishment to the defendant,[16] where such damages have occurred prior to the commencement of the suit.[17] There is aggravation when defendant enters into the contract with knowledge that he has a loathesome, contagious venereal disease.[18]

For the purpose of enhancing her damages the plaintiff may prove that she announced the fact of her engagement to her friends and invited them to attend the wedding.[19] Breaking her promise of marriage to another in order to marry defendant is not an aggravation of damages.[20]

§ 45. **Seduction as aggravation of damages.**—Very generally seduction under a promise of marriage is considered an aggravation of the injury and enhances the damages,[21] except in a few

[16]Lanigan v. Neely, 4 Cal. App. 760, 89 Pac. 441; Harrison v. Carlson, 45 Colo. 55, 101 Pac. 76; Jacoby v. Stark, 205 Ill. 34, 68 N. E. 557, 41 L. R. A. (N. S.) 840; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; Hughes v. Nolte, 7 Ind. App. 526, 34 N. E. 745; Morgan v. Muench, 181 Iowa 719, 156 N. W. 819; Denslow v. Van Horn, 16 Iowa 476; Sramek v. Sklenar, 73 Kans. 450, 85 Pac. 566; Lawrence v. Cooke, 56 Maine 187, 96 Am. Dec. 443; Sauer v. Schulenberg, 33 Md. 288, 3 Am. Rep. 174; Roberts v. Druillard, 123 Mich. 286, 82 N. W. 49; Sheahan v. Barry, 27 Mich. 217; Hively v. Golnick, 123 Minn. 498, 144 N. W. 213, 49 L. R. A. (N. S). 757, Ann. Cas. 1915A, 295; Sneve v. Lunder, 100 Minn. 5, 110 N. W. 99; Tamke v. Vangsness, 72 Minn. 236, 75 N. W. 217; Johnson v. Travis, 33 Minn. 231, 22 N. W. 624; Coryell v. Colbaugh, 1 N. J. L. 77, 1 Am. Dec. 192; Chellis v. Chapman, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784; Thorn v. Knapp, 42 N. Y. 474, 1 Am. Dec. 561; Johnson v. Jenkins, 24 N. Y. 252; Wells v. Padgett, 8 Barb. (N. Y.) 323; White v. Thomas, 12 Ohio St. 312, 80 Am. Dec. 347; Baumle v. Verde, 33 Okla. 243, 124 Pac. 1083, 41 L. R. A. (N. S.) 840, Ann. Cas. 1914B, 317; Kelley v. Highfield, 15 Ore. 277, 14 Pac. 744; Conn v. Wilson, 2 Overt. (Tenn.) 233, 5 Am. Dec. 663; Daggett v. Wallace, 75 Tex. 352, 13 S. W. 49, 16 Am. St. 908; Stokes v. Mason, 85 Vt. 164, 81 Atl. 162, 36 L. R. A. (N. S.) 388, Ann. Cas. 1914B, 1199; Luther v. Shaw, 157 Wis. 231, 147 N. W. 17.

[17]Dent v. Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. 921.

[18]Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. 302. But see Churan v. Sebesta, 131 Ill. App. 330.

[19]Reed v. Clark, 47 Cal. 194; Mainz v. Lederer, 24 R. I. 237, 51 Atl. 1044, 59 L. R. A. 954, 96 Am. St. 702.

[20]Hahn v. Bettingen, 81 Minn. 91, 83 N. W. 467, 50 L. R. A. 669; Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. 302.

[21]Espy v. Jones, 1 Ala. Sel. Cas. 454; Anderson v. Kirby, 125 Ga. 62, 54 S. E. 197, 114 Am. St. 185, 5 Ann.

jurisdictions,[22] and this though the statutes may give a woman the right of action for her own seduction.[23] The courts are not disposed to make smooth the path of a seducer.[24] It is seduction by promise of marriage which justifies enhancement of damages, not merely sexual intercourse, as the latter may be the result of inclination, passion, or cupidity, without entitling the woman to any reward by law.[25] As to whether additional damages, whether

Cas. 103; Tubbs v. Van Kleek, 12 Ill. 446; Gunder v. Tibbets, 153 Ind. 591, 55 N. E. 762; Haymond v. Saucer, 84 Ind. 3; Cates v. McKinney, 48 Ind. 562, 17 Am. Rep. 768; Wilds v. Bogan, 57 Ind. 453; King v. Kersey, 2 Ind. 402; Whalen v. Layman, 2 Blackf. (Ind.) 194, 18 Am. Dec. 157; Davis v. Pryor, 3 Ind. Ter. 396, 58 S. W. 660 (seduction beyond the limits of the jurisdiction of the forum); Geiger v. Payne, 102 Iowa 581, 69 N. W. 554, 71 N. W. 571; Sramek v. Sklenar, 73 Kans. 450, 85 Pac. 566; Contra, Burks v. Shain, 2 Bibb. (Ky.) 341, 5 Am. Dec. 616; Smith v. Braun, 37 La. Ann. 225; Sauer v. Schulenberg, 33 Md. 288, 3 Am. Rep. 174; Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336; Sherman v. Ralston, 102 Mass. 395; Boynton v. Kellogg, 3 Mass. 189, 3 Am. Dec. 122; Paul v. Frazier, 3 Mass. 71, 3 Am. Dec. 95; Houser v. Carmody, 173 Mich. 121, 139 N. W. 9; Bennett v. Beam, 42 Mich. 346, 4 N. 8, 36 Am. Rep. 442; Sheahan v. Barry, 27 Mich. 217; Liese v. Meyer, 143 Mo. 547, 45 S. W. 282; Wilbur v. Johnson, 58 Mo. 600; Roper v. Clay, 18 Mo. 383, 59 Am. Dec. 314; Green v. Spencer, 3 Mo. 318, 26 Am. Dec. 672; Dreibelbiss v. Banner, 196 Mo. App. 236, 195 S. W. 68; Kniffen v. McConnell, 30 N. Y. 285; Cheney v. Arnold, 15 N. Y. 345, 69 Am. Dec. 609; Lynch v. Figge, 194 App. Div. 126, 185 N. Y. S. 777; Getzelson v. Bernstein, 15 Misc. 627, 37 N. Y. S. 220; Jennette v. Sullivan, 63 Hun 361, 18 N. Y. S. 266; Wells v. Padgett, 8 Barb. (N. Y.) 323; Matthews v. Cribbett, 11 Ohio St. 330; Jarvis v. Johnson, 2 Ohio Dec. 312; Osmun v. Winters, 25 Ore. 260, 35 Pac. 250; Perkins v. Hersey, 1 R. I. 493; Spellings v. Parks, 104 Tenn. 351, 58 S. W. 126; Williams v. Hollingsworth, 6 Baxt. (Tenn.) 12; Conn. v. Wilson, 2 Overt. (Tenn.) 233, 5 Am. Dec. 663; Daggett v. Wallace, 75 Tex. 352, 13 S. W. 49, 16 Am. St. 908; Freeman v. Bennett (Tex. Civ. App.), 195 S. W. 238; Biela v. Urbanczyk, 38 Tex. Civ. App. 213, 85 S. W. 451; Klitzke v. Davis, 172 Wis. 425, 179 N. W. 586. An instruction to the jury that the measure of damages was compensation to the plaintiff for the breach of promise, and that this included all damages sustained by her on account of injury to her feelings, affections, and wounded pride, as well as the loss of the marriage, was broad enough to include damages for the seduction where that had occurred. Huggins v. Carey, 108 Tex. 358, 194 S. W. 133.

[22]Burks v. Shain, 2 Bibb. (Ky.) 341, 5 Am. Dec. 616; Baldy v. Stratton, 11 Pa. St. 316; Weaver v. Bachert, 2 Pa. St. 80, 44 Am. Dec. 159; Wrynn v. Downey, 27 R. I. 454, 63 Atl. 401, 4 L. R. A. (N. S.) 615, 114 Am. St. 63, 8 Ann. Cas. 912.

[23]Osmun v. Winters, 26 Ore. 260, 35 Pac. 250.

[24]Gunder v. Tibbetts, 153 Ind. 591, 55 N. E. 762.

[25]Fletcher v. Ketcham, 160 Iowa

in compensation, aggravation or as exemplary, may be awarded where pregnancy and childbirth result from the seduction, the decided weight of authority seems to be that they may,[26] but cases in Wisconsin,[27] and Kansas hold to a contrary doctrine. In the latter case, however, it is to be noted that there was a divided court, three out of seven judges not concurring.[28] The Wisconsin courts hold that damages in this class of actions may be increased by the fact of the seduction so as to give the plaintiff a fair and liberal compensation for mental suffering, injury to reputation, and loss of virtue sustained by the plaintiff, and the proximate damages resulting from the seduction, but they can not go beyond this, and the losses of service and the expenses of sickness which might, or might not result from the seduction, are held not proximate results of the breach of promise although they may be of the seduction.[29] So in Pennsylvania, it is held the circumstances attending the breach, before, at the time, and after may be given as evidence in aggravation of damages; and, although seduc-

364, 141 N. W. 916; Stowers v. Singer, 113 Ky. 584, 68 S. W. 637; citing People v. Clark, 33 Mich. 112; Comer v. Taylor, 82 Mo. 341; State v. Brassfield, 81 Mo. 151, 51 Am. Rep. 234; Hogan v. Cregan, 29 N. Y. Super. 138; Bowers v. State, 29 Ohio St. 542; Patterson v. Hayden, 17 Ore. 238, 21 Pac. 129, 3 L. R. A. 529, 11 Am. St. 822; Salchert v. Reinig, 135 Wis. 194, 115 N. W. 132. See also Stamm v. Wood, 86 Ore. 174, 168 Pac. 69.

[26]Churan v. Sebesta, 131 Ill. App. 330; Tubbs v. Van Kleek, 12 Ill. 446; Wilds v. Bogan, 57 Ind. 453; Dalrymple v. Green, 88 Kans. 673, 129 Pac. 1145, 43 L. R. A. (N. S.) 972 (dissenting opinion, Wilds v. Bogan, 57 Ind. 453); Johnson v. Levy, 122 La. 118, 47 So. 422, 16 Ann. Cas. 978; Tyler v. Salley, 82 Maine 128, 19 Atl. 107; Musselman v. Barker, 26 Nebr. 737, 42 N. W. 759; Cheney v. Arnold, 15 N. Y. 345, 69 Am. Dec. 609; Hotchkins v. Hodge, 38 Barb. (N. Y.) 117; Booren v. McWilliams, 26 N. Dak. 558, 145 N. W. 410, Ann. Cas. 1916A, 388; Jarvis v. Johnson, 2 Ohio 312; Gauerke v. Kiley, 171 Wis. 543, 177 N. W. 889.

[27]Giese v. Schultz, 65 Wis. 487, 27 N. W. 353.

[28]Bowes v. Sly, 96 Kans. 388, 152 Pac. 17; Dalrymple v. Green, 88 Kans. 673, 129 Pac. 1145, 43 L. R. A. (N. S.) 972.

[29]Giese v. Schultz, 69 Wis. 521, 34 N. W. 913; Leavitt v. Cutler, 37 Wis. 46. The breach of the promise of marriage is the foundation of the action, the seduction is the result of such promise—perhaps proximate—although, but for the authority cited, that might well be doubted. Giese v. Schultz, 53 Wis. 462, 10 N. W. 598. The rule allowing seduction to be alleged and proven in an action for breach of promise, is a rule of damages based upon the theory that a plaintiff is entitled to compensation for mental suffering, injury to reputation, loss of virtue, and shame and disgrace caused by the breach. Osmun v. Winters, 25 Ore. 260, 35 Pac. 250.

tion can not be given in evidence in this action, the improper conduct of the defendant in which the plaintiff did not participate, may be so given in aggravation of damages.[30] A loss of character, and social position and not only deep shame and sorrow due to the seduction but a darker future may be considered in estimating damages.[31]

Damages for seduction followed by pregnancy and birth of a child may be allowed,[32] but it is essential in some jurisdictions that such damages shall be specially pleaded.[33] The jury may also consider the mental suffering connected with a miscarriage due to the seduction,[34] but not the pain and suffering incident to the performance of an abortion.[35] A second seduction of plaintiff by defendant after reformation may be shown on the question of the ascendency defendant had over the plaintiff.[36]

The cost and care of maintaining and educating a bastard child is not the subject of damages.[37]

Sexual intercourse with plaintiff by force and against her consent which is rape, can not be shown on the question of damages for seduction.[38]

§ 46. **Attacks on character of plaintiff as aggravation of damages.**—Where the plaintiff, wantonly, maliciously, recklessly, or in bad faith, or without any reasonable grounds, or without any hope or reasonable expectation of proving his assertions, in his pleadings, or in open court, under a plea of the general issue, charges the plaintiff with immorality, or unchastity, and fails to sustain his charges by proof, such failure may be considered in

[30]Baldy v. Stratton, 11 Pa. St. 316.

[31]Haymond v. Saucer, 84 Ind. 3; King v. Kersey, 2 Ind. 402; Whalin v. Layman, 2 Blackf. (Ind.) 194, 18 Am. Dec. 157; Smith v. Braun, 37 La. Ann. 225; Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336; Paul v. Frazier, 3 Mass. 71, 3 Am. Dec. 95; Sheahan v. Barry, 27 Mich. 217; Wilbur v. Johnson, 58 Mo. 600; Green v. Spencer, 3 Mo. 318, 36 Am. Dec. 672; Hill v. Maupin, 3 Mo. 323.

[32]Musselman v. Barker, 26 Nebr. 737, 42 N. W. 759; Huggins v. Carey, 108 Tex. 358, 194 S. W. 133.

[33]Tyler v. Salley, 82 Maine 128, 19 Atl. 107.

[34]Western Union Tel. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 1 L. R. A. 728, 10 Am. St. 772. See also Giese v. Schultz, 65 Wis. 487, 27 N. W. 353.

[35]Gauerke v. Kiley, 171 Wis. 543, 177 N. W. 889.

[36]Morgan v. Muench, 181 Iowa 719, 156 N. W. 819.

[37]Wilds v. Bogan, 57 Ind. 453.

[38]Fleetford v. Barnett, 11 Colo. App. 77, 52 Pac. 293; Dent v. Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. 921; Geise v. Schultz, 65 Wis. 487, 27 N. W. 353.

aggravation of the plaintiff's damages for the breach; but they will not be so considered if the charges are made in good faith, and an honest attempt is made to sustain them by proof although the defendant fails therein.[39] This general rule is bottomed on the ground that a justification was presented on the record and will remain there as a continued reiteration of the charge against the plaintiff and therefore a trifling verdict would not show that such a charge was unfounded,[40] and while the wrong the plaintiff has suffered is not wholly atoned for by the defendant's good faith, because good faith can not atone for the wrong, still, it must be considered by the jury in estimating how much the defendant ought to pay for that wrong.[41] But it has been held that full damages can not be awarded for these defamatory charges to the same extent as would be admissible if the same had been counted on in an independent action for slander.[42] It is not necessary, in such a case, that the defendant should have known the charges to be false, but the bad faith may be inferred from the fact that he had no sufficient reason for believing them to be

[39]Reed v. Clark, 47 Cal. 194; Powers v. Wheatley, 45 Cal. 113; Smillie v. Mendoza, 68 Colo. 461, 190 Pac. 533; Fleetford v. Barnett, 11 Colo. App. 77, 52 Pac. 293; Blackburn v. Mann, 85 Ill. 222; Burnett v. Simpkins, 24 Ill. 264; Fidler v. McKinney, 21 Ill. 308; Simons v. Busby, 119 Ind. 13, 21 N. E. 451; Haymond v. Saucer, 84 Ind. 3; Benslow v. Van Horn, 16 Iowa 476; Sherman v. Rawson, 102 Mass. 395; Spencer v. Simmons, 160 Mich. 292, 125 N. W. 9, 19 Ann. Cas. 1126; Roberts v. Druillard, 123 Mich. 286, 82 N. W. 49; Hively v. Golnick, 123 Minn. 498, 144 N. W. 213, 49 L. R. A. (N. S.) 757, Ann. Cas. 1915A, 295; Davis v. Slagle, 27 Mo. 600; Cole v. Holliday, 4 Mo. 94; Smith v. Compton, 67 N. J. L. 548, 52 Atl. 386, 58 L. R. A. 480; Chellis v. Chapman, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784; Thorn v. Knapp, 42 N. Y. 474, 1 Am. Rep. 561; Kniffen v. McConnell, 30 N. Y. 285; Johnson v. Jenkins, 24 N. Y. 252; O'Brien v. Manning, 101 Misc. 123, 166 N. Y. S. 760; Wells v. Padgett, 8 Barb. (N. Y.) 323; Southard v. Rexford, 6 Cow. (N. Y.) 254; Barnes v. Buck, 1 Lans. (N. Y.) 268; Rayner v. Kinney, 14 Ohio St. 283; White v. Thomas, 12 Ohio St. 312, 80 Am. Dec. 347; Osmun v. Winter, 30 Ore. 177, 46 Pac. 780; Baldy v. Stratton, 11 Pa. St. 316; Alberts v. Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584; Leavitt v. Cutler, 37 Wis. 46.

[40]2 Sedgw. Meas. Dam. 640; Davis v. Slagle, 27 Mo. 600; Thorn v. Knapp, 42 N. Y. 474, 1 Am. Rep. 561; Kniffen v. McConnell, 30 N. Y. 285; Kaufman v. Fye, 99 Tenn. 145, 42 S. W. 25.

[41]Pearce v. Stace, 207 N. Y. 506, 101 N. E. 434; Bryan v. Manning, 101 Misc. 123, 166 N. Y. S. 760; Kelly v. Highfield, 15 Ore. 277, 14 Pac. 744.

[42]Spencer v. Simmon, 160 Mich. 292, 125 N. W. 9, 19 Ann. Cas. 1126; Roberts v. Druillard, 123 Mich. 286, 82 N. W. 49.

true.[43] Let it be repeated the rule obtains whether such charges are made under a special plea to that effect, or come in under the general issue.[44]

And the failure to offer any evidence whatever in support of the damaging averment or the introduction of evidence apparently fabricated is so frivolous that it is equivalent to an entire failure of proof, and this would show that bad faith on the part of the defendant which increases the injury and ought to enhance the damages.[45] Consequently a complete failure, as here defined, to prove the charge against the character of the plaintiff may be taken into consideration in aggravation of damages regardless of whether the attack was made in good or bad faith.[46]

Still more strongly it is said, where the averments are unsustained by any proof, it is a most serious aggravation of the damages sustained,[47] and if not proven true they must be held to have been wantonly made.[48] On the other hand the Wisconsin courts hold that where no proof is given of the charge, this fact of itself is not sufficient to aggravate the damages, but the jury must be satisfied that the charge was made dishonestly or in bad faith.[49]

[43]Fleetford v. Barnett, 11 Colo. App. 77, 52 Pac. 293; Fidler v. McKinley, 21 Ill. 308; Leavitt v. Cutler, 37 Wis. 46.

[44]Reed v. Clark, 47 Cal. 194; Fleetford v. Barnett, 11 Colo. App. 77, 52 Pac. 293; Blackburn v. Mann, 85 Ill. 222; Fidler v. McKinley, 21 Ill. 308; Thorn v. Knapp, 42 N. Y. 474, 1 Am. Rep. 561; Kniffen v. McConnell, 30 N. Y. 285.

[45]Reed v. Clark, 47 Cal. 194.

[46]Kaufman v. Fye, 99 Tenn. 145, 42 S. W. 25.

[47]Liese v. Meyer, 143 Mo. 547, 45 S. W. 282; Thorn v. Knapp, 42 N. Y. 475, 1 Am. Rep. 561. Hunter v. Hatfield, 68 Ind. 416, which held that even though charges of unchastity were made in good faith, the defendant who made them would make them "at his peril" was overruled in Haymond v. Saucer, 84 Ind. 3.

[48]Kaufman v. Fye, 99 Tenn. 145, 42 S. W. 25; Ferguson v. Moore, 98 Tenn. 342, 39 S. W. 341; Williams v. Norwoods, 2 Yerg. (Tenn.) 329.

[49]Alberts v. Albertz, 78 Wis. 72, 47 N. W. 95, 10 L. R. A. 584. There is a plain distinction between "failure to prove" and a failure to introduce evidence; proof is that degree and quality of evidence that produces conviction. Proof convinces, evidence tends to convince, Nevling v. Commonwealth, 98 Pa. 322; Jastrzembski v. Marxhausen, 120 Mich. 677, 79 N. W. 935. And it is manifestly the failure to observe this distinction which led the Wisconsin Supreme Court to hold that where no proof is offered the allegations of unchastity or bad character or reputation is not the subject of aggravating damages unless such allegations are made in bad faith, as the cases cited in supporting the proposition are both cases where some evidence had been introduced, Leavitt v. Cutler, 36 Wis.

A published article by defendant attacking the plaintiff's character after the action is begun may be admitted in evidence as aggravating the damages, and so an insulting letter by him to the plaintiff.[50]

Where to sustain his charge against plaintiff's character, the defendant testifies to a situation from which unchastity may be inferred, evidence of her good reputation is competent.[51]

The damages can not be enhanced by anything the counsel for the defendant says derogatory to the character of the plaintiff.[52]

§ 47. **Exemplary damages.**—Exemplary, punitive and vindictive damages are synonymous terms,[53] and mean, in this connection, the amount over and above all actual damages that may be imposed as punishment of the defendant and to deter others from being guilty of like breaches of a legal and social duty.[54] Such damages may be allowed when from a broad, common sense view of all the circumstances, they are required, to do justice,[55]

46; Simpson v. Black, 27 Wis. 206. But this criticism may be applied to many other opinions. Even the leading case of Thorn v. Knapp, 42 N. Y. 474, 1 Am. Rep. 561, where no attempt to prove this allegation was made, the decision being given to support an instruction in which the trial court had used the expression and "fails to prove it."

[50]Osmun v. Winters, 30 Ore. 177, 46 Pac. 780.

[51]Smillie v. Mendoza, 68 Colo. 461, 190 Pac. 533, citing McKane v. Howard, 202 N. Y. 181, 95 N. E. 642, Ann. Cas. 1912D, 960.

[52]Pearce v. Stace, 207 N. Y. 506, 101 N. E. 434.

[53]Chiles v. Drake, 2 Metc. (Ky.) 146, 74 Am. Dec. 406; Raynor v. Nims, 37 Mich. 34, 26 Am. Rep. 493. In Fidler v. McKinley, 21 Ill. 308.

[54]Kelly v. Highfield, 15 Ore. 277, 14 Pac. 744. In what may be termed a violent protest against exemplary or aggravated damages in this sort of action Justice Breese said: "So far as it is made to partake of a tort the jury are necessarily on a sea of uncertainty and conjecture, with no compass to guide them, and all courts lament the difficulty of applying any certain rules by which to ascertain the damages. My view is that once an action ex contractu, it should be so regarded through all its states and when it is proved that a contract to marry has been legally made, by the parties capable of contracting—that there are mutual promises—and no fraud or circumvention practiced, and no imputation upon character and a readiness to marry or offer to do so shown, and no cause appearing to justify a refusal to perform the contract, materials for the formation of a proper verdict should be found in this consideration,—what is the value of the contract." Johnson v. Jenkins, 24 N. Y. 252.

[55]Raynor v. Nims, 37 Mich. 34, 26 Am. Rep. 493. So long as the woman's breast remains what it is, whatever the law may decide or judge may declare, juries in an action for breach of promise to marry

and when it is shown that the conduct of defendant has been wanton or malicious, or he has unnecessarily wounded the feelings or injured the reputation of the plaintiff.[56]

Affliction with loathsome, contagious venereal disease at time of contracting, entering into the obligation for the purpose of seducing the plaintiff and maliciously attacking the plaintiff's character during the engagement have been held causes for allowing exemplary damages.[57] But such damages may not be allowed where the evidence shows the conduct of plaintiff throughout their unlawful connection, to have been just as bad as that of the defendant, and it is reversible error to instruct the jury that they were bound to give exemplary damages if the defendant purposely wronged plaintiff or that his conduct was malicious as such questions are for the jury.[58] Some courts, however, take the view that entering into the contract with malice is not the subject of punitive damages and merely to be considered as aggravation increasing compensatory damages.[59] Before such damages can be awarded it must appear that there has been something more than a refusal, without sufficient legal excuse to carry out the contract.[60] Very generally, exemplary damages are held properly allowed where the breach of promise is aggravated by seduction, fraud or deceit,[61] either in the making of the contract or its

will know whether the plaintiff has been ruined under color of defendant's promise and will measure damages accordingly. Coil v. Wallace, 24 N. J. L. 291.

[56]Schilling v. Osten, 7 Boyce (Del.) 524, 108 Atl. 741; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; Dupont v. McAdow, 6 Mont. 226, 9 Pac. 925; Thorn v. Knapp, 42 N. Y. 474, 1 Am. Rep. 561; Baumle v. Verde, 33 Okla. 243, 124 Pac. 1083, Ann. Cas. 1914B, 317.

[57]Hendry v. Ellis, 61 Fla. 277, 54 So. 797, 33 L. R. A. (N. S.) 702; Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. 302; Davis v. Slagle, 27 Mo. 600; Johnson v. Jenkins, 24 N. Y. 252; Thorn v. Knapp, 42 N. Y. 474, 1 Am. Rep. 561; Osmun v. Winters, 30 Ore. 177, 46 Pac. 780. The particular injury which insues need not have been intended if the act is wilful and malicious, or is likely to produce the injury. Sloss-Sheffield, S. & I. Co. v. Salser, 158 Ala. 511, 48 So. 374; Mecartney v. Smith, 10 Kans. App. 580, 62 Pac. 540; Bouillon v. Laclede Gas Light Co., 148 Mo. App. 462, 129 S. W. 401; Hunter v. Southern R. Co., 152 N. Car. 682, 68 S. E. 237, 29 L. R. A. (N. S.) 851, 136 Am. St. 854.

[58]Jacobs v. Sire, 4 Misc. 398, 23 N. Y. S. 1063.

[59]Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. 302.

[60]Goddard v. Westcott, 82 Mich. 180, 46 N. W. 242.

[61]Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; Morgan v. Muench, 181 Iowa 719, 156 N. W. 819; Cory-

breach.[62] These damages are upheld where the defendant entered into the contract with the plaintiff for the purpose of seducing her,[63] and this although the defendant has already been punished criminally for the seduction,[64] and the principle was the same where there has been a long continued sexual intercourse under a promise to marry.[65]

Exemplary damages were held proper in a case where the plaintiff gave up her position as teacher and the defendant did not appear on the day set for the marriage.[66]

Exemplary damages are not allowable where the defendant has pleaded unchastity as a defense unless such defense is set up maliciously, without expectation of being able to prove it.[67]

Exemplary damages are not allowable against the heirs or succession of a deceased promisor.[68]

§ 48. **Damages affected by pecuniary circumstances of parties.**—It is competent in an action for breach of promise of marriage to prove the pecuniary circumstances of the defendant,[69]

ell v. Colbaugh, 1 N. J. L. 77, 1 Am. Dec. 192; Stout v. Prall, 1 N. J. L. 79.

[62]Jacoby v. Stark, 205 Ill. 34, 68 N. E. 557; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; Hughes v. Nolte, 7 Ind. App. 526, 34 N. E. 745; Tamke v. Vangsness, 72 Minn. 236, 75 N. W. 217; Johnson v. Travis, 33 Minn. 231, 22 N. W. 624; Duvall v. Fuhrman, 3 Ohio Cir. Ct. 305, 2 O. C. D. 174; Baumle v. Verde, 33 Okla. 243, 124 Pac. 1083, 41 L. R. A. (N. S.) 840, Ann. Cas. 1914B, 317. See also Chellis v. Chapman, 52 Hun 613, 7 N. Y. S. 78.

[63]Goodall v. Thurman, 1 Head (Tenn.) 209.

[64]Corwin v. Walton, 18 Mo. 71, 59 Am. Dec. 285; Roberts v. Mason, 10 Ohio St. 277; Cole v. Tucker, 6 Tex. 266; Hoadley v. Watson, 45 Vt. 289, 12 Am. Rep. 197; Luther v. Shaw, 157 Wis. 234, 147 N. W. 18, 52 L. R. A. (N. S.) 85.

[65]Dalrymple v. Green, 88 Kans. 673, 129 Pac. 1145, 43 L. R. A. (N. S.) 972; Sramek v. Sklenar, 73 Kans. 450, 85 Pac. 566.

[66]Chellis v. Chapman, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784.

[67]Hively v. Golnick, 123 Minn. 498, 144 N. W. 213, 49 L. R. A. (N. S.) 757, Ann. Cas. 1915A, 295.

[68]Edwards v. Ricks, 30 La. Ann. 926; Johnson v. Levy, 122 La. 118, 47 So. 422, 16 Ann. Cas. 978.

[69]Humphrey v. Brown, 89 Fed. 641; Reed v. Clark, 47 Cal. 194; Smillie v. Mendoza, 68 Colo. 461, 190 Pac. 533; Vaughan v. Smith, 177 Ind. 111, 96 N. E. 594; Hunter v. Hatfield, 68 Ind. 416; Morgan v. Muench, 181 Iowa 719, 156 N. W. 819; McKee v. Mouser, 131 Iowa 203, 108 N. W. 228; Kennedy v. Rodgers, 2 Kans. App. 764, 44 Pac. 47. Lawrence v. Cooke, 56 Maine 187, 96 Am. Rep. 443; Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936; Bennett v. Beam, 42 Mich. 346, 4 N. 8, 36 Am. Rep. 442; Birum v. Johnson, 87 Minn. 362, 92 N. W. 1; Tamke v. Vangsness, 72 Minn. 236, 75 N. W. 217; Ashley v. Dalton, 119 Miss. 672, 81 So. 488; Casey v. Gill, 154 Mo. 181, 55 S. W. 219; Fisher v. Oliver,

but not the wealth of a relative from whom he may inherit an estate.[70] The earning capacity of the defendant may be shown to aid in determining the damages,[71] and also his social position.[72] The general rule limits evidence of the defendant's financial ability to the time the breach occurred, or to such time as he might reasonably be expected to fulfill his contract; though when the trial of the action for the breach occurs soon after the contract was made, proof may be made of the property owned by the defendant at the time of the trial.[73]

So far, on this subject, the authorities have been in harmony but when we come to the method by which the defendant's financial standing is to be shown, we find a great and emphatic divergence of opinion. In some jurisdictions it is held that it must be proven by evidence of general reputation; and it is not admissible to prove his ownership of specific property, the purpose of admitting the evidence being not to establish the ability to pay, but to show the social standing which the defendant's means did or might command.[74] Other authorities hold that specific evidence

172 Mo. App. 18, 154 S. W. 453; Higgins v. Doty (Nebr.), 186 N. W. 315; Fellers v. Howe, 106 Nebr. 495, 184 N. W. 122; Stratton v. Dole, 45 Nebr. 472, 63 N. W. 875; Smith v. Compton, 67 N. J. L. 548, 52 Atl. 386, 58 L. R. A. 480; O'Brien v. Manning, 101 Misc. 123, 166 N. Y. S. 760; Chellis v. Chapman, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784; Kniffen v. McConnell, 30 N. Y. 285; Rubin v. Klemer (R. I.), 114 Atl. 131; Mainz v. Lederer, 24 R. I. 23, 51 Atl. 1044, 59 L. R. A. 954, 96 Am. St. 702; Clark v. Hodges, 65 Vt. 273, 26 Atl. 726; Fisher v. Kenyon, 56 Wash. 8, 104 Pac. 1127, 20 Ann. Cas. 1264; Olsen v. Solverson, 71 Wis. 663, 38 N. W. 329; Kerfoot v. Marsden, 2 Fost. & F. 160.

[70]Spencer v. Simons, 160 Mich. 292, 125 N. W. 9, 19 Ann. Cas. 1226; Miller v. Rosier, 31 Mich. 475; Totten v. Read, 16 Daly (N. Y.) 282, 32 N. Y. St. 46, 10 N. Y. S. 318; Clark v. Hodges, 65 Vt. 273, 26 Atl. 726, holds that "a decree settling the share of defendant in the estate of his deceased father, whose death occurred previous to the breach was admissible as tending to show defendant's pecuniary ability at the time of the breach, although the decree was not rendered until afterward."

[71]Rime v. Rater, 108 Iowa 61, 78 N. W. 835.

[72]Bennett v. Beam, 42 Mich. 346, 4 N. 8, 36 Am. Rep. 442; Johnson v. Travis, 33 Minn. 231, 22 N. W. 624; Dent v. Pickins, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. 921.

[73]Douglas v. Gausman, 68 Ill. 170; McKee v. Mouser, 131 Iowa 203, 108 N. W. 228; Vierling v. Binder, 113 Iowa 337, 85 N. W. 621; Arbon v. Blyth, 54 Utah 153, 179 Pac. 979; Fisher v. Kenyon, 56 Wash. 8, 104 Pac. 1127, 20 Ann. Cas. 1264; Gauerke v. Kiley, 171 Wis. 543, 177 N. W. 889; 2 Enc. of Evidence 750. See also Bukowski v. Kuznia (Minn.), 186 N. W. 311.

[74]Humphrey v. Brown, 89 Fed. 640; Stratton v. Dole, 45 Nebr. 472,

of the defendant's pecuniary circumstances is to be received to enable the jury to fix the money value for loss of material benefit and social standing occasioned by the breach.[75] Still other cases hold that both his actual and reputed wealth may be shown.[76] However, the defendant may rebut this evidence of general repu-

63 N. W. 875; Smith v. Compton, 67 N. J. L. 548, 52 Atl. 386, 58 L. R. A. 480; Chellis v. Chapman, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784; Kniffen v. McConnell, 30 N. Y. 285; Dent v. Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. 921; Kerfoot v. Marsden, 2 Fost. & F. 160. In Smith v. Compton, 67 N. J. L. 548, 52 Atl. 386, 58 L. R. A. 480, it is said it is in principle like those cases in which it is competent to attack character. It must be done by proving the general reputation, and cannot be done by proving particular instances of misconduct, because a party having no notice of such an attack could not be prepared to meet it. In cases where character may be assailed, he must be prepared to support his general reputation for good character.

[75]Reed v. Clark, 47 Cal. 194; Smillie v. Mendoza, 68 Colo. 461, 190 Pac. 533; Douglas v. Gausman, 68 Ill. 170; Hunter v. Hatfield, 68 Ind. 416; McKenzie v. Gray, 143 Iowa 112, 120 N. W. 71; Vierling v. Binder, 113 Iowa 337, 85 N. W. 621; Holloway v. Griffith, 32 Iowa 409, 7 Am. Rep. 208; McPherson v. Ryan, 59 Mich. 33, 26 N. W. 321; Bennett v. Beam, 42 Mich. 346, 4 N. 8, 36 Am. Rep. 442; Birum v. Johnson, 87 Minn. 362, 92 N. W. 1; Casey v. Gill, 154 Mo. 181, 55 S. W. 219; Crosier v. Craig, 47 Hun (N. Y.) 83, 13 N. Y. St. 208; Clark v. Hodges, 65 Vt. 273, 26 Atl. 726; Fisher v. Kenyon, 56 Wash. 8, 104 Pac. 1127, 20 Ann. Cas. 1264; Dent. v. Pickens, 34 W. Va. 240, 12 S. E. 698, 26 Am. St. 921; Hanson v. Johnson, 141 Wis. 550, 124 N. W. 506; Salchert v. Reinig, 135 Wis. 194, 115 N. W 132; Olson v. Solverson, 71 Wis. 663, 38 N. W. 329. It is a fundamental rule that the best attainable evidence must be produced, and while evidence of the reputed amount of the defendant's property may not be incompetent, because in most cases accurate knowledge of the amount is confined to the defendant and his friends, yet it cannot be incompetent to permit the amount in defendant's possession to be shown by direct and precise evidence, greatly superior in probative force to evidence of reputation. Crosier v. Craig, 47 Hun 83. It is peculiar about this situation, that in championing the proposition that specific property must be shown, the court in Vaughan v. Smith supra, says: "the contrary has been held in a few cases, but the great weight of authority and reason is in support of that proposition," but in Smith v. Compton, 67 N. J. L. 548, 52 Atl. 386, 58 L. R. A. 480, in which is espoused the other side of the question it is said, "but the weight of authority is otherwise. That is to say, the defendant's financial ability can only be shown by the evidence of his reputation in that respect."

[76]Humphrey v. Brown, 89 Fed. 640; Smillie v. Mendoza, 68 Colo. 461, 190 Pac. 533; Vaughan v. Smith, 177 Ind. 111, 96 N. E. 594, Ann. Cas. 1914C, 1092; McKee v. Mouser, 131 Iowa 203, 108 N. W. 228; Rime v. Rater, 108 Iowa 61, 78 N. W. 835; Bennett v. Beam, 42

tation as to his pecuniary circumstances by evidence showing the property actually possessed by him.[77]

If within the time in which the contract was to have been performed, it was renounced and repudiated by the defendant, and his social and pecuniary standing remained the same when the action was brought as when the contract was entered into, there is no difficulty in estimating damages on that score.[78] When the declaration alleges as a ground of special damages the loss of a valuable right of dower in the property of defendant, evidence of his ownership of specific property may be given by the plaintiff.[79]

§ 49. **Damages—Amount of award.**—Inasmuch as many elements enter into the damages to be allowed in breach of promise cases, and the question is so peculiarly within the discretion of the jury, the appellate courts are not inclined to interfere on the ground of inadequacy or excessiveness of the award of damages,[80] except in plain cases where the amount shows that the jury has been influenced by prejudice, partiality, or corruption.[81] The appellate court has no means of determining whether there has been an excessive award where the defendant offered no evidence as to his means.[82] Some illustrative instances of awards of damages that have been held excessive are given in the mar-

Mich. 346, 4 N. 8, 36 Am. Rep. 442; Birum v. Johnson, 87 Minn. 362, 92 N. W. 1; Casey v. Gill, 154 Mo. 181, 55 S. W. 219; Meyer v. Mayo, 173 App. Div. 199, 159 N. Y. S. 405; Fisher v. Kenyon, 56 Wash. 8, 104 Pac. 1127, 20 Ann. Cas. 1264; Olson v. Solverson, 71 Wis. 663, 38 N. W. 329. If reputed wealth may be considered by the jury in considering the loss the plaintiff in such a case has sustained, surely that loss would be determined more accurately and more justly to both parties from a knowledge of the actual wealth of the defendant. Vaughan v. Smith, 177 Ind. 111, 96 N. E. 594.

[77]Stratton v. Dole, 45 Nebr. 472, 63 N. W. 875; Smith v. Compton, 67 N. J. L. 548, 52 Atl. 386, 58 L. R. A. 480; Chellis v. Chapman, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784; Kniffen v. McConnell, 30 N. Y. 285; Kerfoot v. Marsden, 2 Fost. & F. 160. Reputation is the common knowledge of the community, and, if exaggerated or incorrect, the defendant has the opportunity to correct it, and to give the exact facts upon the trial. Smith v. Compton, 67 N. J. L. 548, 52 Atl. 386, 58 L. R. A. 480.

[78]Holloway v. Griffith, 32 Iowa 409, 7 Am. Rep. 208.

[79]Smith v. Compton, 67 N. J. L. 548, 52 Atl. 386, 58 L. R. A. 480.

[80]Lemke v. Franzenburg, 159 Iowa 466, 141 N. W. 332; Greenberg v. Ergang, 179 N. Y. S. 647.

[81]Hooker v. Phillippe, 26 Ind. App. 501, 60 N. E. 167.

[82]Capehart v. Carradine, 4 Strob. (S. Car.) 42.

gin,[83] as well as instances where the award was not deemed excessive.[84]

[83]$225,000 reduced to $125,000, O'Brien v. Manning, 101 Misc. 123, 166 N. Y. S. 760; $25,000, against decedent's estate valued at $45,000, reduced to $10,000—seduction and pregnancy—punitive damages disallowed, Johnson v. Levy, 122 La. 118, 47 So. 422, 16 Ann. Cas. 978; $25,000, defendant a railway mail clerk—aggravating circumstances—verdict reduced one-half, Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024; $22,500, defendant's property worth $70,000, but encumbered for $20,000, McCarty v. Heryford, 125 Fed. 46; $22,000 reduced to $17,000, Fellers v. Howe, 106 Nebr. 495, 184 N. W. 122; $8,000, defendant 22 years old, and no income or occupation, Gardner v. Arnett, 21 Ky. L. 1, 50 S. W. 840; $7,500, reduced to $2,500, plaintiff sewing machine teacher—defendant's salary $20.00 per week, Kolsch v. Jewell, 21 App. Div. 581, 48 N. Y. S. 527; $5,600 reduced to $3,000, Rubin v. Klemer (R. I.), 114 Atl. 131; $5,000 reduced to $2,500, Bischoff v. Harris, 198 Mich. 59, 164 N. W. 389; $3,500, defendant worth $6,000, Kellett v. Robie, 99 Wis. 303, 74 N. W. 781.

[84]$45,000, defendant worth $250,000, Campbell v. Arbuckle, 123 N. Y. 662, 26 N. E. 750; $35,000, seduction, defendant worth over $200,000, Huggins v. Carey (Tex. Civ. App.), 194 S. W. 390; $30,000, defendant worth $90,000, Bundy v. Dickinson, 108 Wash. 52, 182 Pac. 947; $20,000, defendant worth $60,000—engagement broken after existing for 18 years, Dyer v. Lalor, 94 Vt. 103, 109 Atl. 30; $16,000, seduction, defendant worth from $50,000 to $75,000, Geiger v. Payne, 102 Iowa 581, 69 N. W. 554, 71 N. W. 571; the plaintiff's pecuniary loss of $15,000, a verdict of $25,000 not excessive where the defendant worth $125,000, Sanborn v. Bay, 194 Fed. 351; $15,000, defendant seduced plaintiff and award not disproportional to wealth of defendant, Morgan v. Muench, 181 Iowa 719, 156 N. W. 819; $12,500, seduction, defendant worth $70,000, at least, Mainz v. Lederer, 21 R. I. 370, 43 Atl. 876; $10,000, defendant worth $40,000, and plaintiff had lived with him and nursed him, Birkel v. Powers, 208 Ill. App. 430; $10,000, Liese v. Mayer, 143 Mo. 547, 45 S. W. 482; $10,000, Booren v. McWilliams, 34 N. Dak. 74, 157 N. W. 698; $10,000, defendant one-third owner in firm whose capital is $200,000, Stribley v. Welz, 8 Ohio Cir. Ct. 571, 4 O. C. D. 520; $10,000, seduction, defendant beneficiary of one-third interest in estate of $200,000, Salchert v. Reinig, 135 Wis. 194, 115 N. W. 132; $8,000, seduction, defendant worth over $16,500, Lanigan v. Neely, 4 Cal. App. 760, 89 Pac. 441; $8,000, defendant worth from $75,000 to $90,000, McKenzie v. Gray, 143 Iowa 112, 120 N. W. 71; $8,000, seduction, engagement fourteen years, sexual intercourse during entire period, defendant a man of considerable means, Hanson v. Johnson, 141 Wis. 550, 124 N. W. 506; $7,500, breach aggravated by seduction, Dreibelbiss v. Banner, 196 Mo. 236, 195 S. W. 68; $7,500, seduction and childbirth, Daggett v. Wallace, 75 Tex. 352, 13 S. W. 49, 16 Am. St. 908; $7,000, seduction and childbirth, Musselman v. Barker, 26 Nebr. 737, 42 N. W. 759; $6,000, seduction and childbirth, Hattin v. Chapman, 46 Conn. 607; $6,000 admitted wealth, $25,000, evidence tended to show he was worth several times that amount, Fisher v. Kenyon,

56 Wash. 8, 104 Pac. 1127, 20 Ann. Cas. 1264; $5,000, Mahiat v. Codde, 106 Mich. 387, 64 N. W. 194; $5,000, Kerns v. Hagenbuchle, 17 N. Y. 367, 42 N. Y. St. 210, 60 N. Y. Super. 222; $5,000, seduction and childbirth, Goodall v. Thurman, 1 Head (Tenn.) 209; $5,000 compensation and $1,500 exemplary where defendant seduced plaintiff, Klitzke v. Davis, 172 Wis. 425, 179 N. W. 586; $4,500, financial and social standing of defendant considered, McPherson v. Ryan, 59 Mich. 33, 26 N. W. 321; $4,250, Lemke v. Franzenburg, 159 Iowa 466, 141 N. W. 332; $4,000, defendant worth $12,000 and engagement had lasted for 17 years, Thrush v. Fullhart, 230 Fed. 24; $4,000, Richmond v. Roberts, 98 Ill. 472; $4,000, Hahn v. Bettingen, 84 Minn. 512, 88 N. W. 10; $3,600, defendant worth $25,000, Douglas v. Gausman, 68 Ill. 170; $3,500, Hickey v. Kimball, 109 Maine 433, 84 Atl. 943; $3,500, plaintiff 30 years of age and engagement had lasted nearly 3 years, West v. Oakey, 84 Okla. 59, 202 Pac. 318; $3,500, defendant worth from $25,000 to $50,000, Fisher v. Barber, 62 Tex. Civ. App. 34, 130 S. W. 871; $3,000, defendant worth $25,000, sixty-four years old, and the woman fifty years old, Maybin v. Webster, 8 Ind. App. 547, 35 N. E. 194, 36 N. E. 373; $3,000, seduction and pregnancy, Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; $3,000, Herriman v. Layman, 118 Iowa 590, 92 N. W. 710; $2,800, defendant worth $10,000, Fritzinger v. Ahrens, 151 Ill. App. 396; $2,800 defendant worth $10,000, Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 600, 78 Am. St. 914; $2,500, defendant worth from $12,000 to $15,000, Milder v. Milder (Iowa), 180 N. W. 274; $2,500, Poser v. Kahrs, 2 C. C. R. (N. Y.) 92; $2,108.33, Kendall v. Dunn, 71 W. Va. 262, 76 S. E. 454; $2,000, seduction, man worth $12,000, Hess v. Zimmer, 152 Wis. 193, 139 N. W. 740; $1,500, Clark v. Pendleton, 20 Conn. 495; $1,500, defendant worth $7,000, Sulzer v. Yott, 57 Ill. 164; $1,500, defendant worth $3,000 in excess of liabilities, plaintiff allowed $500, Halness v. Anderson, 110 Minn. 204, 124 N. W. 830. $1,500, childbirth, Jennette v. Sullivan, 63 Hun 361, 18 N. Y. S. 266, 43 N. Y. St. 641; $1,500, actual, and $500, exemplary damages, defendant, iron molder, plaintiff, factory girl, seduction, Luther v. Shaw, 157 Wis. 231, 147 N. W. 17; $1,500 Olson v. Solverson, 71 Wis. 663, 38 N. W. 329; $1,500, two illegitimate children, defendant worth $30,000, $2,144 on third trial, $3,500 being given on second trial, verdict did not show bias or partiality, Giese v. Schultz, 69 Wis. 521, 34 N. W. 913; $1,350, childbirth, Fidler v. McKinley, 21 Ill. 308; $1,100, defendant worth $8,000, Bukowski v. Kuznia (Minn.), 186 N. W. 311; $1,000, Kuck v. Johnson, 114 La. 781, 38 So. 559; $1,000, Lohner v. Coldwell, 15 Tex. Civ. App. 444, 39 S. W. 591; $800, Hiveley v. Golnick, 123 Minn. 498, 144 N. W. 213, 49 L. R. A. (N. S.) 757, Ann. Cas. 1915A, 295; $750, plaintiff, mother of illegitimate children, known by defendant to be so when contract was made, Johnson v. Travis, 33 Minn. 231, 22 N. W. 624; $500, Parker v. Forehand, 99 Ga. 743, 28 S. E. 400.

CHAPTER 3

MARRIAGE IN GENERAL

Section

55. Nature and status created in general.
56. Definitions of marriage.
57. Consent as element—Consummation.
58. Effect of collateral agreements.
59. State regulation of marriage in general.
60. State regulation of legal capacity of parties.
61. State regulation of ceremonial incidents.
62. Effect of marriage on wills.
63. What law governs.
64. What law governs—Illustrations.
65. What law governs—Exceptions to rule of validity everywhere of marriage legal in contractual state.

§ 55. **Nature and status created in general.**—Marriage is universal; it is founded on the law of nature. The essence of marriage is a sexual union and should be pure, and, for this reason the law encourages marriage and frowns on divorce and on all conduct which tends to weaken the obligations of the marital tie. In all civilized communities it is contractual in its inception. It requires the capacity to enter into its relations and the consent to do so. It is therefore at law treated as a contract[1] creating a

[1]Maryland v. Baldwin, 112 U. S. 490, 28 L. ed. 822, 5 Sup. Ct. 278; Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244; Meister v. Moore, 96 U. S. 76, 24 L. ed. 826; Patterson v. Gaines, 6 How. (U. S.) 550, 12 L. ed. 553; Nelson v. Brown, 164 Ala. 397, 51 So. 360, 137 Am. St. 61; Burns v. State, 48 Ala. 195, 17 Am. Rep. 34; In re Gregorson, 160 Cal. 21, 116 Pac. 60, L. R. A. 1916-C, 697, Ann. Cas. 1912D, 1124; Klipfel v. Klipfel, 41 Colo. 40, 92 Pac. 26, 124 Am. St. 96; Cartwright v. McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. 105; Barkshire v. State, 7 Ind. 389, 65 Am. Dec. 738; State v. Walker, 36 Kans. 297, 13 Pac. 279, 59 Am. Rep. 556; Watson v. Lawrence, 134 La. 194, 63 So. 873, L. R. A. 1915E, 121, Ann. Cas. 1916A, 651; Quealy v. Waldron, 126 La. 258, 52 So. 479, 27 L. R. A. (N. S.) 803, 20 Ann. Cas. 1374; Holmes v. Holmes, 6 La. 463, 26 Am. Dec. 482; Harding v. Alden, 9 Greenl. (Maine) 140, 23 Am. Dec. 549; Hulett v. Carey, 66 Minn. 327, 69 N. W. 31, 34 L. R. A. 384, 61 Am. St. 419; Bishop v. Brittain Inv. Co., 229 Mo. 699, 129 S. W. 668, Ann. Cas. 1912A, 868; Topper v. Perry, 197 Mo. 531, 95 S. W. 203, 114 Am. St. 777; Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79,

status, and not in any controlling sense as a sacrament.[2]

It is a social institution regulated by public authority.[3] But marriage is not a mere contract in the ordinary meaning of that term. It can not be rescinded by either party or both at their desire, for its conditions are fixed by law. Certain forms, ceremonies, or conditions must be complied with before it is valid. Not only are the parties themselves interested but likewise the state and the community.[4]

It is necessary to any valid marriage that there should be one woman and one man capable of contracting and they must enter into a contract by which they assume the relation of husband and

51 L. R. A. 854, 81 Am. St. 302; Banks v. Galbraith, 149 Mo. 529, 51 S. W. 105 (in which case an Indian woman was sold to a white man, and it was held that the issue could not inherit); State v. Zichfield, 23 Nev. 304, 46 Pac. 802, 34 L. R. A. 784, 62 Am. St. 800, True v. Ranney, 21 N. H. 52, 53 Am. Dec. 164; Voorhees v. Voorhees, 46 N. J. Eq. 411, 19 Atl. 172, 19 Am. St. 404; Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, 95 Am. St. 609; Piper v. Hoard, 107 N. Y. 73, 13 N. E. 626, 1 Am. St. 789; In re Love, 42 Okla. 478, 142 Pac. 305, L. R. A. 1915E, 109; Reaves v. Reaves, 15 Okla. 240, 82 Pac. 490, 2 L. R. A. (N. S.) 353; Draughn v. State, 12 Okla. Cr. 479, 158 Pac. 890, L. R. A. 1916F, 793; Sturgis v. Sturgis, 51 Ore. 10, 93 Pac. 696, 15 L. R. A. (N. S.) 1034, 131 Am. St. 724; Richard v. Brehm, 73 Pa. St. 140, 13 Am. Rep. 733; Commonwealth v. Stump, 53 Pa. St. 132, 91 Am. Dec. 198; McCreery v. Davis, 44 S. Car. 195, 22 S. E. 178, 28 L. R. A. 655, 51 Am. St. 794; Bowers v. Bowers, 10 Rich. Eq. (S. Car.) 551, 73 Am. Dec. 99; McKinney v. Clarke, 2 Swan (Tenn.) 321, 58 Am. Dec. 59; Cole v. Cole, 5 Sneed (Tenn.) 57, 70 Am. Dec. 275; Grigsby v. Reib, 105 Tex. 597, 153 S. W. 1124, L. R. A. 1915E, 1, Ann. Cas. 1915C, 1011; Hilton v. Roylance, 25 Utah 129, 69 Pac. 660, 58 L. R. A. 723, 95 Am. St. 821; Mountholly v. Andover, 11 Vt. 226, 34 Am. Dec. 685; In re McLaughlin, 4 Wash. 570, 30 Pac. 651, 16 L. R. A. 699; Crouch v. Wartenberg, 86 W. Va. 664, 104 S. E. 117, 11 A. L. R. 212; Becker v. Becker, 153 Wis. 226, 140 N. W. 1082, L. R. A. 1915E, 56; State v. Duket, 90 Wis. 272, 63 N. W. 83, 31 L. R. A. 515, 48 Am. St. 928; Dalrymple v. Dalrymple, 2 Hag. Cons. 54, 17 Eng. Rul. Cas. 10. See notes, L. R. A. 1915E, 15; 12 Eng. Rul. Cas. 736; 22 Am. Dec. 157; 23 Am. St. 451; 72 Am. St. 659.

[2]Gatto v. Gatto, 79 N. H. 177, 106 Atl. 493. See also Wiley v. Wiley, 75 Ind. App. 456, 123 N. E. 252.

[3]Marsicano v. Marsicano, 79 Fla. 278, 84 So. 156.

[4]Magee v. Young, 40 Miss. 164, 90 Am. Dec. 322; Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. 302; Willits v. Willits, 76 Nebr. 228, 107 N. W. 379, 5 L. R. A. (N. S.) 767, 14 Ann. Cas. 883; Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, 95 Am. St. 609; Rugh v. Ottenheimer, 6 Ore. 231, 25 Am. Rep. 513; State v. Duket, 90 Wis. 272, 63 N. W. 83, 31 L. R. A. 515, 48 Am. St. 928. See notes, 19 Am. St. 409; 124 Am St. 104.

wife for their joint lives, and they must both understand that neither one, nor both can rescind the contract or destroy the relation.[5] The contract is a life contract, imposing on the husband support and maintenance of the wife in sickness and in health during life, contingent only on termination by decree of court for statutory reasons.[6]

Some claim that marriage is of divine origin, others that it is the natural outgrowth of society. While the law does not expressly recognize its religious character it does recognize it as the most important of domestic relations and in most countries it has had the sanction of religion superadded.[7] It is the source of the family, the safeguard of public and private morals, the strength of the nation, and, whenever the general law of contracts conflicts with the stability and purity of marriage, its character as a contract is held subordinate to its character as a domestic relation.[8]

And while the constitution of the United States expressly states that no state shall pass any law impairing the obligation of a contract, it is held by a great majority of decisions that marriage is not a contract in the sense in which the word "contract" is there used, and the provision does not apply to the law of marriage and divorce.[9]

" 'Salus populi suprema lex esto' applies with peculiar force to this case. The marriage contract, once entered into, becomes a relation, rather than a contract, and invests each party with a status towards the other and society at large, involving duties and

[5]Perkins v. Silverman, 284 Mo. 238, 223 S. W. 895; State v. Cooper, 103 Mo. 266, 15 S. W. 327; In re Goode's Estate, 188 N. Y. S. 188.

[6]Van Dommelen v. Van Dommelen, 218 Mich. 149, 187 N. W. 324.

[7]Dalrymple v. Dalrymple, 2 Hag. Con. 54, 17 Eng. Rul. Cas. 10.

[8]State v. Duket, 90 Wis. 272, 63 N. W. 83, 31 L. R. A. 515, 48 Am. St. 928. See note, 124 Am. St. 105.

[9]Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. 723; State v. Tutty, 41 Fed. 753, 7 L. R. A. 50; Green v. State, 58 Ala. 190, 29 Am. Rep. 739. See People v. Case, 241 Ill. 279, 89 N. E. 638 (pointing out also the interest of the public in the married status and citing 2 Bishop Mar. & Div., §498, and 1 Nelson Sep. & Div., §8); Hurry v. Hurry, 144 La. 877, 81 So. 381; Magee v. Young, 40 Miss. 164, 90 Am. Dec. 322; Wade v. Kalbfleisch, 58 N. Y. 282, 16 Abb. Pr. (N. S.) 104, 17 Am. Rep. 250; Rugh v. Ottenheimer, 6 Ore. 231, 25 Am. Rep. 513; Ditson v. Ditson, 4 R. I. 87; Mountholly v. Andover, 11 Vt. 226, 34 Am. Dec. 685. Except in South Carolina, (McCreery v. Davis, 44 S. Car. 195, 22 S. E. 178, 28 L. R. A. 655, 51 Am. St. 794), the courts have generally abandoned the old doctrine that marriage is merely a civil contract, but now treat it as a status. See note, 84 Am. St. 449.

responsibilities which are no longer matter for private regulation, but concern the commonwealth. And in this aspect marriage is a civil or social institution, publici juris, being the foundation of the family and the origin of domestic relations of the utmost importance to civilization and social progress; hence the state is deeply concerned in its maintenance in purity and integrity."[10]

The matrimonial status is a matter of public concern and is governed by the law of the domicile and subject to legal control only in that jurisdiction.[11]

§ 56. **Definitions of marriage.**—A legal marriage is a union of a man and woman in the lawful relation of husband and wife, whereby they can cohabit and rear legitimate children.[12]

Sir William Blackstone says that: "Our law considers marriage in no other light than a civil contract. The holiness of the matrimonial state is left entirely to ecclesiastical law. Such a contract is good and valid, if the parties were, at the time of making it, willing to contract, able to contract, and actually did contract in the proper forms and solemnities required by law."[13]

Dole says that: "Marriage is a contract between two competent persons of opposite sex to live together for life, subject to such laws as do and may govern the relation of husband and wife."[14]

Bishop says: "Marriage is a civil status of one man and one woman united in law for life, under the obligation to discharge, to each other and the community, those duties which the community by its laws hold incumbent on persons whose association is founded on the distinction of the sex."[15]

It is also defined as a civil contract, into which parties who are competent may enter, either through the performance of a ceremonial marriage or through a mutual agreement between the

[10]Coy v. Humphreys (Mo.), 125 S. W. 877, quoting with approval the principle stated in Cramer v. Hurt, 154 Mo. 112, 55 S. W. 258, 77 Am. St. 752. See also Reifschneider v. Reifschneider, 241 Ill. 92, 89 N. E. 255 (to the effect that there is a presumption in favor of the validity of marriage citing Cartwright v. McGown, 121 Ill. 388, 391, 12 N. E. 737, 738, 2 Am. St. 105).

[11]Wagoner v. Wagoner, 287 Mo. 567, 229 S. W. 1064.

[12]Duntze v. Levett, Fac. Dec. 1816, p. 139.

[13]Hull v. Hull, 2 Strob. Eq. (S. Car.) 174; Duke v. Fulmer, 5 Rich. Eq. (S. Car.) 121.

[14]E. P. Dole's Talks About Law, 113.

[15]Bishop, Marriage and Divorce, § 1. See also McCabe v. Berge, 89 Ind. 225; State v. Bittick, 103 Mo. 183, 15 S. W. 325, 11 L. R. A. 587, 23 Am. St. 869.

parties to be husband and wife in praesenti, with subsequent cohabitation as husband and wife, and the holding out to the world of each other as such.[16]

§ 57. **Consent as element—Consummation.**—Mutual consent which is of the essence of all ordinary contracts, is likewise necessary to the validity of the marriage contract. This consent implies not only willingness to go through the ceremony of marriage, but also an intention to enter into the marriage status and assume the obligations, duties, rights, and privileges which appertain to the relation.[17] The parties must be capable of consenting, and must in fact, consent to form such relation.[18] Even consummation by coition does not establish the validity of a marriage to which there was no consent.[19]

The contract is complete when entered into and does not depend upon coition.[20]

§ 58. **Effect of collateral agreements.**—Once a marriage has been properly solemnized and the obligations of married life undertaken its validity can not be affected by an antenuptial agreement not to live together, nor by an agreement previously entered into that the marriage should not be valid and binding, nor yet merely because one or even both of the parties did not intend it to be a permanent relation. So, likewise, an antenuptial agreement between the parties not to cohabit is void and may be repudiated by either.

§ 59. **State regulation of marriage in general.**—The regulation of marriage and divorce is a matter within the exclusive province of the legislature of the states, in general, and they may prescribe who may marry, the age at which they may marry, the procedure and form essential to constitute marriage, the duties and obligations created by marriage, the effect on the property right of the parties and the causes which shall be regarded as

[16]Clark v. Clark, 44 Nev. 44, 194 Pac. 96.

[17]McClurg v. Terry, 21 N. J. Eq. 225; Dorgeloh v. Murtha, 92 Misc. 279, 156 N. Y. S. 181; Clark v. Field, 13 Vt. 460; Crouch v. Wartenberg, 86 W. Va. 664, 104 S. E. 117, 11 A. L. R. 212; Ford v. Stier, L. R. (1896) Prob. 1.

[18]In re Stevenson's Estate, 272 Pa. 291, 116 Atl. 162.

[19]Gatto v. Gatto, 79 N. H. 177, 106 Atl. 493.

[20]Love v. Love, 181 Iowa 930, 171 N. W. 257; Martin v. Otis, 233 Mass. 491, 124 N. E. 294, 6 A. L. R. 1340; Franklin v. Franklin, 154 Mass. 515, 28 N. E. 681, 13 L. R. A. 843, 26 Am. St. 266.

sufficient for its dissolution.[21] The state has this power over the subject, notwithstanding constitutional inhibitions concerning impairing the obligations of contracts, or interfering with private rights and immunities,[22] providing such regulations are not prohibitory.[23] These laws, however, have no extra-territorial effect.[24] Being fully under its regulation the state may declare what marriages between its citizens shall be void,[25] and may prescribe the qualifications of the parties and the manner in which the contract shall be entered into.[26] Accordingly the legislature may fix degrees of consanguinity and affinity, and prohibit miscegenation;[27] regulate and prescribe the duties and obligations of the parties;[28] regulate and establish the age of consent;[29] prescribe

[21]Barrington v. Barrington, 206 Ala. 192, 89 So. 512, 17 A. L. R. 789; Horton v. Horton, 22 Ariz. 490, 198 Pac. 1105; Wiley v. Wiley (Ind. App.), 123 N. E. 252.

[22]Green v. State, 58 Ala. 190, 29 Am. Rep. 739; Maguire v. Maguire, 7 Dana (Ky.) 181; Frasher v. State, 3 Tex. Civ. App. 263, 30 Am. Rep. 131.

[23]State v. Walker, 36 Kans. 297, 13 Pac. 279, 59 Am. Rep. 556.

[24]Lyannes v. Lyannes (Wis.), 177 N. W. 683 (Wisconsin eugenic law).

[25]Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. 723; State v. Tutty, 41 Fed. 753, 7 L. R. A. 50; Green v. State, 58 Ala. 190, 29 Am. Rep. 739; Gould v. Gould, 78 Conn. 242, 61 Atl. 604, 2 L. R. A. (N. S.) 531; State v. Walker, 36 Kans. 297, 13 Pac. 279, 59 Am. Rep. 556; Gregory v. Gregory, 78 Maine 187, 3 Atl. 280, 57 Am. Rep. 792; Kapigian v. Minassian, 212 Mass. 412, 99 N. E. 264, Ann. Cas. 1913D, 535; State v. Jackson, 80 Mo. 175, 50 Am. Rep. 499; Rugh v. Ottenheimer, 6 Ore. 231, 25 Am. Rep. 513; Grigsby v. Reid, 105 Tex. 597, 153 S. W. 1124, L. R. A. 1915E, 1, Ann. Cas. 1915C, 1011; Frasher v. State, 3 Tex. App. 263, 30 Am. Rep. 131; Greenbow v. James, 80 Va. 636, 56 Am. Rep. 603; Kinney v. Commonwealth, 30 Grat. (Va.) 858, 32 Am. Rep. 690; Lanham v. Lanham, 136 Wis. 360, 117 N. W. 787, 17 L. R. A. (N. S.) 804, 128 Am. St. 1085; State v. Duket, 90 Wis. 272, 63 N. W. 83, 31 L. R. A. 515, 48 Am. St. 928, Brook v. Brook, 9 H. L. Cas. 193, 7 Jur. N. S. 422, 4 L. T. N. S. 93, 9 W. R. 461, 15 Eng. Rul. Cas. 783. See notes, 79 Am. St. 361; 52 L. R. A. (N. S.) 778; Ann. Cas. 1916B, 1051.

[26]Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. 723; In re Gregorson, 160 Cal. 21, 116 Pac. 60, L. R. A. 1916C, 697, Ann. Cas. 1912D, 1124; State v. Walker, 36 Kans. 297, 13 Pac. 279, 59 Am. Rep. 556; State v. Kennedy, 76 N. Car. 251, 22 Am. Rep. 683; Kinney v. Commonwealth, 30 Grat. (Va.) 858, 32 Am. Rep. 690. See note, Ann. Cas. 1916B, 1051.

[27]Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. 723; Eaton v. Eaton, 66 Nebr. 676, 92 N. W. 995, 60 L. R. A. 605, 1 Ann. Cas. 199; State v. Kennedy, 76 N. Car. 251, 22 Am. Rep. 683. See note, Ann. Cas. 1916B, 1051.

[28]State v. Kennedy, 76 N. Car. 251, 22 Am. Rep. 683. See note, Ann. Cas. 1916B, 1051.

[29]Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. 723.

the terms on which divorced parties may remarry;[30] forbid the marriage of epileptics;[31] regulate physical conditions and require the certificate of a physician before license can be issued;[32] fix the effect of marriage upon property rights;[33] and prescribe the grounds for the dissolution of the marriage relation.[34]

§ 60. **State regulation of legal capacity of parties.**—Aside from the consideration of the mental and physical capacity of the parties, there are incapacities which are created by law which are based upon claims of public policy. One of these is the prohibition of persons of different races marrying, which creates a sort of racial incapacity, and is termed miscegenation in the books.[35] Another is the incapacity of persons to marry where within certain degrees of relationship.[36]

The age at which persons are considered to be capable of entering marriage is based on statute and varies in the different states.[37]

Legal capacity also includes the question of the legal condition of the parties as the result of a former marriage or divorce. If either party is already married and such marriage has never been absolutely dissolved, there is a legal incapacity to marry regardless of the good faith of one or the other of the parties.[38] Even though there may have been a divorce entered which was afterward vacated for fraud or other reason, the second marriage will be void, and the issue rendered illegitimate.[39]

[30]Eaton v. Eaton, 66 Nebr. 676, 92 N. W. 995, 60 L. R. A. 605, 1 Ann. Cas. 199.

[31]Gould v. Gould, 78 Conn. 242, 61 Atl. 604, 2 L. R. A. (N. S.) 531. See note, Ann. Cas. 1916B, 1051.

[32]Peterson v. Widule, 157 Wis. 641, 147 N. W. 966, 52 L. R. A. (N. S.) 778, Ann. Cas. 1916B, 1040.

[33]Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. 723; Kinney v. Commonwealth, 30 Grat. (Va.) 858, 32 Am. Rep. 690; State v. Duket, 90 Wis. 272, 63 N. W. 83, 31 L. R. A. 515, 48 Am. St. 928. See note, 84 Am. St. 449; Ann. Cas. 1916B, 1051.

[34]In re Gregorson, 160 Cal. 21, 116 Pac. 60, L. R. A. 1916C, 697. Ann. Cas. 1912D, 1124.

[35]See post chap. 8, § 105.

[36]See post, § 27.

[37]See infra, chap. 7, § 95. Infancy, and § 98, Table of Nonage.

[38]Brown v. Brown, 142 Ill. 409, 32 N. E. 500; Turner v. Turner, 189 Mass. 373, 75 N. E. 612, 109 Am. St. 643; Adams v. Adams, 154 Mass. 290, 28 N. E. 260, 13 L. R. A. 275; Moors v. Moors, 121 Mass. 232; Glass v. Glass, 114 Mass. 563; Morrill v. Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411. See also note Ann. Cas. 1914C, 1296.

[39]In re Cook, 77 Cal. 220, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567, 11 Am. St. 267; Caswell v. Caswell, 120 Ill. 377, 11 N. E. 342; Whitcomb v. Whitcomb, 46 Iowa 437; Edson v. Edson, 108 Mass. 590, 11 Am. Rep.

§ 61. **State regulation of ceremonial incidents.**—In most states the law plainly sets out how and by whom a marriage may be celebrated, usually by an ordained minister of the gospel, a magistrate, or according to the rites of the Quakers. It is not quite clear, however, in some states whether a celebration is absolutely necessary or not.[40] Although various state statutes prescribe these formalities in the marriage ceremony, the courts uniformly look to the spirit of the acts and the intention[41] of the parties and, if possible, will declare the marriage valid, even though there is some irregularity. This is done on the ground of public policy and the courts hold that it is a substantial compliance with the statute for regulating marriages for the parties themselves to make the mutual agreement in the presence of a justice of the peace or a minister, with his assent, he undertaking to act in his official capacity. But if the justice or minister does not consent to act in his official character, the marriage is void.[42] Thus statutes regulating the issuing of licenses, the attendance of witnesses, formal solemnization and the like, are generally held to be directory only unless such a statute expressly invalidates marriages not in conformity therewith.[43]

In one of the cases one of the parties testified that seven years before they went before a justice of the peace for the county where they both lived, and in the town where the justice resided with the intent of both to contract a marriage before the justice; that the man stated in the presence and hearing of the justice that the woman was his wife; that afterward he and she lived together as husband and wife, and had children; that he believed himself lawfully married to her, and she believed herself lawfully married to him, although the justice testified that he did not understand

393; Allen v. Maclellan, 12 Pa. St. 328, 51 Am. Dec. 608.

[40]People v. Pizzura, 211 Mich. 71, 178 N. W. 235, 10 A. L. R. 405. A religious ceremony is necessary in Maryland. Scott v. Independent Ice Co., 135 Md. 343, 109 Atl. 117.

[41]Jackson v. Jackson (N. J. Ch.), 113 Atl. 495; Tedder v. Tedder, 108 S. Car. 271, 94 S. E. 19, 2 A. L. R. 438, 440.

[42]Milford v. Worcester, 7 Mass. 48.

[43]Meister v. Moore, 96 U. S. 76, 24 L. ed. 826; Smith v. Smith, 205 Ala. 502, 88 So. 577; Wilmington Trust Co. v. Hendrixson (Del. Super.), 114 Atl. 215; Minshew v. State, 25 Ga. App. 240, 102 S. E. 906; People v. Reynolds, 217 Ill. App. 577; State v. Trull, 147 La. 444, 85 So. 70; Hutchins v. Kimmell, 31 Mich. 128, 18 Am. Rep. 164; Melcher v. Melcher, 102 Nebr. 790, 169 N. W. 720, 4 A. L. R. 492; Londonderry v. Chester, 2 N. H. 268, 9 Am. Dec. 61. See note, 79 Am. St. 362.

that he married the parties at the time and all that was said by either was that the plaintiff introduced the woman as his wife. The court held the marriage valid and said "the policy of the law, as thus expressed, is strongly opposed to regarding a marriage, entered into in good faith, believed by one or both parties to be legal and followed by cohabitation, void. A liberal construction of the statute authorizes us to construe it as including a case where the parties go before a magistrate or minister, make a marriage contract in some form in his presence, in the belief that he sanctions and assents to it in his official capacity, and cohabit as husband and wife afterward, believing that they are legally married, though the magistrate understands the matter differently and does not intend to act officially in the matter. The misunderstanding between the parties and the magistrate may be regarded as an informality not rendering the marriage void. The spirit of the statute would be violated by holding the parties to be fornicators and the children illegitimate."[44]

There are statutes, however, making these formalities absolute conditions to the validity of a marriage.[45] In case of doubt the general policy of the law is to sustain the marriage.[46]

There should always be either a religious ceremony or a civil celebration and all marriages by simple consent should be declared void on the ground of public policy. Such marriages are contrary to the principles of sound morality, and a man and woman living together without the formality of a celebration are in reality living in a state of adultery, and should be prevented from so doing by criminal statutes, for this reason if no other, that, should there be children born while the parents are living in this state they would be illegitimate and consequently innocent sufferers. Again, where two persons intend to form a union for life they can have no reasonable excuse for concealing the fact from the rest of the world, for the celebration can be obtained with little expense. Then there is always difficulty in determin-

[44]Meyers v. Pope, 110 Mass. 314. In Donohue v. Donohue, 159 Mo. App. 610, 141 S. W. 465, the court held that the improper motives that induced the marriage did not render it void.

[45]Norman v. Norman, 121 Cal. 620, 54 Pac. 143, 42 L. R. A. 343, 66 Am. St. 74; Commonwealth v. Munson, 127 Mass. 459, 34 Am. Rep. 411; Morrill v. Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411; In re McLaughlin, 4 Wash. 570, 30 Pac. 651, 16 L. R. A. 699. See notes, 2 L. R. A. (N. S.) 354; L. R. A. 1915E, 118.

[46]In re Imboden's Estate, 111 Mo. App. 220, 86 S. W. 263.

ing whether persons so loosely joined together are married or not, and it requires very unpleasant and expensive litigation to determine the question. The court said in a Massachusetts case that, "The mere belief of either or both parties that they were husband and wife does not constitute a legal marriage."[47]

§ 62. **Effect of marriage on wills.**—At common law the marriage of a woman after the execution of her will revoked the will, whether she survived her husband or not, and by statute in a majority of the states of this country this rule is expressly declared, but in some the will is revived if she survives her husband.[48] In many jurisdictions the incapacity of married women to make wills has been removed by statute, and if her marriage operated to revoke her pre-existing will, she might by republishing it, or by executing a will of like tenor, avoid the effect of such implied revocation; but in most of the states this removal of her want of capacity has been determined to be in effect the removal of all the reasons of the common-law rule, and therefore to make the rule itself obsolete, and to leave her antenuptial will in full force.[49]

At common law the marriage of a man did not revoke his will, and this is the rule in this country, unless expressly abrogated by statute.[50] In several states, statutes have been enacted providing that the marriage of a man or woman revokes his or her will, unless the will makes provision in contemplation of the marriage, or otherwise shows that the marriage is not to revoke it.[51]

[47]Thompson v. Thompson, 114 Mass. 566; Commonwealth v. Munson, 127 Mass. 459, 34 Am. Rep. 411.

[48]Colcord v. Conroy, 40 Fla. 97, 23 So. 561; McAnnulty v. McAnnulty, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552; Blodgett v. Moore, 141 Mass. 75, 5 N. E. 470; Swan v. Hammond, 138 Mass. 45, 52 Am. Rep. 255; Vandeveer v. Wiggins, 59 Nebr. 333, 80 N. W. 1043.

[49]Chapman v. Dismer, 14 App. D. C. 446; In re Emery, 81 Maine 275, 17 Atl. 68; Noyes v. Southworth, 55 Mich. 173, 20 N. W. 891, 54 Am. Rep. 359; Kelly v. Stevenson, 85 Minn. 247, 88 N. W. 739, 56 L. R. A. 754, 89 Am. St. 545; Hulett v. Carey, 66 Minn. 327, 69 N. W. 31, 34 L. R. A. 384, 61 Am. St. 419; Lee v. Blewett, 116 Miss. 341, 77 So. 147, L. R. A. 1918B, 941; Fellows v. Allen, 60 N. H. 439, 49 Am. Rep. 328; Webb v. Jones, 36 N. J. Eq. 163; Morton v. Amion, 45 Vt. 145; In re Ward's Will, 70 Wis. 251, 35 N. W. 731, 5 Am. St. 174.

[50]In re Goodsell's Appeal, 55 Conn. 171, 10 Atl. 557; Bowers v. Bowers, 53 Ind. 430; Hoitt v. Hoitt, 63 N. H. 475, 3 Atl. 604, 56 Am. Rep. 530; In re Ward's Will, 70 Wis. 251, 35 N. W. 731, 5 Am. St. 174. But see Morgan v. Ireland, 1 Idaho 786.

[51]Gay v. Gay, 84 Ala. 38, 4 So. 42; Corker v. Corker, 87 Cal. 643, 25

§ 63. **What law governs.**—Generally, the validity of a marriage depends upon the law of the place where the marriage is performed. The lex loci contractus governs. If valid there the general rule, with few exceptions, make it valid everywhere.[52] The law of the domicil of the parties, however, controls in all questions governing the civil consequences of a marriage, as distinguished from the contract by which it is entered into, including the reciprocal rights and obligations of the parties and the causes for which the marriage may be dissolved.[53] The Virginia courts lay down the general rule that a marriage valid where celebrated is good everywhere and approves the exception from Story on Conflict of Laws, where he says (Sec. 113a): "The most prominent, if not the only known exceptions to the rule are those marriages involving polygamy and incest, those positively prohibited by the public law of a country from motives of policy, and those celebrated in foreign countries by subjects entitling themselves under special circumstances to the benefit of the laws of their own country." The court approves the case of Brook v. Brook, 9 H. C. L. 193 (marg.), 145 (bottom) where an Englishman married his deceased wife's sister in Denmark and the marriage was held invalid. It is pointed out that while the forms of entering into the contract of marriage are to be regu-

Pac. 922; McAnnulty v. McAnnulty, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552; Byrd v. Surles, 77 N. Car. 435; In re Fidelity Insurance Co.'s Appeal, 121 Pa. St. 1, 15 Atl. 484.

[52]Horton v. Horton, 22 Ariz. 490, 198 Pac. 1105; Potter v. Stanley, 187 Ky. 292, 219 S. W. 167; Green v. McDowell (Mo. App.), 242 S. W. 168; Bolmer v. Edsall, 90 N. J. Eq. 299, 106 Atl. 646; Bays v. Bays, 174 N. Y. S. 212; Ollschlager's Estate v. Widmer, 55 Ore. 145, 105 Pac. 717. The court says that the legality of the marriage must be determined by the laws of the state in which the marriage ceremony was performed, citing Sturgis v. Sturgis, 51 Ore. 10, 93 Pac. 696, 15 L. R. A. (N. S.) 1034, 131 Am. St. 724. Accord, In re Lando's Estate, 112 Minn. 257, 127 N. W. 1125, 30 L. R. A. (N. S.) 940 (marriage in Germany, valid in Minnesota), citing Hills v. State, 61 Nebr. 589, 85 N. W. 836, 57 L. R. A. 155 (where most of the cases will be found analyzed).

[53]Kinney v. Commonwealth, 30 Grat. (Va.) 858, 32 Am. Rep. 690. This is a case of fraud. A negro man and a white woman went from Virginia to District of Columbia to marry and returned in a few days. It was held that the marriage was void and that they could be indicted in Virginia for lewd and lascivious cohabitation. But see Reifschneider v. Reifschneider, 241 Ill. 92, 89 N. E. 255, where the parties went from Illinois into Indiana to marry and the legality of the marriage was adjudged by the laws of Indiana; and this would seem to be the general rule unless they went with fraudulent intent.

lated by the lex loci contractus, the essentials of the contract depend upon the lex domicilii. Although the forms of celebrating the foreign marriage may be different from those required by the country of domicil, the marriage may be good everywhere. But if the contract of marriage is such in essentials as to be contrary to the law of the country of domicil, and it is declared void by that law, it is to be regarded as void in the country of domicil, though not contrary to the law of the country in which it was celebrated.[54] If the parties are once legally married according to the lex loci contractus,—the place where the marriage takes place,—they are legally married everywhere.

Story says that a marriage valid in one locality is valid everywhere, and this is the rule except as herein noted. In other words the validity of a marriage depends upon its validity at the place of its celebration.[55]

When persons residing in one state in order to evade the statutes as to prohibited marriages, and with the intention of returning to reside in that state, go into another state and there have the marriage solemnized and afterwards return to and reside in the original state, the marriage is void and may be annulled. To warrant such a decree, however, both parties must have intended to evade the statute.[56]

The courts of this country will recognize the provision of the law of Turkey that the marriage in that country of a Christian wife to a Mohammedan dissolves her previous marriage and the husband is free to marry another.[57]

§ 64. **What law governs—Illustrations.**—A negro and a white person, whose domicil was in Massachusetts, were married in Rhode Island where such a marriage was valid, although it was

[54]Kinney v. Commonwealth, 30 Grat. (Va.) 858, 32 Am. Rep. 693; Brook v. Brook, 7 Jur. N. S. 422, 4 L. T. N. S. 93, 9 W. R. 461, 5 Eng. Rul. Cas. 783.

[55]Harrison v. State, 22 Md. 468, 85 Am. Dec. 658; Commonwealth v. Kenney, 120 Mass. 387. It has been decided in a case (apparently of first impression) that a state will not refuse to recognize a marriage between uncle and niece, valid where contracted, although its statutes prohibit such marriages. Fensterwald v. Burk, 129 Md. 131, 98 Atl. 358, 3 A. L. R. 1562. (Writ of error dismissed by U. S. Supreme Court, Nov. 19, 1918, 248 U. S. 592, 63 L. ed. 436, 39 Sup. Ct. 21).

[56]Gardner v. Gardner, 232 Mass. 253, 122 N. E. 308; Whippen v. Whippen, 171 Mass. 560, 51 N. E. 174; Commonwealth v. Lane, 113 Mass. 458, 18 Am. Rep. 509.

[57]Kapigian v. Minassian, 212 Mass. 412, 99 N. E. 264, Ann. Cas. 1913D, 535.

void in Massachusetts.[58] The Massachusetts court held the marriage valid because it was valid in Rhode Island where it was solemnized.[59] But where a negro married a white person in South Carolina, such marriage being permitted there, but both parties were domiciled residents of North Carolina, where such marriages were not permitted, the marriage was void in North Carolina.[60] But where its celebration took place in South Carolina, and both parties removed there immediately with the honest intention at the time of making that state their home, the marriage was held to be valid because there was no intent to evade the North Carolina law as in State v. Kennedy.[61]

And where a man married his mother's sister in England, where such a marriage was not forbidden, and afterward removed to Massachusetts and became domiciled there, the Massachusetts court held the marriage to be valid; but if such a marriage had been entered into in Massachusetts it would have been absolutely void.[62]

Again, where a person has been forbidden to marry, as where a court has imposed a restriction upon the libellee after a divorce in one state, and he or she goes to another state, where the prohibition does not apply, and is married according to the laws of that state, the marriage is valid according to the great weight of authority.[63] Where, however, there is an express prohibition against the legality of a marriage within a specified time after divorce and a divorced person being under the prohibition leaves the state of domicil and goes to another state for the purpose of marrying and there marries one who knows his disability and they immediately return to the state of domicil, such marriage will be void in the state of domicil,[64] and in some jurisdictions

[58]Statute of 1786, ch. 3 § 7.

[59]Medway v. Needham, 16 Mass. 157, 8 Am. Dec. 131; Putnam v. Putnam, 8 Pick. (Mass.) 433.

[60]State v. Kennedy, 76 N. Car. 251, 22 Am. Rep. 683; cited in 32 Am. Rep. 695. Accord, Johnson v. Johnson, 57 Wash. 89, 106 Pac. 500, 26 L. R. A. (N. S.) 179.

[61]Levy v. Downing, 213 Mass. 334, 100 N. E. 638; State v. Hand, 87 Nebr. 189, 126 N. W. 1002, 28 L. R. A. (N. S.) 753; Fowler v. Fowler, 131 N. Car. 169, 173, 42 S. E. 563, 59 L. R. A. 317; State v. Ross, 76 N. Car 242, 22 Am. Rep. 678.

[62]Sutton v. Warren, 10 Metc. (Mass.) 451.

[63]Wilson v. Holt, 83 Ala. 528, 3 So. 321, 3 Am. St. 768; Fuller v. Fuller, 40 Ala. 301; Putnam v. Putnam, 8 Pick. (Mass.) 433.

[64]Wilson v. Cooke, 256 Ill. 460, 100 N. E. 222, 43 L. R. A. (N. S.) 365; Lanham v. Lanham, 136 Wis. 360, 117 N. W. 787, 17 L. R. A. (N. S.) 804, 128 Am. St. 1085.

will be held void in a third state which has the same general rule of public policy.[65]

In Massachusetts, where a marriage between a man and his deceased wife's sister is lawful, if the marriage was solemnized in Massachusetts, it would be held valid in other states even though they prohibit such marriages.[66]

§ 65. **What law governs—Exceptions to rule of validity everywhere of marriage legal in contractual state.**—The only exceptions to the general rule, "that a marriage valid where it is contracted is valid everywhere," are the following:

(a) Polygamous marriages. Such marriages, although valid by the law of the place where the parties were domiciled will not be upheld in a country where polygamy is a crime.[67]

(b) Incestuous or unnatural marriages, as where a man marries his mother or sister. Such marriages being contrary to nature, will not be upheld, though permitted by the law of the domicil of the parties.[68]

(c) Marriages which the legislature of a state has declared shall not be allowed any validity because they are contrary to the policy of its law.[69]

(d) Marriages by parties under the age of consent entered into in foreign state have been held void in state of domicil.[70]

(e) The validity of a marriage contracted by citizens of one state in a foreign state, to which the contracting parties went for the purpose of evading the laws of the state of domicile may be called in question by the courts of the state of domicil, if there is no change in domicil.[71]

[65]Hall v. Industrial Comm., 165 Wis. 364, 162 N. W. 312, L. R. A. 1917D, 829.

[66]Greenwood v. Curtis, 6 Mass. 358, 4 Am. Dec. 145, giving illustrations on page 148 of a contract valid where made, valid everywhere.

[67]Hyde v. Hyde, L. R. 1 P. & D. 133. See also Brinkley v. Attorney General, 15 P. D. 76; Commonwealth v. Lane, 113 Mass. 458, 18 Am. Rep. 509.

[68]Story, Conflict of Laws, § 114; Sutton v. Warren, 10 Metc. (Mass.) 451; In re Wilbur's Estate, 8 Wash. 35, 35 Pac. 407, 40 Am. St. 886. See also Lincoln v. Riley, 217 Ill. App. 571.

[69]Commonwealth v. Graham, 157 Mass. 73, 31 N. E. 706, 16 L. R. A. 578, 34 Am. St. 255; Commonwealth v. Lane, 113 Mass. 458, 18 Am. Rep. 509; People v. Steere, 184 Mich. 556, 151 N. W. 617; Lanham v. Lanham, 136 Wis. 360, 117 N. W. 787, 17 L. R. A. (N. S.) 804, 128 Am. St. 1085.

[70]Mitchell v. Mitchell, 63 Misc. 580, 117 N. Y. S. 671.

[71]Norman v. Norman, 121 Cal. 620, 54 Pac. 143, 42 L. R. A. 343, 66 Am. St. 74 (marriage on high

A marriage which is invalid where it was celebrated is invalid everywhere, and so of a marriage on the high seas entered into in order to evade the laws of the state of residence.[72]

The parties must comply with the forms required by the law of the place where they contract the marriage or it will be invalid, except:—in cases where there is a special provision of law applicable to marriages of foreigners according to the rites of their own country; in cases of ambassadors, consuls, etc., where the parties enjoy extra-territorial rights;[73] and in cases where a compliance with the law is impossible. A ceremony, performed by a man and woman in good faith as a marriage rite, no third person participating, and no magistrate or minister, nor any person believed to be such, being present, and neither party being a Friend or Quaker, does not constitute a valid marriage under the laws of Massachusetts.[74]

seas); Succession of Gabisso, 119 La. 704, 44 So. 438, 11 L. R. A. (N. S.) 1082, 121 Am. St. 529, 12 Ann. Cas. 574; Levy v. Downing, 213 Mass. 334, 100 N. E. 638; Whippen v. Whippen, 171 Mass. 560, 51 N. E. 174; Cunningham v. Cunningham, 206 N. Y. 341, 99 N. E. 845, 43 L. R. A. (N. S.) 355; In re Stull's Estate, 183 Pa. St. 625, 39 Atl. 16, 39 L. R. A. 530, 63 Am. St. 776; Johnson v. Johnson, 57 Wash. 89, 106 Pac. 500, 26 L. R. A. (N. S.) 179. Contra, State v. Hand, 87 Nebr. 189, 126 N. W. 1002, 28 L. R. A. (N. S.) 753; Sturgis v. Sturgis, 51 Ore. 10, 93 Pac. 696, 131 Am. St. 724, 15 L. R. A. (N. S.) 1034; Leefield v. Leefield, 85 Ore. 287, 166 Pac. 953.

[72]Norman v. Norman, 121 Cal. 620, 54 Pac. 143, 42 L. R. A. 343, 66 Am. St. 74.

[73]Loring v. Thorndike, 5 Allen (Mass.) 257.

[74]Commonwealth v. Munson, 127 Mass. 459, 34 Am. Rep. 411.

CHAPTER 4

COMMON-LAW MARRIAGE

Section

70. Common-law marriage in general.
71. Common-law marriage—Per verba de praesenti.
72. Common-law marriage—Per verba de futuro cum copula.
73. Common-law marriage—Form and essentials of contract in general.
74. Common-law marriage—Binding effect.
75. Common-law marriage—Necessity of matrimonial intent.
76. Common-law marriage—Cohabitation as element.
77. Common-law marriage—Consummation after removal of impediments.

§ 70. **Common-law marriage in general.**—A marriage by agreement between capable parties to assume the full marital relation, without a ceremonial celebration and followed by the parties living together publicly as husband and wife is called a common-law marriage.[1]

Marriage having been considered by the old natural and canon law to be primarily the result of an agreement between the two parties to become husband and wife, no formal celebration was considered necessary. It was sufficient if there was a present agreement between them to assume the marital relation.[2] By the

[1]White v. Hill, 176 Ala. 480, 58 So. 444; Warren v. Warren, 66 Fla. 138, 63 So. 726; Coad v. Coad, 87 Nebr. 290, 127 N. W. 455; In re Seymour, 113 Misc. 421, 185 N. Y. S. 373; Bothwell v. Way, 44 Okla. 555, 145 Pac. 350; In re Love's Estate, 42 Okla. 478, 142 Pac. 305, L. R. A. 1915E, 109; Bobbitt v. Bobbitt (Tex. Civ. App.), 223 S. W. 478; Nye v. State, 77 Tex. Cr. 389, 179 S. W. 100. In re Wells Estate, 194 N. Y. 548, 87 N. E. 1129; this simply affirms the order of the Appellate Court, 123 App. Div. 79, 108 N. Y. S. 164; but see the comment on this case in In re Fitzgibbon's Estate, 162 Mich. 416, 127 N. W. 313, 139 Am. St. 570; Harlan v. Harlan (Tex. Civ. App.), 125 S. W. 950.

[2]Reed v. Harkrader, 264 Fed. 834; Sprung v. Morton, 182 Fed. 330; Sneed v. Ewing, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41; Londonderry v. Chester, 22 N. H. 268, 9 Am. Dec. 61; Reaves v. Reaves, 15 Okla. 240, 82 Pac. 490, 2 L. R. A. (N. S.) 353; Mountholly v. Andover, 11 Vt. 226, 34 Am. Dec. 685; In re McLaughlin, 4 Wash. 570, 30 Pac. 651, 16 L. R. A. 699; Dalrymple v. Dalrymple, 2 Hag. Con. 54, 17 Eng. Rul. Cas. 10. See notes, 12 Eng. Rul. Cas. 737; L. R. A. 1915E, 10, 23.

decree of the Council of Trent in 1563, the canon law was changed and celebration by a priest in the presence of witnesses was required.[3]

Although this decree was adopted generally in the Catholic countries it was never adopted in England. There the old canon law still remained in effect and was in effect at the time the American colonies were established. It accordingly, became the general law in America in colonial days and is now the law in a number of states.[4] In a few of the states the courts have refused to follow the canon law,[5] and in still others ceremonial marriage has since been expressly required in order to make a marriage valid.[6] But the courts of these states recognize the validity of such marriages entered into in states sanctioning them.[7]

Statutes forbidding common-law marriages have no retroactive effect.[8]

Whether there is a common-law marriage in any case is nearly always a question of fact.[9]

§ 71. **Common-law marriage—Per verba de praesenti.**—This common-law contract of marriage may grow out of either of two kinds of contracts, known to the old law as marriage per verba de praesenti and marriage per verba de futuro cum copula. In mar-

[3]Hallett v. Collins, 10 How. (U. S.) 174, 13 L. ed. 376; Reaves v. Reaves, 15 Okla. 240, 82 Pac. 490, 2 L. R. A. (N. S.) 353; In re McLaughlin, 4 Wash. 570, 30 Pac. 651, 16 L. R. A. 699. See note, 79 Am. St. 361.

[4]Great Northern R. Co. v. Johnson, 254 Fed. 683. Dickerson v. Brown, 49 Mass. 357; Hollinghausen v. Ade (Mo.), 233 S. W. 39; Dyer v. Brannock, 66 Mo. 391, 27 Am. Rep. 359; In re Love's Estate, 42 Okla. 478, 142 Pac. 305, L. R. A. 1915E, 109; Draughn v. State, 12 Okla. Cr. 479, 158 Pac. 890, L. R. A. 1916F, 793; In re McCausland, 213 Pa. St. 189, 62 Atl. 780, 110 Am. St. 540; Grigsby v. Reib, 105 Tex. 597, 153 S. W. 1124, L. R. A. 1915E, 1, Ann. Cas. 1915C, 1011; Becker v. Becker, 153 Wis. 226, 140 N. W. 1082, L. R. A. 1915E, 56. See notes, L. R. A. 1915E, 12, 19; 17 Eng. Rul. Cas. 164.

[5]Furth v. Furth, 97 Ark. 272, 133 S. W. 1037, Ann. Cas. 1912D, 595; Commonwealth v. Munson, 127 Mass. 459, 34 Am. Rep. 411; Meton v. State Industrial Insurance Department, 104 Wash. 652, 177 Pac. 696. Notes, 124 Am. St. 121; L. R. A. 1915E, 17; Ann. Cas. 1912D, 603, 604.

[6]Wilmington Trust Co. v. Hendrixson (Del. Super), 114 Atl. 215. See note, L. R. A. 1915E, 19.

[7]Petras v. Petras, 7 Boyce (Del.), 290, 105 Atl. 835; In re Seymour, 113 Misc. 421, 185 N. Y. S. 373.

[8]Randazzo v. Randazzo (Mo. App.), 236 S. W. 1061.

[9]Brown v. Long Mfg. Co., 213 Mich. 221, 182 N. W. 124; Hollinghausen v. Ade (Mo.), 233 S. W. 39; Walton v. Walton (Tex. Civ. App.), 228 S. W. 921.

riages per verba de praesenti there must a present contract or agreement of marriage. This may or may not be followed by consummation through cohabitation.[10]

There must be an agreement of the parties, in words of the present tense to live together as husband and wife, but no particular words are necessary.[11] Copula serves only as evidence that the parties have entered into the marriage relation.[12] "The primary, essential element is a mutual agreement of the man and the woman to become then and thenceforth husband and wife."[13]

§ 72. **Common-law marriage—Per verba de futuro cum copula.**—In marriage per verba de futuro cum copula there is a present promise of future marriage with subsequent cohabitation

[10]Travers v. Reinhardt, 205 U. S. 423, 51 L. ed. 865, 27 Sup. Ct. 563 (N. J. rule); Maryland v. Baldwin, 112 U. S. 490, 28 L. ed. 822, 5 Sup. Ct. 278; Meister v. Moore, 96 U. S. 76, 24 L. ed. 826; Patterson v. Gaines, 6 How. (U. S.) 550, 12 L. ed. 553; Farley v. Farley, 94 Ala. 501, 10 So. 646, 33 Am. St. 141; Chaves v. Chaves, 79 Fla. 602, 84 So. 672; Marsicano v. Marsicano, 79 Fla. 278, 84 So. 156; Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451, 15 L. R. A. (N. S.) 190; Hiler v. People, 156 Ill. 511, 41 N. E. 181, 47 Am. St. 221; Teter v. Teter, 101 Ind. 129, 51 Am. Rep. 742; Brisbin v. Huntington, 128 Iowa 166, 103 N. W. 144, 5 Ann. Cas. 931; Sneed v. Ewing, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41; Hutchins v. Kimmell, 31 Mich. 126, 18 Am. Rep. 164; Johnson v. Johnson, 30 Mo. 72, 77 Am. Dec. 598; Michigan University v. McGuckin, 62 Nebr. 489, 87 N. W. 180, 57 L. R. A. 917; State v. Zichfeld, 23 Nev. 304, 46 Pac. 802, 34 L. R. A. 784, 62 Am. St. 800; Londonderry v. Chester, 2 N. H. 268, 9 Am. Dec. 61; Hayden v. Vreeland, 37 N. J. L. 372, 18 Am. Rep. 723; Hynes v. McDermott, 82 N. Y. 41, 37 Am. Rep. 538; In re Seymour, 113 Misc. 421, 185 N. Y. S. 373; In re Love's Estate, 42 Okla. 478, 142 Pac. 305, L. R. A. 1915E, 109; Commonwealth v. Stump, 53 Pa. St. 132, 91 Am. Dec. 198; Grigsby v. Reib, 105 Tex. 597, 153 S. W. 1124, L. R. A. 1915E, 1, Ann. Cas. 1915C, 1011; Winters v. Duncan (Tex. Civ. App.), 220 S. W. 219; Edmondson v. Johnson (Tex. Civ. App.), 207 S. W. 586. But see Great Northern Ry. Co. v. Johnson, 254 Fed. 683; Herd v. Herd, 194 Ala. 613, 69 So. 885, L. R. A. 1916B, 1243. See notes, 22 Am. Dec. 157, 567; 24 Am. St. 451; 61 Am. St. 431; 72 Am. St. 353, 659; 124 Am. St. 107; L. R. A. 1915E, 13, 23; Ann. Cas. 1912D, 598 et seq.; 12 Eng. Rul. Cas. 737.

[11]Randazzo v. Randazzo (Mo. App.), 236 S. W. 1061; Jackson v. Jackson (N. J. Ch.), 113 Atl. 495.

[12]Port v. Port, 70 Ill. 484; Topper v. Perry, 197 Mo. 531, 95 S. W. 203, 114 Am. St. 777; Horrigan v. Gibson (Okla.), 206 Pac. 219. See note, 124 Am. St. 109.

[13]Wofford v. State (Tex.), 132 S. W. 929. See also McClurkin v. McClurkin, 206 Ala. 513, 90 So. 917; Randazzo v. Randazzo (Mo. App.), 236 S. W. 1061; Jackson v. Jackson (N. J. Ch.), 113 Atl. 495; Smith v. Smith, 194 App. Div. 543, 185 N. Y. S. 558.

or carnal intercourse.[14] This form of common-law marriage is not consummated until there is a subsequent cohabitation,[15] and this subsequent cohabitation raises the presumption of a contract of marriage.[16] Some states refuse to recognize marriage per verba de futuro cum copula.[17]

§ 73. **Common-law marriage—Forms and essentials of contract in general.**—There must be mutual consent and capacity; and consent may be oral or in writing.[18]

The agreement need not be couched in any particular language or phraseology but it must be free from conditions and reservations.[19] It is necessary that both understand that neither one nor both can rescind the contract or destroy the relation.[20] It has been held sufficient for the man to say, "This is your wedding ring, we are married," where cohabitation followed.[21]

A proposal must be followed by assent, but such assent may be given in any fashion denoting such assent,[22] and the consent must be mutual to constitute the marriage. The law looks to the intention of the parties to form the relationship rather than to the use of words which may or may not have been meant to be final.[23]

§ 74. **Common-law marriage—Binding effect.**—The whole relation under a common-law marriage is bottomed on good faith

[14]Chaves v. Chaves, 79 Fla. 602, 84 So. 672; Dalrymple v. Dalrymple, 2 Hag. Con. 54, 17 Eng. Rul. Cas. 10. See also Clark v. Clark, 44 Nev. 44, 194 Pac. 96. See notes, 59 Am. Dec. 615; L. R. A. 1915E, 31; 12 Eng. Rul. Cas. 737.

[15]Dalrymple v. Dalrymple, 2 Hag. Con. 54, 17 Eng. Rul. Cas. 10. See notes, 59 Am. Dec. 615; L. R. A. 1915E, 31; 12 Eng. Rul. Cas. 737.

[16]See note, L. R. A. 1915E, 31.

[17]Marsicano v. Marsicano, 79 Fla. 278, 84 So. 156.

[18]Chaves v. Chaves, 79 Fla. 602, 84 So. 672; Love v. Love, 185 Iowa 930, 171 N. W. 257; McConnell v. McConnell, 211 Mich. 483, 179 N. W. 33; Smith v. Smith, 194 App. Div. 543, 185 N. Y. S. 558; In re Seymour, 113 Misc. 421, 185 N. Y. S. 373.

[19]Cartwright v. McGowan, 121 Ill. 388, 12 N. E. 737, 2 Am. St. 105; Hulett v. Carey, 66 Minn. 327, 69 N. W. 31, 34 L. R. A. 384, 61 Am. St. 419; Peck v. Peck, 12 R. I. 485, 34 Am. Rep. 702. See notes 124 Am. St. 109, L. R. A. 1915E, 24, 66.

[20]Perkins v. Silverman, 284 Mo. 238, 223 S. W. 895.

[21]Dickerson v. Brown, 49 Miss. 357.

[22]State v. Zichfeld, 23 Nev. 304, 46 Pac. 802, 34 L. R. A. 784, 62 Am. St. 800; In re Seymour, 113 Misc. 421, 185 N. Y. S. 373; Richard v. Brehm, 73 Pa. St. 140, 13 Am. Rep. 733; Hilton v. Roylance, 25 Utah 129, 69 Pac. 660, 58 L. R. A. 723, 95 Am. St. 821. See notes, 124 Am. St. 107, L. R. A. 1915E, 23.

[23]Form is immaterial. Lavery v. Hutchinson, 249 Ill. 86, 94 N. E. 6.

—a bona fide intention to create, and enter into a legal marriage.[24] The marriage is as binding as a statutory marriage,[25] and carries with it similar rights, duties and obligations,[26] and can only be dissolved by divorce during the life of the parties.[27] Where all the facts are sufficient to establish a common-law marriage, the marriage will be binding notwithstanding mental reservations and secret intentions of one of the parties not to occupy the relation of spouse.[28]

§ 75. **Common-law marriage—Necessity of matrimonial intent.**—Matrimonial intent is necessary, however, no matter what language or custom is used or followed.[29]

And it has been held, where the woman said, "I hereby declare A. B. to be my husband," the declaration being answered by words or signs acknowledging the relationship, that this constituted marriage. Mere words without any intention of the parties will not make a marriage. Thus, where the marriage ceremony is gone through in jest or with the distinct understanding that it is not for the purpose of marriage, or where one of the parties is mistaken and believes the ceremony to be a mere preliminary, there is really no consent given, and can be no marriage.[30] And where one party impersonates another and by this means procures a marriage ceremony to be performed, the marriage is void. So where two parties go through a marriage ceremony in masquerade, each mistaking the identity of the other, there is no marriage. Again, where A consents to become betrothed to B and the marriage ceremony is gone through with between them upon the pretence or belief that it means only betrothal, it is not binding.[31]

[24]Stripe v. Meffert, 287 Mo. 366, 229 S. W. 762.

[25]Hummel v. State, 73 Ind. App. 12, 126 N. E. 444.

[26]Lavery v. Hutchinson, 249 Ill. 86, 94 N. E. 6, Ann. Cas. 1912A, 74; State v. Hughes, 35 Kans. 626, 12 Pac. 28, 57 Am. Rep. 195; Commonwealth v. Jackson, 11 Bush (Ky.) 679, 21 Am. Rep. 225; People v. Mendenhall, 119 Mich. 404, 78 N. W. 325, 75 Am. St. 408; Hayes v. People, 25 N. Y. 390, 24 How. Prac. 452, 82 Am. Dec. 364; Dumas v. State, 14 Tex. Civ. App. 464, 46 Am. Rep. 241. See notes, L. R. A. 1915E, 16; 17 Eng. Rul. Cas. 176.

[27]McClurkin v. McClurkin, 206 Ala. 513, 90 So. 917.

[28]Clark v. Clark, 44 Nev. 44, 194 Pac. 96; Jackson v. Jackson (N. J. Ch.), 113 Atl. 495.

[29]Port v. Port, 70 Ill. 484; Ellis v. Kelsey, 195 N. Y. S. 126; 11 Hag. Con. 216; Dalrymple v. Dalrymple, 2 Hag. Con. 54, 105.

[30]McClurg v. Terry, 21 N. J. Eq. 225; Smith v. Blunt, 84 Okla. 225, 202 Pac. 1027.

[31]Clark v. Field, 13 Vt. 460.

§ 76. **Common-law marriage—Cohabitation as element.**—The promise of marriage must be positive and in good faith.' Mere courtship followed by carnal intercourse is not sufficient.[32]

While no particular period of cohabitation is essential to complete the marriage, mere illicit relations will not raise the presumption especially where such relations also precede the betrothal.[33] But in such cases where the courts have held that there was no marriage, common-law marriages followed by sexual intercourse, would be ratified and held valid, but not where there is only occasional cohabitation after an express promise which is not fulfilled.[34] Hence it may be concluded that copulation following betrothal does not make a legal marriage where the parties contemplated a subsequent formal marriage ceremony.[35] But where a man and woman are living together and by general repute are husband and wife, it will not be presumed that they are living together in a state of fornication,[36] for the law presumes that the acts of the parties were lawful rather than criminal.[37]

The relation is not established by cohabitation under the erroneous belief that a ceremonial marriage is valid.[38]

Where a celebration is required no technical words are necessary. It is sufficient if both parties actually intend to become husband and wife.[39] A common-law marriage was held established by evidence of cohabitation for fifteen years, the adoption of a child and their insurance of the lives of each other.[40]

§ 77. **Common-law marriage—Consummation after removal of impediments.**—A cohabitation meretricious in its origin may ripen into a common-law marriage where, after the removal of

[32]Beverson's Estate, 47 Cal. 621; Peck v. Peck, 12 R. I. 485, 34 Am. Rep. 702.

[33]Floyd v. Calvert, 53 Miss. 37; Duncan v. Duncan, 10 Ohio St. 181; Williams v. Williams, 46 Wis. 464, 1 N. W. 98, 32 Am. Rep. 722.

[34]In re Callery's Estate, 226 Pa. St. 469, 75 Atl. 672.

[35]Nelson v. State, 84 Tex. Cr. 219, 206 S. W. 361.

[36]In re Hartman's Estate, 157 Cal. 206, 107 Pac. 105, 36 L. R. A. (N. S.) 530.

[37]Coad v. Coad, 87 Nebr. 290, 127 N. W. 455.

[38]Smith v. Smith, 194 App. Div. 543, 185 N. Y. S. 558. But see Clark v. Clark, 44 Nev. 44, 189 Pac. 676.

[39]Dickerson v. Brown, 49 Miss. 357; Meister v. Moore, 96 U. S. 76, 24 L. ed. 826. As to common-law marriages see synopsis of marriage statutes, Ch. 49, and notes in L. R. A. 1915E, 12, 19; 17 Eng. Rul. Cas. 164, 79 Am. St. 364.

[40]Long v. Long, 217 Mich. 211, 185 N. W. 692.

an impediment to the marriage, the parties take the steps to consummate the common-law marriage.[41]

There may be a common-law marriage by a former husband and wife after dissolution of the ceremonial marriage by divorce.[42] Thus there was a common-law marriage under an agreement between a man and his divorced wife to let the past be past and from that time on to live together as man and wife, followed by cohabitation.[43]

[41]Schaffer v. Krestovnikow, 89 N. J. Eq. 549, 105 Atl. 239; Leeds v. Joyce, 195 N. Y. S. 468.

[42]In re Sheedy, 189 App. Div. 582, 178 N. Y. S. 863.

[43]Mickle v. State (Ala.), 21 So. 66.

CHAPTER 5

MARRIAGE BY LETTER OR TELEPHONE

Section

80. By letter.
81. By telephone.

§ 80. **By letter.**—In states where common-law marriages are legal there may be such a marriage under a written contract sent by a man to a woman in another state which set out that the parties would henceforth be husband and wife and so conduct themselves and the woman accepted the contractual offer.[1]

The acceptance in this case as in other cases of common-law marriage must be within a reasonable time. There must be mutual assent in all respects. Where the words are used by one and assented to by the other, but not understanding or intending a marriage, there is no marriage.[2]

§ 81. **By telephone.**—Marriages by telephone have not been approved by the courts although they have been entered into on various occasions. In common-law states such marriages should be legal.[3]

[1]Great Northern Ry. Co. v. Johnson, 254 Fed. 683. But see In re Lum Lin Ying, 59 Fed. 682, where marriage by proxy in the United States under Chinese custom was held invalid in America though valid in China.

[2]In re Hulett's Estate, 66 Minn. 327, 69 N. W. 31, 34 L. R. A. 384, 61 Am. St. 419.

[3]Sec 4 Va. Law Reg. N. S. 636.

CHAPTER 6

MENTAL AND PHYSICAL QUALIFICATIONS AND IMPEDIMENTS

Section

85. Mental capacity to marry.
86. Physical capacity to marry.
87. Physical capacity—Marriage of epileptics.
88. Physical capacity—Eugenics laws.
89. Marriage between persons of same sex.

§ 85. **Mental capacity to marry.**—No insane person or idiot is capable of contracting a marriage. An engagement to marry being an executory contract, it requires the intelligent assent of both parties, and a person lacking in mental capacity to understand the nature of the marriage agreement is incapable of entering the marriage status.[1] But if a person who is insane at the time of marriage, afterward, at lucid intervals, acquiesces in the marital state no decree of annulment will be granted.[2]

A marriage with a person who has, in appropriate proceedings, been found to be mentally imbecile, is absolutely void ab initio, and can be at any time so declared by the court. A marriage declared void on account of lunacy can not be cured merely by cohabitation after restoration. The guardian of a lunatic may bring an action to have the marriage set aside when it was solemnized after a declaration of insanity. Receipt and confirmation of the report of a jury finding lunacy as required by statute will be presumed if the clerk acts on it by appointing a guardian.[3] But in the absence of statute the court will not grant a divorce for insanity arising after marriage, as the court can grant a divorce to the injured party only where the other party is a wrongdoer.[4]

[1]Wiley v. Wiley, 75 Ind. App. 456, 123 N. E. 252; Middleborough v. Rochester, 12 Mass. 363.

[2]Cole v. Cole, 5 Sneed (Tenn.) 57, 70 Am. Dec. 275; McReynolds v. State, 5 Cold. (Tenn.) 23, 1 Bishop Marriage and Divorce § 189.

[3]Sims v. Sims, 121 N. Car. 297, 28 S. E. 407, 40 L. R. A. 737 and note, 61 Am. St. 665, where the court says, that, the marriage being a nullity, could only be remedied by proceedings to set aside the inquisition of lunacy for fraud or other good ground, or by a new marriage if the lunatic is since found to be restored. The void marriage could not be validated by cohabitation after restoration, as it could in case of infancy by cohabitation after arrival at the marriageable age.

[4]Curry v. Curry, 1 Wils. (Ind.) 236.

It is a general rule that marriages of insane parties are absolutely void rather than voidable,[5] but in some states they are either by statutes or decisions treated as voidable rather than void.[6] Again the conduct of the parties in living together as husband and wife after restoration to sanity may be such as to raise a presumption of a new marriage.[7]

Drunkenness at the time of the marriage may be cause for annulment but does not render a marriage void.[8] Where the drunkenness has developed to a degree of insanity the usual rules of insanity apply.[9]

An appellate court will not reverse the decree of the trial court as being against the evidence where the evidence is conflicting upon the subject of the mental capacity of one who enters into a marriage contract, where there is sufficient evidence, if believed, to show that the party was not deprived of the use of his reasoning faculties at such time, and where the uncontradicted evidence shows that the party has repeatedly since the marriage ratified the same by cohabitation with the other party thereto. If a party at the time of entering into a marriage contract, is so intoxicated as to be non compos mentis, and does not know what he is doing, and is for the time deprived of reason, the marriage is invalid; but it is not invalid if the intoxication is of a less degree than that stated.[10]

§ 86. **Physical capacity to marry.**—Because the institution of marriage is in a substantial measure for the protection of society

[5]In re Gregorson, 160 Cal. 21, 116 Pac. 60, L. R. A. 1916C, 697, Ann. Cas. 1912D, 1124; Gould v. Gould, 78 Conn. 242, 61 Atl. 604, 2 L. R. A. (N. S.) 531; Orchardson v. Cofield, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 256, 63 Am. St. 211; Powell v. Powell, 18 Kans. 371, 26 Am. Rep. 774; Jenkins v. Jenkins, 2 Dana (Ky.) 102, 26 Am. Dec. 437; Gatherings v. Williams, 27 N. Car. 487, 44 Am. Dec. 49; Crump v. Morgan, 38 N. Car. 91, 40 Am. Dec. 447; Sims v. Sims, 121 N. Car. 297, 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. 665; Foster v. Means, Speers Eq. (S. Car.) 569, 42 Am. Dec. 332. See notes, 44 Am. Dec. 56; 61 Am. St. 667; 79 Am. St. 373-376; 9 L. R. A. 505; L. R. A. 1916C, 700; Ann. Cas. 1912D, 1127.

[6]In re Gregorson, 160 Cal. 21, 116 Pac. 60, L. R. A. 1916C, 697, Ann. Cas. 1912D, 1129; Lewis v. Lewis, 44 Minn. 124, 46 N. W. 323, 9 L. R. A. 505, 20 Am. St. 559. See notes, Ann. Cas. 1912D, 1129; L. R. A. 1916C, 702.

[7]Wiley v. Wiley, 75 Ind. App. 456, 123 N. E. 252.

[8]Barber v. People, 203 Ill. 543, 68 N. E. 93.

[9]Dunphy v. Dunphy, 161 Cal. 380, 119 Pac. 512, 38 L. R. A. (N. S.) 818, Ann. Cas. 1913B, 1230.

[10]Prine v. Prine, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87.

in the indulgence of natural sex passions, it is a legal requirement that parties to a marriage contract be capable of copulation. This condition is satisfied, however, where the sex organs of both parties are complete.[11] Mere barrenness or physical defect not interfering with copulation is no ground for annulment of a marriage.[12] The general rule is that both parties must have the physical capacity to consummate the marriage relation and that if either or both are physically incapacitated to enter into the relation, a valid marriage is not created.[13] Such impotency must be incurable or such as would require a dangerous operation to correct.[14] Refusal of carnal intercourse after marriage for an unreasonable time may create a presumption of impotency for which annulment will be granted.[15] Impotency from old age alone affords no ground for annulment or divorce.[16] Impotent marriages are not void however, and must be avoided by regular court proceeding at the suit of the aggrieved person,[17] and in some jurisdictions failure to act within reasonable time will work an estoppel.[18]

§ 87. **Physical capacity—Marriage of epileptics.**—The states of Connecticut, Kansas, Michigan, Minnesota, Ohio and Wisconsin[19] have passed laws substantially as follows: No man or woman either of whom is epileptic, imbecile, or feeble minded, shall intermarry or live together as husband and wife when the woman is under forty-five years of age. Prohibiting such marriages does not contravene the Constitution of Connecticut, art. 1, § 1, guarantying equality in the rights of liberty and the pursuit of happiness, and one induced by fraudulent concealment to marry an epileptic forbidden by statute is entitled to a divorce on the ground of fraudulent contract.[20] The supreme court of Wisconsin in a case where the marriage was entered into by both parties

[11]Bennett v. Bennett, 169 Ala. 618, 53 So. 986, L. R. A. 1916C, 693. See note, Ann. Cas. 1916B, 1051.

[12]Kirschbaum v. Kirschbaum, 92 N. J. Eq. 7, 111 Atl. 697; Wendel v. Wendel, 30 App. Div. 447, 52 N. Y. S. 72.

[13]Bennett v. Bennett, 169 Ala. 618, 53 So. 986, L. R. A. 1916C, 693.

[14]Anonymous, 158 N. Y. S. 51.

[15]Cowles v. Cowles, 112 Mass. 298.

[16]Hatch v. Hatch, 58 Misc. 54, 110 N. Y. S. 18.

[17]Bennett v. Bennett, 169 Ala. 618, 53 So. 986, L. R. A. 1916C, 693; Martin v. Otis, 233 Mass. 491, 124 N. E. 294, 6 A. L. R. 1340.

[18]Peipho v. Peipho, 88 Ill. 438; Kirschbaum v. Kirschbaum, 92 N. J. Eq. 7, 111 Atl. 697 (lived together for 11 years).

[19]Kitzman v. Kitzman, 167 Wis. 308, 166 N. W. 789.

[20]Gould v. Gould, 78 Conn. 242, 61 Atl. 604, 2 L. R. A. (N. S.) 531 and cases cited.

in good faith and in ignorance by one of the parties that the other was an epileptic, held the marriage merely voidable but not void.[21]

§ 88. **Physical capacity—Eugenics laws.**—It is not unreasonable to believe that the years that are yet to come will witness the enactment of many laws, the purpose of which is to restrict marriage only to those physically and morally fit to enter into the relation and beget offspring free from physical and moral taint. The power of the state to thus safeguard its future citizenship within reasonable bounds is unquestioned. One of these eugenic laws is that of Wisconsin which requires all male applicants for marriage licenses to submit to a medical examination to determine whether such persons are free from acquired venereal diseases and making it a condition to the issuance of a license that the applicant present to the licensing officer a certificate showing such freedom from such venereal diseases. The law was upheld as within the police power of the state and as not infringing any constitutional right of persons desiring to enter into the matrimonial relation. Meeting the argument that the law was discriminating in that it did not require a similar certificate from the woman, Chief Justice Winslow said: "Theoretically the argument is sound. Women who marry and transmit a loathesome disease to their husbands, do just as much harm as men who transmit such a disease to their wives; if women were in fact doing this thing as frequently, or any where near as frequently as men, the argument could hardly be met. The medical evidence in the case, however, corroborates what we suppose to be common knowledge, namely, that the great majority of women who marry are pure, while a considerable percentage of men have had illicit sexual relations before marriage, and consequently that the number of cases where newly married men transmit a venereal disease to their wives is vastly greater than the number of cases where women transmit the disease to their newly married husbands. Classification is not to be condemned because there may be occasional instances in which it does not fit the situation; it is proper if the great mass of situations to which the law applies justifies the formation of a class and the application of some special or different legislative provision to that class. Classification can rarely be mathematically exact."[22]

[21]In re Jansa's Estate, 169 Wis. 220, 171 N. W. 947.

[22]Peterson v. Widule, 157 Wis. 641, 147 N. W. 966, 52 L. R. A. (N. S.) 778, Ann. Cas. 1916B, 1040.

§ 89. **Marriage between persons of same sex.**—There can be no marriage between any two persons of the same sex, and no kind of an attempted solemnization of such a marriage can be legal or valid. Marriage is the status founded on a contract to perform the duties legally incumbent on those whose association is founded on the distinction of sex.[23]

[23]State v. Bittick, 103 Mo. 183, 15 S. W. 325, 11 L. R. A. 587, 23 Am. St. 869.

CHAPTER 7

AGE QUALIFICATION—MARRIAGE OF INFANTS IN GENERAL

Section

95. Marriage of infants in general.
96. Marriage of infants—Consent of parents.
97. Marriage of infants—Consent of probate court.
98. Marriage of infants—Table of nonage.

§ 95. **Marriage of infants in general.**—At common law the marriage of a child under seven years of age is absolutely void,[1] and the marriage of a male child between the age of seven and fourteen years and a female child between seven and twelve is voidable.[2] The latter form of marriage is termed an inchoate or imperfect marriage which may be disaffirmed by either of the parties on reaching the age of consent.[3] At common law the marriage is considered legal if the parties have arrived at the age of puberty, which is fourteen years in the male and twelve in the female.[4]

Though by statutes of the different states the marriageable age varies, marriages under these ages are voidable rather than void. Such marriages may be ratified by sexual intercourse after arriving at lawful age, and such ratification is an absolute defense to an action for annulment or divorce.[5] But in an Ohio case[6] it was held that a marriage by an infant under the age of consent was void unless confirmed by cohabitation after arriving at lawful age.

[1]1Bishop Marriage and Divorce, § 147; notes 44 Am. Dec. 57; 22 L. R. A. (N. S.) 1202.

[2]1 Blackstone Comm. 436; Beggs v. State, 55 Ala. 108; Bonker v. People, 37 Mich. 4; State v. Cone, 86 Wis. 498, 57 N. W. 50.

[3]Wolf v. Wolf, 194 App. Div. 33, 185 N. Y. S. 37.

[4]Beggs v. State, 55 Ala. 108; Green v. Green, 77 Fla. 101, 80 So. 739; Parton v. Hervey, 1 Gray (Mass.) 119; Fodor v. Kunie, 92 N. J. Eq. 301, 112 Atl. 598; Bennett v. Smith, 21 Barb. (N. Y.) 439; Fisher v. Bernard, 65 Vt. 663, 27 Atl. 316.

[5]Goodwin v. Thompson, 2 Greene (Iowa) 329; Kuykendall v. Kuykendall, 112 Misc. 12, 182 N. Y. S. 308; Wolf v. Wolf, 111 Misc. 391, 181 N. Y. S. 368; Bays v. Bays, 105 Misc. 492, 174 N. Y. S. 212; State v. Parker, 106 N. Car. 711, 11 S. E. 517; Koonce v. Wallace, 52 N. Car. 194. See also State v. Stewart, 57 Utah 224, 193 Pac. 855. In Georgia the age for a male person is 17 years. Morgan v. Morgan, 148 Ga. 625, 97 S. E. 675, 4 A. L. R. 925.

[6]Shafher v. State, 20 Ohio 1. See Holtz v. Dick, 42 Ohio St. 23, 51 Am. Rep. 791.

At common law an infant who married under the age of consent could deny and avoid the marriage without any judicial decree,[7] but by statute such a marriage is frequently held valid until set aside by decree of court.[8]

The marriage between infants of the age of consent is as valid as a marriage between adults[9] and where one of the parties is of the age of consent he will be bound where the other party under the age of consent refuses to repudiate the marriage.[10] It is the law of the state in which the marriage occurs that controls where there is a difference as to the age of consent.[11]

§ 96. **Marriage of infants—Consent of parents.**—In some states if the parties wishing to marry are under the age prescribed by law, the statutes require the consent of the parents or guardian.[12] But if the celebration takes place in another state, where there is no such provision in the statute, the marriage is valid if the parties were old enough to contract marriage, and this is generally the law even though they left the state for the sole purpose of evading the statute requiring the consent of parents.[13] Generally speaking, prohibitory laws not based upon natural laws have no extra-territorial effect.[14] The effect of the statutes fixing the conditions of marriage of infants, is not to render such marriages void if they have been duly solemnized, even though the provisions of the statutes have not been complied with. They are intended to prevent, as far as possible, ministers and magistrates from solemnizing marriages when the prescribed conditions of the statutes have not been fulfilled by inflicting upon

[7]Beggs v. State, 55 Ala. 108; People v. Bennett, 39 Mich. 208; Governor v. Rector, 10 Humph. (Tenn.) 57.

[8]Walls v. State, 32 Ark. 565; People v. Beevers, 99 Cal. 286, 33 Pac. 844; People v. Reynolds, 217 Ill. App. 577; Wolf v. Wolf, 194 App. Div. 33, 185 N. Y. S. 37; State v. Cone, 86 Wis. 498, 57 N. W. 50.

[9]Wolf v. Wolf, 111 Misc. 391, 181 N. Y. S. 368.

[10]People v. Pizzura, 211 Mich. 71, 178 N. W. 235, 10 A. L. R. 405.

[11]Perkey v. Perkey, 87 W. Va. 656, 106 S. E. 40.

[12]In re Gregorson, 160 Cal. 21, 116 Pac. 60, L. R. A. 1916C, 697, Ann. Cas. 1912D, 1124, Browning v. Browning, 89 Kans. 98, 130 Pac. 852, L. R. A. 1916C, 737, Ann. Cas. 1914C, 1288.

[13]Commonwealth v. Graham, 157 Mass. 73, 31 N. E. 706, 16 L. R. A. 578, 34 Am. St. 255. Contra, see Cunningham v. Cunningham, 206 N. Y. 341, 99 N. E. 845, 43 L. R. A. (N. S.) 355.

[14]Fuller v. Fuller, 40 Ala. 301; State v. Weatherby, 43 Maine 258, 69 Am. Dec. 59; Dickson v. Dickson, 1 Yerg. (Tenn.) 110, 24 Am. Dec. 444.

them a penalty for so doing.[15] In a Massachusetts case the court said: "When a justice or minister shall solemnize a marriage between parties who may lawfully marry, although without the consent of the parents or guardians, such marriage would unquestionably be lawful, although the officer would incur the penalty for a breach of his duty."[16] In general the consent of the parent or guardian is necessary to the validity of the marriage of a minor only where the statute expressly declares that a marriage contracted without such consent shall be void.[17]

§ 97. **Marriage of infants—Consent of probate court.**—In Massachusetts the judge of probate for the county in which a minor male under eighteen years, or a minor female under sixteen years, reside, may, after a hearing, make an order allowing the marriage of such minor, if the father of such minor, or, if he is not living, the mother, or, if neither parent is alive, and resident in the commonwealth, a legal guardian duly appointed, has consented to such order. The judge of probate may also after a hearing make such order in the case of a person whose age is alleged to exceed that specified above, but who is unable to produce an official record of birth, whereby the reasonable doubt of the clerk or register may be removed.[18]

§ 98. **Marriage of infants—Table of nonage.**—Nonage as here used signifies the age below which a person is either forbidden to marry or, if starred, is not permitted by law to be married except under certain restrictions.

	Male	Female
Alabama	17 years	14 years
Arizona	18 "	16 "
Arkansas	17 "	14 "
California	18 "	15 "
*Colorado	21 "	18 "
*Connecticut	21 "	21 "
Delaware	18 "	16 "
*District of Columbia	21 "	18 "
*Florida	21 "	21 "
Georgia	17 "	14 "

[15]Christlieb v. Christlieb, 71 Ind. App. 682, 125 N. E. 486; Radford v. Radford, 214 Mich. 545, 183 N. W. 182.

[16]Milford v. Worcester, 7 Mass. 48.

[17]Fodor v. Kunie, 92 N. J. Eq. 301, 112 Atl. 598.

[18]Mass. Gen. Laws, 1921, ch. 207, § 25.

Idaho	18 years	18 years
Illinois	18 "	16 "
Indiana	18 "	16 "
Iowa	16 "	14 "
Kansas	15 "	12 "
Kentucky	14 "	12 "
Louisiana	14 "	12 "
*Maine	21 "	18 "
*Maryland	21 "	16 "
Massachusetts	14 "	12 "
Michigan	18 "	16 "
Minnesota	18 "	15 "
*Mississippi	21 "	18 "
*Missouri	21 "	18 "
Montana	18 "	16 "
Nebraska	18 "	16 "
Nevada	18 "	16 "
New Hampshire	14 "	13 "
*New Jersey	21 "	18 "
New Mexico	18 "	15 "
New York	18 "	18 "
North Carolina	16 "	14 "
North Dakota	16 "	13 "
Ohio	18 "	16 "
Oklahoma	18 "	15 "
Oregon	18 "	15 "
*Pennsylvania	21 "	21 "
Philippines	14 "	12 "
Porto Rico	18 "	16 "
*Rhode Island	21 "	21 "
South Carolina	No statute	
South Dakota	18 "	15 "
Tennessee	14 "	12 "
Texas	16 "	14 "
Utah	16 "	14 "
*Vermont	21 "	18 "
Virginia	14 "	12 "
*Washington	21 "	18 "
West Virginia	18 "	16 "
Wisconsin	18 "	15 "
Wyoming	18 "	16 "

CHAPTER 8

RACIAL MARRIAGES

Section

105. Marriage between persons of different races—Miscegenation.
106. Indian marriages.
107. Slave marriages.

§ 105. **Marriage between persons of different races—Miscegenation.**—Miscegenation, or the mixing of races, is prohibited by the statutes of some of the states, and marriages between a white person and a negro, an Indian, or a Mongolian, are declared void.[1] Such statutes are not considered laws "impairing the obligation of contracts," within the meaning of the Constitution of the United States, and are, therefore, constitutional.[2] Such statutes have no retroactive effect and hence will not disturb marriages between the races legally existing at the time of their passage.[3]

A negro within the meaning of the Missouri statute forbidding marriages between whites and negroes is a person having a one-eighth portion or more of negro blood.[4]

The validity of such marriages depends upon the law of the domicil of the parties thereto and not upon the place of contract, it being a question of the legal capacity of the parties and not one relating to the proper solemnization. Such legal incapacity is not avoided by a ceremony performed in a state where such marriages are valid, if the domicil of the parties is not changed.[5]

In general, the laws relate to marriages of white persons and negroes in the southern states, although some northern states have similar provisions, while in South Carolina, at least, there

[1]See note, 79 Am. St. 382.

[2]Pace v. Alabama, 106 U. S. 583, 27 L. ed. 207, 1 Sup. Ct. 637; Dred Scott v. Sandford, 19 How. (U. S.) 393, 15 L. ed. 691; In re Hobbs, 1 Woods (U. S.) 537, Fed. Cas. 6550; In re Paquet's Estate, 101 Ore., 393, 200 Pac. 911; Greenhow v. James, 80 Va. 636, 56 Am. Rep. 603; Kinney v. Commonwealth, 30 Grat. (Va.) 858, 32 Am. Rep. 690. See note in 52 L. R. A. (N. S.) 778.

[3]Minor v. Young, 149 La. 583, 89 So. 757.

[4]Marre v. Marre, 184 Mo. App. 198, 168 S. W. 636.

[5]State v. Kennedy, 76 N. Car. 251, 22 Am. Rep. 683.

is no such prohibition and such marriages are valid. What constitutes a "negro," or "colored person" has arisen and has been determined in opinions shaded to blend with local color or conditions.[6] And the supreme court of Missouri has held that, it having always been unlawful in Missouri for white persons and negroes to intermarry, no common-law marriage existed between a white man and a negro woman who cohabited together without any marriage ceremony, from 1851 to 1883, and had children born to them; that the fact that the woman, after her emancipation from slavery, continued living with the man without any marriage ceremony as she had done before, did not raise a presumption of a common-law marriage in view of the fact that they separated in 1883, and that a marriage between them would have been criminal; and that children born to such persons did not fall within a statute providing that "the issue of all marriages declared null in law, or dissolved by divorce, shall be legitimate."[7]

§ 106. **Indian marriages.**—A marriage, according to the Indian custom by tribal Indians and the living together as man and wife according to such custom is generally held to constitute a lawful marriage and to render the offspring of such a marriage legitimate.[8]

The rule does not apply where the Indians do not maintain the tribal relation or live on a reservation. Here their marriages and divorces are governed by local laws.[9]

§ 107. **Slave marriages.**—In the cases of persons in bondage where the marriage was in accordance with slave customs and

[6]Felix v. State, 18 Ala. 720; Bailey v. Fiske, 34 Maine 77; Ferrall v. Ferrall, 153 N. Car. 174, 69 S. E. 60; State v. Watters, 25 N. Car. 455; McPherson v. Commonwealth, 28 Grat. (Va.) 939.

[7]Keen v. Keen, 184 Mo. 358, 83 S. W. 526.

[8]Wall v. Williamson, 8 Ala. 48; Brown v. Steele, 23 Kans. 672; Kobogum v. Jackson Iron Co., 76 Mich. 498, 43 N. W. 602; Earl v. Godley, 42 Minn. 361, 44 N. W. 254, 7 L. R. A. 125, 18 Am. St. 517; Sealey v. Smith, 81 Okla. 97, 197 Pac. 490; Meagher v. Harjo, 72 Okla. —, 179 Pac. 757; Oklahoma Land Co. v. Thomas, 34 Okla. 681, 127 Pac. 8; Cyr. v. Walker, 29 Okla. 281, 116 Pac. 931, 35 L. R. A. (N. S.) 795; Kalyton v. Kalyton, 45 Ore. 116, 74 Pac. 491, 78 Pac. 332; Henry v. Taylor, 16 S. Dak. 424, 93 N. W. 641; Morgan v. McGhee, 5 Humph. (Tenn.) 13.

[9]Roche v. Washington, 19 Ind. 53, 81 Am. Dec. 376; In re Wo-gin-up's Estate, 57 Utah 29, 192 Pac. 267. See also Moore v. Nah-con-be, 72 Kans. 169, 83 Pac. 400; Sesostris Youchican v. Texas & P. Ry. Co., 147 La. 1080, 86 So. 551; In re Paquet's Estate, 101 Ore. 393, 200 Pac. 911.

there was a mutual acknowledgment of the relation after emancipation then the parties became legally husband and wife.[10]

The cohabitation and recognition as husband and wife before emancipation did not have this effect since slaves were incapable of entering into any kind of a contract.[11]

[10]Haden v. Ivey, 51 Ala 381; Williams v. State, 67 Ga. 260; Erwin v. Nolan, 280 Mo. 401, 217 S. W. 837. See also Cabble v. Hawkins, 186 Ky. 114, 216 S. W. 345; Wiley v. Stewart, 145 La. 1081, 83 So. 260; Coleman v. Vollmer (Tex.), 31 S. W. 413.

[11]Stewart v. Munchandler, 2 Bush (Ky.), 278; Merrick v. Betts, 214 Mass. 223, 101 N. E. 131; State v. Samuel, 19 N. Car. 177; Napier v. Church, 132 Tenn. 111, 177 S. W. 56; Lemons v. Harris, 115 Va. 809, 80 S. E. 740.

CHAPTER 9

MARRIAGE WITHIN FORBIDDEN DEGREES OF RELATIONSHIP

Section

110. Incestuous marriages in general.
111. Affinity and consanguinity.
112. Construction of statutes on question.

§ 110. **Incestuous marriages in general.**—Sexual intercourse between near relatives has been tabooed by all nations during all ages. In England during the time of Henry VIII a statute was passed regulating the degree of relationship within which a marriage was illegal. This degree is the present English law. In America the state statutes similarly fix such relationship, although the statutes are by no means uniform.[1] Under these statutes marriages have been declared illegal between cousins,[2]

[1]The following table is a fair example of these statutes:

A MAN SHALL NOT MARRY

His stepmother.
His grandfather's wife.
His son's wife.
His mother.
His grandmother.
His daughter.
His granddaughter.
His sister.
His grandson's wife.
His wife's mother.
His wife's grandmother.
His wife's daughter.
His wife's granddaughter.
His brother's daughter.
His sister's daughter.
His father's sister.
His mother's sister.

A WOMAN SHALL NOT MARRY

Her stepfather.
Her grandmother's husband.
Her daughter's husband.
Her father.
Her grandfather.
Her son.
Her grandson.
Her brother.
Her granddaughter's husband.
Her husband's father.
Her husband's grandfather.
Her husband's son.
Her husband's grandson.
Her brother's son.
Her sister's son.
Her father's brother.
Her mother's brother.

[2]Arado v. Arado, 281 Ill. 123, 117 N. E. 816, 4 A. L. R. 28; In re Wittick's Estate, 164 Iowa 485, 145 N. W. 913; Blaisdell v. Bickum, 139 Mass. 250, 1 N. E. 281 (under New Hampshire law); Shofield v. Shofield, 51 Pa. Super. Ct. 564; McClain v. McClain, 40 Pa. Super. Ct. 248; State v. Nakashima, 62 Wash. 686, 114 Pac. 894, Ann. Cas. 1912D, 220. Incestuous marriages generally see notes in L. R. A. 1916C, 720, 752.

uncles and nieces,[3] a brother's widow,[4] and his deceased wife's sister.[5]

Where a marriage is between persons otherwise within the prohibited degrees, its invalidity is not affected by the fact that one of the connecting links between the parties was either illegitimate,[6] or of the half blood.[7] The marriage may not be validated by ratification by the parties.[8]

§ 111. **Affinity and consanguinity.**—Affinity, under the English law, was treated the same as consanguinity. Affinity is the relationship resulting from marriage. There is not the same physical reason for making affinity marriages illegal as exists in cases of consanguinity, for there is no enfeebling of offspring, mental or physical, resulting from such marriages. Neither is there the natural repugnance to sexual intercourse between one and his relatives by marriage, especially where the relation is somewhat remote. There is, of course, the same undesirable confusion of domestic rights and duties. As a result of this difference in effect and natural repugnance, statutes regulating marriages between those related by affinity are more strictly construed. In some instances they have been rendered of but little value by holdings that the relations of affinity cease as soon as a divorce has been granted.[9]

[3]Williams v. McKeene, 193 Ill. App. 615 (bars marriages with daughter of half-sister); Weisberg v. Weisberg, 112 App. Div. 231, 98 N. Y. S. 260, (not incestuous apart from statute). Marriage between uncle and niece has been treated as incestuous. Harrison v. State, 22 Md. 468, 85 Am. Dec. 658; Bowers v. Bowers, 10 Rich. Eq. (S. Car.) 551, 73 Am. Dec. 99. As to brother's daughter, see Baity v. Cranfill, 91 N. Car. 293, 49 Am. Rep. 641; Weisberg v. Weisberg, 112 App. Div. 231, 98 N. Y. S. 260. As to her step-grandson, see Boylan v. Deinzer, 45 N. J. Eq. 485, 18 Atl. 119. As to her sister's son see Campbell v. Crampton, 18 Blatchf. 150, 2 Fed. 417, 8 Abb. N. C. 363. Also Mass. Rev. Laws. ch. 151, § § 1, 2.

[4]Kelly v. Scott, 5 Grat. (Va.) 479.

[5]Commonwealth v. Perryman, 2 Leigh (Va.) 717.

[6]Morgan v. State, 11 Ala. 289; Reg. v. Brighton, B. & S. 447, 101 E. C. L. 446, 30 L. J. M. C. 197, 5 L. T. N. S. 56, 9 W. R. 831, 12 Eng. Rul. Cas. 738. See note, L. R. A. 1916C, 728, 758.

[7]Audley v. Audley, 196 App. Div. 103, 187 N. Y. S. 652. See notes, L. R. A. 1916C, 758; 12 Eng. Rul. Cas. 738.

[8]Audley v. Audley, 196 App. Div. 103, 187 N. Y. S. 652.

[9]Back v. Back, 148 Iowa 223, 125 N. W. 1009, Ann. Cas. 1912B, 1025, and note L. R. A. 1916C, 752 (discussing generally when relationship by affinity terminates).

There is, in fact, a noteworthy absence of any statutory regulations of marriage between relatives by affinity. Generally incestuous marriages as defined by the statutes are confined to marriages between persons related by blood.[10] As examples of this tendency on the part of American court to construe with strictness statutes relating to marriage between persons related by marriage, it has been held that a statute prohibiting a man from marrying his son's wife does not prohibit him from marrying his son's widow,[11] and one prohibiting him from marrying his wife's daughter does not prohibit him from marrying the daughter of his divorced wife.[12] Accordingly, a statute forbidding the marriage of a man to the daughter of his wife is not violated by the marriage of a man to the daughter by a former marriage of his divorced wife. In this case the relationship by affinity terminated with the termination of the marriage through the divorce.[13] Numerous authorities have discussed the right of a man to marry his divorced or deceased wife's sister. In American courts, however, there have been quite uniform holdings that such a marriage is not incestuous or illegal.[14]

§ 112. **Construction of statutes on question.**—The statutes of most states declare marriages within the prohibited degrees void, but as a rule the courts hold the word "void" when used in this connection to mean voidable only.[15]

An exception in the statute forbidding marriage within certain degrees of consanguinity because of religious belief has been held not to violate the constitutional provision that religious opinions shall in no wise diminish, enlarge, or affect civil capacity.[16]

[10]See note, L. R. A. 1916C, 724, 728.

[11]Houston Oil Co. of Texas v. Griggs (Tex. Civ. App.), 181 S. W. 833.

[12]Back v. Back, 148 Iowa 223, 125 N. W. 1009, L. R. A. 1916C, 752, Ann. Cas. 1912B, 1025.

[13]Back v. Back, 148 Iowa 223, 125 N. W. 1009, L. R. A. 1916C, 752, Ann. Cas. 1912B, 1025.

[14]Paddock v. Wells, 2 Barb. Ch. (N. Y.) 331; Blodget v. Brinsmaid, 9 Vt. 27.

[15]See note, L. R. A. 1916C, 723.

[16]Fensterwald v. Burk, 129 Md. 131, 98 Atl. 358, 3 A. L. R. 1562.

CHAPTER 10

DEVISES, GIFTS AND CONTRACTS IN RESTRAINT OR DEROGATION OF MARRIAGE

Section

115. Restraints generally.
116. Wills.
117. Devises conditional on marriage to particular person.
118. Contracts.
119. Contracts partially invalid for illegal restraint
120. Restraint of second marriages.
121. Deeds.
122. Marriage of school teachers.
123. Marriage brokage contracts.
124. Contracts to facilitate divorces.

§ 115. **Restraints generally.**—The laws are very partial to the institution of marriage. Presumptions in its favor have been most liberally recognized by the law in all jurisdictions, for the purpose of legalizing domestic relations and protecting society and innocent parties from the mistakes, and weaknesses of the innocent party and against the fraud and illegal acts of the guilty. The state is very indulgent to promote healthy family life, and frowns upon any act or effort of whatsoever character in restraint or derogation of marriage.

§ 116. **Wills.**—A general restraint of marriage imposed on the beneficiary by a testator is void and the beneficiary takes free from the restraint. Any undue restraint is against public policy. Thus a devise to a daughter determinable upon her marrying, will be held to be void and to vest a full and complete title in her.[2] Accordingly, it has been held that a devise to an unmarried woman providing for a smaller amount in case of marriage is good as to the entire amount devised, the alternative being void.[3]

But a devise to a sister conditioned that she shall be unmarried

[1]See note, 89 Am. St. 198.

[2]Sullivan v. Garesche, 229 Mo. 496, 129 S. W. 949, 49 L. R. A. (N. S.) 605; Knost v. Knost, 229 Mo. 170, 129 S. W. 665, 49 L. R. A. (N. S.) 627; Meek v. Fox, 118 Va. 774, 88 S. E. 161, L. R. A. 1916D, 1194; Jones v. Jones, 1 Q. B. D. 279.

[3]Knost v. Knost, 229 Mo. 170, 129 S. W. 665, 49 L. R. A. (N. S.) 627.

at the time of testator's death is not conditioned in restraint of marriage, since the condition is one operating only at testator's death and taking effect at once, with the obvious purpose of providing for a sister if she should be single and in need.[4]

Where the gift or devise is conditioned on the procuring of a divorce there is no such illegal restraint, since the law presumes that only legal and regular divorce was intended. Such a divorce will be fully protected by regularity of court procedure.[5]

§ 117. **Devises conditional on marriage to particular person.**—The common law placed no prohibition against testamentary conditions in restraint of marriage with particular classes of persons or specific persons.[6] So, a condition in the will of a parent against the marriage of his daughter to a particular person was held not invalid although it involved the breach of a promise made before the execution of the will.[7]

§ 118. **Contracts.**—As with wills so with contracts of whatsoever character the principle is firmly established that provisions therein in general restraint of marriage are void,[8] and this is so however good the intent of the parties, and even though no harm has resulted or is likely to result in the particular case.[9] Of this character are contracts binding one to render service to another during life and not to marry meanwhile,[10] and the case is the same with promises to remain single, whether during the lifetime of the promisee or promisor.[11]

§ 119. **Contracts partially invalid for illegal restraint.**—Where the illegal restraint is separable from the contract as a whole the contract will stand and the illegal condition fall. Where

[4]Dusbiber v. Melville, 178 Mich. 601, 146 N. W. 208, 51 L. R. A. (N. S.) 367.

[5]Daboll v. Moon, 88 Conn. 387, 91 Atl. 646, L. R. A. 1915A, 311, Ann. Cas. 1917B, 164; Nichols' Estate, In re, 102 Wash. 303, 172 Pac. 1146, L. R. A. 1918E, 986; Sparks v. Southall, 54 L. T. 362.

[6]In re Seaman, 218 N. Y. 77, 112 N. E. 576, L. R. A. 1917A, 40, Ann. Cas. 1918B, 1138, affirming order In re Seaman's Estate, 170 App. Div. 971, 155 N. Y. S. 1140.

[7]Turner v. Evans, 134 Md. 238, 106 Atl. 617.

[8]For extended note on validity of contractual restraints on marriage see, 49 L. R. A. (N. S.) 639.

[9]Sheppey v. Stevens, 177 Fed. 484.

[10]Lowe v. Doremus, 84 N. J. L. 658, 87 Atl. 459, 49 L. R. A. (N. S.) 632. But see Fletcher v. Osborn, 282 Ill. 143, 118 N. E. 446, L. R. A. 1918C, 331.

[11]Quirk v. Bank of Commerce & Trust Co., 244 Fed. 682.

such separation is not reasonably possible the entire contract falls.[12]

§ 120. **Restraint of second marriages.**—The will that contracts in restraint of marriage are void does not apply to second marriages. The provision in a will, contract or conveyance for the termination of the estate on the second marriage does not restrain marriage in any way. It merely limits the estate.[13] "The reason for the rule as to first marriage has no substantial force when applied to a second marriage. Neither the conservation of morals, nor public policy, furnishes a basis for the rule as applied to the right of a husband or wife to withhold his or her estate from passing to the support of a second husband or second wife, as the case might be; and the authorities declare that the rule has never been extended to second marriages;[14] on this theory a condition in a will that a bequest to the widow of testator should be equally divided among their children in the event that the widow should remarry during the minority of either of the children was held not void as a restraint of marriage.[15]

§ 121. **Deeds.**—In line with the main principle it may be said that a condition subsequent in general restraint of marriage contained in a deed will be disregarded as invalid.[16]

[12]Quirk v. Bank of Commerce & Trust Co., 244 Fed. 682; Fletcher v. Osborn, 282 Ill. 143, 118 N. E. 446, L. R. A. 1918C, 331; McCoy v. Flynn, 169 Iowa 622, 151 N. W. 465, L. R. A. 1915D, 1064; Lowe v. Doremus, 84 N. J. L. 658, 87 Atl. 459, 49 L. R. A. (N. S.) 632.

[13]Giles v. Little, 104 U. S. 291, 26 L. ed. 745; In re Fitzgerald, 161 Cal. 319, 119 Pac. 96, 49 L. R. A. (N. S.) 615; Jones v. Jones, 1 Colo. App. 28, 27 Pac. 85; Bennett v. Packer, 70 Conn. 357, 39 Atl. 739, 66 Am. St. 112; Glass v. Johnson, 297 Ill. 149, 130 N. E. 473; Summit v. Yount, 109 Ind. 506, 9 N. E. 852; Thompson v. Patten, 70 Ind. App. 490, 123 N. E. 705; Staack v. Detterding, 182 Iowa 582, 161 N. W. 44, L. R. A. 1918C, 856; Mann v. Jackson, 84 Maine 400, 24 Atl. 886, 16 L. R. A. 707, 30 Am. St. 358; Ijams v. Schapiro, 138 Md. 16, 113 Atl. 343; Bostick v. Blades, 59 Md. 231, 43 Am. Rep. 548; Arthur v. Cole, 56 Md. 100, 40 Am. Rep. 409; Knight v. Mahoney, 152 Mass. 523, 25 N. E. 971, 9 L. R. A. 573; Appleby v. Appleby, 100 Minn. 408, 111 N. W. 305, 10 L. R. A. (N. S.) 590, 117 Am. St. 709, 10 Ann. Cas. 563; Nations v. Spence (Mo.), 235 S. W. 1064; Wise v. Crandall (Mo.), 215 S. W. 245; Knost v. Knost, 229 Mo. 170, 129 S. W. 665, 49 L. R. A. (N. S.) 627; Irwin v. Irwin, 179 App. Div. 871, 167 N. Y. S. 76; Jordan v. Holkham, 1 Ambl. 209.

[14]Appleby v. Appleby, 100 Minn. 408, 111 N. W. 305, 10 L. R. A. (N. S.) 590, 117 Am. St. 709, 10 Ann. Cas. 563.

[15]Bryan v. Harper, 177 N. Car. 308, 98 S. E. 822.

[16]Knost v. Knost, 229 Mo. 170, 129 S. W. 665, 49 L. R. A. (N. S.) 627; Gard v. Mason, 169 N. Car. 507, 86

§ 122. **Marriage of school teachers.**—It is generally held that statutes giving school boards the right to discharge school teachers for reasonable cause confers no right to discharge a woman teacher because of marriage. The state may make this a ground for discharge but not the school boards of cities or school districts. To hold otherwise would be to give sanction to a restraint of marriage.[17]

The New York courts, however, hold that prolonged absence of a married teacher during confinement may amount to such neglect of duty as to warrant her discharge on that ground.[18]

§ 123. **Marriage brokage contracts.**—A contract to procure or bring about a marriage for a consideration—usually termed a marriage brokage agreement—is invalid both at law and in equity, as being opposed to public policy.[19]

This applies not only to contracts to bring about a marriage between strangers but also to an agreement to hasten an intended marriage for a consideration. A contract to hasten an intended marriage is as obnoxious as a contract to bring about a marriage

S. E. 302, L. R. A. 1916B, 1077, Ann. Cas. 1917D, 281. But see Graham v. McRae, 147 Ga. 49, 92 S. E. 871.

[17]Blair v. United States, 45 App. D. C. 353; Peixotto v. Board of Education, 212 N. Y. 463, 106 N. E. 307; People v. Maxwell, 177 N. Y. 494, 69 N. E. 1092; People v. Maxwell, 39 Misc. 166, 79 N. Y. S. 174; Richards v. District School Board, 78 Ore. 621, 153 Pac. 482, L. R. A. 1916C, 789, Ann. Cas. 1917D, 266; Jameson v. Board of Education, 74 W. Va. 389, 81 S. E. 1126.

[18]Peixotto v. Board of Education, 212 N. Y. 463, 106 N. E. 307.

[19]Morrison v. Rogers, 115 Cal. 252, 46 Pac. 1072, 56 Am. St. 95; Leupert v. Shields, 14 Colo. App. 404, 60 Pac. 193; Hellen v. Anderson, 83 Ill. App. 506; James v. Jellison, 94 Ind. 292, 48 Am. Rep. 151; Chalfant v. Payton, 91 Ind. 202, 46 Am. Rep. 586; In re Grobe's Estate, 127 Iowa 121, 102 N. W. 804; Johnson v. Hunt, 81 Ky. 321 (agreement by grandfather that he would surrender to grandson a note held against the latter if he would aid in inducing a young lady to marry the former); Fuller v. Dame, 18 Pick. (Mass.) 472; Duval v. Willman, 124 N. Y. 156, 26 N. E. 343; Place v. Conklin, 34 App. Div. 191, 54 N. Y. S. 532; Crawford v. Russell, 62 Barb. (N. Y.) 92; Overman v. Clemmons, 19 N. Car. 185; Roberts v. Roberts, 3 P. Wms. 66; Hall v. Potter, 3 Lev. 411; Keat v. Allen, 2 Vern. 588. A contract to hasten an intended marriage is a marriage brokage contract, Jangraw v. Perkins, 76 Vt. 127, 56 Atl. 532, 104 Am. St. 917. A marriage brokage contract is an agreement for the payment of money or any other consideration or compensation for the procurement of a marriage "Although they may not be a fraud on either party, such contracts are held to be void and a public mischief, forasmuch as they are calculated to bring to pass mistaken and unhappy marriages, to countervail parental

between strangers,[20] so a contract to pay a certain sum for an introduction to a woman in case he marries her is void.[21] The same is true of a contract by which one undertakes to prevent a person from breaking his contract to marry.[22] Marriage brokage contracts can not be enforced either at law or in equity,[23] and if the consideration has been paid to the marriage broker it is held by the latter rule that the payment is induced by fraud or is made under a species of duress or undue influence, and that a court will award restitution of the money or other property parted with.[24] There are cases, however, which hold that the property so parted with can not be recovered.[25]

§ 124. **Contracts to facilitate divorces.**—Contracts to facilitate divorces are in derogation of marriage and are very generally held invalid on grounds of public policy.[26] Thus an antenuptial agreement was held void and unenforcible which provided for the obtaining of a divorce by the wife in consideration of certain payments of money, the husband agreeing not to contest it.[27]

influence in the training and education of children, and to tempt the exercise of an undue and pernicious influence for selfish gain in respect to the most sacred of human relations, an essential element of such contracts is the procurement of a marriage, oftentimes without regard to the wishes of friends or parents, or to the happiness of the parties, most deeply interested." White v. Equitable Nuptial Ben. Union, 76 Ala. 251, 52 Am. Rep. 325.

[20]Jangraw v. Perkins, 76 Vt. 127, 56 Atl. 532, 104 Am. St. 917.

[21]Hellen v. Anderson, 83 Ill. App. 506.

[22]Morrison v. Rogers, 115 Cal. 252, 46 Pac. 1072, 56 Am. St. 95.

[23]Morrison v. Rogers, 115 Cal. 252, 46 Pac. 1072, 56 Am. St. 95; Hellen v. Anderson, 83 Ill. App. 506; In re Grobe's Estate, 127 Iowa 121, 102 N. W. 804; Crawford v. Russell, 62 Barb. (N. Y.) 92. But a contract by which a father promised to a man $2,000 if he would marry the former's daughter has been upheld on the ground that marriage is a valuable consideration. Lieb v. Dobriner, 60 Misc. 66, 111 N. Y. S. 650.

[24]Wenninger v. Mitchell, 139 Mo. App. 420, 122 S. W. 1130; Duvall v. Wellman, 124 N. Y. 156, 26 N. E. 343; Place v. Conklin, 34 App. Div. 191, 54 N. Y. S. 532; Herman v. Charlesworth, (1905) 2 K. B. 123.

[25]Chalfant v. Payton, 91 Ind. 202, 46 Am. Rep. 586.

[26]Rowe v. Young, 123 Ark. 303, 185 S. W. 438; Edleson v. Edleson, 179 Ky. 300, 200 S. W. 625, 2 A. L. R. 689; Westfall v. Westfall (Mo. App.), 236 S. W. 393; McDonald v. McDonald, 175 Mo. App. 513, 161 S. W. 850; Lake v. Lake, 136 App. Div. 47, 119 N. Y. S. 686; Pierce v. Cobb, 161 N. Car. 300, 77 S. E. 350, 44 L. R. A. (N. S.) 379; Huber v. Culp, 46 Okla. 570, 149 Pac. 216; In re Mathiot's Estate, 243 Pa. 375, 90 Atl. 139; Kistler v. Kistler, 141 Wis. 491, 124 N. W. 1028.

[27]Donohue v. Donohue, 159 Mo. App. 610, 141 S. W. 465.

But a bequest provided the legatee was legally divorced from her husband was held a condition precedent not amounting to an inducement to obtain a divorce.[28]

[28]In re Nichols' Estate, 102 Wash. 303, 172 Pac. 1146, L. R. A. 1918E, 986.

CHAPTER 11

PROOF OF MARRIAGE AND PRESUMPTIONS

Section

130. Necessity of proof of marriage.
131. Presumptions and burden of proof in general.
132. Admissions.
133. Declarations.
134. Confession.
135. Circumstantial evidence.
136. Cohabitation and repute—Presumption.
137. Cohabitation as proof of marriage when it begins unlawfully.
138. Eyewitnesses.
139. Marriage certificates.
140. Records.
141. Collateral and unofficial records.
142. Divorce as evidence of marriage.
143. Testimony of persons officiating.
144. Proof of foreign marriage.

§ 130. **Necessity of proof of marriage.**—The requirement of the law that a marriage must be proved as the first step in a suit for divorce is based upon the theory that it is necessary to first judicially and legally determine the present status of the parties before any decree can be properly made which will affect their future status. This is intended to preclude any fraud or error in any claim for relief in person or property in any suit for divorce where no legal relationship, through marriage, ever existed.[1] Such proof is necessary in civil actions for criminal conversation.[2] The evidence to establish a common-law marriage should be closely scrutinized, especially where it is sought to establish the relation by the testimony of one of the parties after the death of the other.[3]

[1]Budd v. Morgan, 187 Cal. 741, 203 Pac. 754; Harman v. Harman, 16 Ill. 85; Mangue v. Mangue, 1 Mass. 240; Randazzo v. Randazzo (Mo. App.), 236 S. W. 1061; Vreeland v. Vreeland, 18 N. J. Eq. 43.

[2]Reed v. Stevens, 120 Maine 290, 113 Atl. 712.

[3]Davidson v. Davidson, 206 Ala. 493, 90 So. 493; Perkins v. Silverman, 284 Mo. 238, 223 S. W. 895; In re Paquet's Estate, 101 Ore. 393,

§ 131. **Presumptions and burden of proof in general.**—Where a marriage is established by evidence, there is a presumption that it is regular and valid, and the burden of proof to the contrary is on one who attacks its validity.[4] So, all the presumptions necessary to make a marriage valid attach on proof of a formal ceremony of marriage by a person assuming to act as a minister of the gospel, followed by cohabitation under the belief of the parties that they are lawfully married,[5] and the burden is on those who attack the validity of the marriage to show its invalidity by clear, distinct, positive and satisfactory proof.[6]

The presumption is rebuttable but the evidence to overcome it must be so clear and convincing as to fairly preclude any other result.[7] The presumption of validity includes the presumption of removal of impediments existing previous to the consummation of the marriage,[8] and that the second of two marriages was valid

200 Pac. 911; In re Stevenson's Estate, 272 Pa. 291, 116 Atl. 162.

[4]Brotherhood of Railroad Trainmen v. Merideth, 146 Ark. 140, 225 S. W. 337; Royal v. Mosaic Templars of America, 143 Ark. 596, 219 S. W. 752; People v. Spitzer (Cal. App.), 208 Pac. 181; Farr v. Farr, 190 Iowa 1005, 181 N. W. 268; Boyce v. McKenna, 211 Mich. 204, 178 N. W. 701; In re Goode's Estate, 188 N. Y. S. 188; In re Tyrrell's Estate, 185 N. Y. S. 762; Price v. Tompkins, 190 App. Div. 967, 179 N. Y. S. 946; Marone v. Marone, 105 Misc. 371, 174 N. Y. S. 151; In re Hilton's Estate, 263 Pa. 16, 106 Atl. 69; In re Wo-gin-up's Estate, 57 Utah 29, 192 Pac. 267; Blodgett v. Blodgett, 109 Wash. 597, 187 Pac. 340; Lyannes v. Lyannes, 171 Wis. 381, 177 N. W. 683. The rule especially strong where children were born of the marriage. In re Cassidy's Estate, 178 N. Y. S. 366.

[5]Ricard v. Ricard, 143 Iowa 182, 121 N. W. 525, 26 L. R. A. (N. S.) 500, 136 Am. St. 763, 20 Ann. Cas. 1346 (the marriage is presumptively legal); Maier v. Brock, 222 Mo. 74, 120 S. W. 1167, 133 Am. St. 513, 17 Ann. Cas. 673, (where the court says the presumption is one of the strongest known to the law); Thomas v. Thomas, 53 Wash. 297, 101 Pac. 865 (the law seizes upon all presumptions both of law and fact to sustain marriage and repel the conclusion of unlawful commerce). 1 Bishop Marriage and Divorce (5th. ed.) § 457.

[6]Megginson's Estate, 21 Ore. 387, 28 Pac. 388, 14 L. R. A. 540.

[7]Ward v. Ward, 24 Ga. App. 695, 102 S. E. 35; Smith v. Smith, 32 Idaho 478, 185 Pac. 67; Brett v. Brett, 191 Iowa 262, 182 N. W. 241; In re Seymour, 113 Misc. 421, 185 N. Y. S. 373; Price v. Tompkins, 190 App. Div. 967, 179 N. Y. S. 946; Dowdle v. U. S. Fidelity & Guaranty Co. (Tex. Civ. App.), 242 S. W. 771

[8]Hamlin v. Grogan, 257 Fed. 59; Ward v. Ward, 24 Ga. App. 695, 102 S. E. 35; Smith v. Smith, 32 Idaho 478, 185 Pac. 67; Wiley v. Wiley, 75 Ind. App. 456, 123 N. E. 252; Farr v. Farr, 190 Iowa 1005, 181 N. W. 268; Clark v. Clark, 44 Nev. 44, 194 Pac. 96; In re Hilton's Estate, 263 Pa. 16, 106 Atl. 69; Lopez v. Missouri, K. & T. R. Co. (Tex. Civ. App.), 222 S.

and that the first marriage was legally terminated.[9] The burden is on the party claiming the existence of a valid first marriage to show that the first marriage was a valid marriage.[10] Accordingly one attacking the validity of the marriage on the ground of incapacity because of an existing valid marriage to another at the time of the second marriage has the burden of establishing that fact by clear, convincing, and satisfactory proof.[11]

The Supreme Court of Tennessee holds that the rule that a general search must be made of the court records for divorce in order to overcome the presumption indulged in favor of the legality of a second marriage has reference to the court records of the state in which the spouse effecting the second marriage has established a residence.[12] In one of the cases where the wife contracted a second marriage before her former husband from whom she had not been divorced, had been absent seven years, the court held that the validity of the second marriage would overcome the presumption that the first husband was alive when the second marriage was contracted.[13]

Where the marriage is established it is presumed to continue until the contrary is proved.[14] The denial of a marriage by one

W. 695; Tanton v. Tanton (Tex. Civ. App.), 209 S. W. 429.

[9]Young v. Young, 213 Ill. App. 402; Kinney v. Woodmen of the World, 110 Kans. 323, 203 Pac. 723; In re Salvin's Will, 173 N. Y. S. 897; Payne v. Payne, 142 Tenn. 320, 219 S. W. 4; Kinney v. Tri-State Telephone Co. (Tex. Com. App.), 222 S. W. 227. But see Industrial Commission of Ohio v. Dell (Ohio), 135 N. E. 669; Lopez v. Missouri, K. & T. R. Co. (Tex. Civ. App.), 222 S. W. 695.

[10]Turner v. Williams, 202 Mass. 500, 89 N. E. 110, 24 L. R. A. (N. S.) 1199, 132 Am. St. 511; Sparks v. Ross, 75 N. J. Eq. 550, 73 Atl. 241, (pointing out that as between the first and second marriages the presumption is in favor of the second, giving the reason and citing authorities). See also Weatherall v. Weatherall, 56 Wash. 344, 105 Pac. 822 (to the effect that the presumption is rebuttable).

[11]Ward v. Ward, 24 Ga. App. 695, 102 S. E. 35; Smith v. Smith, 32 Idaho 478, 185 Pac. 67; Succession of Thomas, 144 La. 25, 80 So. 186; Michaels v. Michaels (N. J. Ch.), 110 Atl. 573; In re Salvin's Will, 173 N. Y. S. 897; Brokeshoulder v. Brokeshoulder, 84 Okla. 249, 204 Pac. 284; Payne v. Payne, 142 Tenn. 320, 219 S. W. 4; Kinney v. Tri-State Telephone Co. (Tex. Com. App.), 222 S. W. 227. Presumption does not obtain where evidence positive that a divorce has not been granted. Succession of Thomas, 144 La. 25, 80 So. 186.

[12]Payne v. Payne, 142 Tenn. 320, 219 S. W. 4.

[13]Hickman v. Hickman, 126 Miss. 469, 89 So. 6. See also In re Cassidy's Estate, 178 N. Y. S. 366.

[14]Lopez v. Missouri, K. & T. R. Co. (Tex. Civ. App.), 222 S. W. 695.

party is not evidence against the other unless made in the presence of or acquiesced in by the other.[15]

§ 132. **Admissions.**—The admissions of a party, as a rule, may be used against him in any case, civil or criminal, and the same applies to an action involving the validity of a marriage. Such admissions are not necessarily conclusive, but are admitted and have the same weight as in other cases.[16] A form of solemn acknowledgment of the existence of the relation where the parties unite in a deed containing a recital that the parties executing the conveyance are husband and wife.[17]

§ 133. **Declarations.**—Declarations by the parties or the introduction by one of the parties of the other to strangers as husband or wife give rise to a strong presumption of marriage.[18]

Declarations contained in income tax returns by one since deceased may be considered in connection with oral declarations made by him on the question of marriage.[19]

The declarations of the existence of marriage by one since deceased, has been held admissible where the purpose is to establish the legitimacy of a child.[20] So the declarations of the decedent that there was no marriage were held admissible where the facts were against the probability of a common-law marriage sought to be established.[21]

[15]Marshall v. Carr, 271 Pa. 271, 114 Atl. 500.

[16]Jewell v. Jewell, 1 How. (U. S.) 219, 11 L. ed. 108; Clayton v. Clayton, 4 Colo. 410; Teter v. Teter, 101 Ind. 129, 51 Am. Rep. 742; Smith v. Fuller, 138 Iowa 91, 115 N. W. 912, 16 L. R. A. (N. S.) 98; State v. Hughes, 35 Kans. 626, 12 Pac. 28, 57 Am. Rep. 195; State v. Libby, 44 Maine 469, 69 Am. Dec. 115; Craufurd v. Blackburn, 17 Md. 49, 77 Am. Dec. 323; Commonwealth v. Caponi, 155 Mass. 534, 30 N. E. 82; Topper v. Perry, 197 Mo. 531, 95 S. W. 203, 114 Am. St. 777; State v. Gonce, 79 Mo. 600; Atlantic City R. Co. v. Goodwin, 62 N. J. L. 394, 42 Atl. 333, 45 L. R. A. 671, 72 Am. St. 652; Badger v. Badger, 88 N. Y. 546, 42 Am. Rep. 263; In re Seymour, 113 Misc. 421, 185 N. Y. S. 373; Walker v. Walker, 151 N. Car. 164, 65 S. E. 923; Spaugh v. Hartman, 150 N. Car. 454, 64 S. E. 198; State v. Behrman, 114 N. Car. 797, 19 S. E. 220, 25 L. R. A. 449; Reaves v. Reaves, 15 Okla. 240, 82 Pac. 490, 2 L. R. A. (N. S.) 353; Reynolds v. Adams, 125 Va. 295, 99 S. E. 695. See notes, 22 Am. Dec. 160; 12 L. R. A. 838.

[17]In re Seymour, 113 Misc. 421, 185 N. Y. S. 373.

[18]Procita v. Procita, 190 N. Y. S. 21.

[19]Farmers' Loan & Trust Co. v. Wagstaff, 194 App. Div. 757, 185 N. Y. S. 812.

[20]Washington, B. & A. R. Co. v. State, 136 Md. 103, 111 Atl. 164.

[21]Beck v. Utah-Idaho Sugar Co., 59 Utah 351, 203 Pac. 647.

Declarations by one spouse, since deceased, are not admissible against the other unless made in his presence.[22] Declarations of deceased that he was the husband of claiming party are admissible in her favor. But such declarations are only hearsay in a suit to which neither husband or wife is a party.

§ 134. **Confessions.**—Admissions made in writing by a party may be construed as a confession and be introduced against him.[23] So plaintiff's application in her maiden name for a commission as notary public was held admissible.[24]

The declarations of a party together with other facts part of the res gestae, used as evidence to establish marriage rather than illicit intercourse, must be contemporaneous with such intercourse.[25]

Declarations of those related by blood or marriage to a person whose marriage is sought to be established, are admissible.[26]

§ 135. **Circumstantial evidence.**—A marriage may be proved by circumstantial evidence in divorce cases, as readily as any other question of fact in any other case,[27] and the presumption is in favor of marriage and against concubinage.[28] This testimony may refer to reputation, the declarations and conduct of the parties, and other circumstances usually accompanying the married relation and evidencing the marital intent.[29]

§ 136. **Cohabitation and repute—Presumptions.**—The law and public policy are favorable to marriage and lend every reasonable presumption in favor of valid marriage as opposed to immorality.[30]

[22]Thompson v. Nims, 83 Wis. 261, 53 N. W. 502, 17 L. R. A. 847. See contra however, Topper v. Perry, 197 Mo. 531, 95 S. W. 203, 114 Am. St. 777; In re Salvin's Will, 173 N. Y. S. 897.

[23]Commonwealth v. Caponi, 155 Mass. 534, 30 N. E. 82.

[24]Collard v. Burch, 138 Mo. App. 94, 119 S. W. 1009.

[25]In re Taylor, 9 Paige (N. Y.) 611, per Chancellor Wolworth.

[26]Jewell v. Jewell, 1 How. (U. S.) 219, 11 L. ed. 108.

[27]Lowry v. Coster, 91 Ill. 182; Mazzei v. Gruis, 128 La. 860, 55 So. 555; Camden v. Belgrade, 75 Maine 126, 46 Am. Rep. 364; Commonwealth v. Dill, 156 Mass. 226, 30 N. E. 1016; Gibson v. Gibson, 24 Nebr. 394, 39 N. W. 450; Mitchell v. Mitchell, 11 Vt. 134.

[28]Linsey v. Jefferson (Okla.), 172 Pac. 641.

[29]Thomas v. Thomas, 150 Ark. 43, 233 S. W. 808; Western Coal & Mining Co. v. Industrial Commission, 296 Ill. 408, 129 N. E. 779; Jackson v. Jackson (N. J. Ch.), 113 Atl. 495; In re Seymour, 113 Misc. 421, 185 N. Y. S. 373.

[30]See notes, 72 Am. St. 562; 14 L. R. A. 540; 16 L. R. A. (N. S.) 98-100; 34 L. R. A. (N. S.) 940; 17 Ann. Cas. 680.

In the absence of any charge of criminal intent, as in the case of bigamy, marriage may be presumed to exist[31] as a fact between a man and woman, who have openly cohabited and consorted together, under circumstances which would justify the presumption.[32] This presumption of fact is based upon the various presumptions of law in favor of innocence rather than guilt, of regularity in a ceremony rather than irregularity.[33]

The reputation of the parties to the alleged marriage must be shown, as well as the cohabitation, and such reputation must result from the cohabitation by the parties. Reputation, without proof of cohabitation, is of itself of little consequence.[34] The following quotation from Lord Westbury's opinion in Campbell v. Campbell[35] is in point: "Cohabitation as husband and wife

[31]In re Fitzgibbon's Estate, 162 Mich. 416, 127 N. W. 313, 139 Am. St. 570, where the court is equally divided on the sufficiency of evidence as to presumption of marriage.

[32]Travers v. Reinhardt, 205 U. S. 423, 51 L. ed. 865, 27 Sup. Ct. 563, Cox v. State, 117 Ala. 103, 23 So. 806, 41 L. R. A. 760, 67 Am. St. 166; Kilburn v. Kilburn, 89 Cal. 46, 26 Pac. 636, 23 Am. St. 447; Employer's Mut. Ins. Co. v. Morgulski, 69 Colo. 223, 193 Pac. 725; Klipfel v. Klipfel, 41 Colo. 40, 92 Pac. 26, 124 Am. St. 96; Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451, 15 L. R. A. (N. S.) 190; Eaton v. Eaton, 66 Nebr. 676, 92 N. W. 995, 60 L. R. A. 605, 1 Ann. Cas. 199; Bolmer v. Edsall, 90 N. J. Eq. 299, 106 Atl. 646; Badger v. Badger, 88 N. Y. 546, 42 Am. Rep. 263; Ellis v. Kelsey, 195 N. Y. S. 126; In re Seymour, 113 Misc. 421, 185 N. Y. S. 373; In re Terwilliger's Estate, 63 Misc. 479, 118 N. Y. S. 424; Walton v. Walton (Tex. Com. App.), 228 S. W. 921; Hilton v. Roylance, 25 Utah 129, 69 Pac. 660, 58 L. R. A. 723, 95 Am. St. 821; Reynolds v. Adams, 125 Va. 295, 99 S. E. 695. See notes, 124 Am. St. 113, 118, 120; 22 Am. Dec. 158; 6 L. R. A. 717; L. R. A. 1915E, 34, 37.

[33]United States v. Green, 98 Fed. 63; Lampkin v. Travelers' Ins. Co., 11 Colo. App. 249, 52 Pac. 1040; Harman v. Harman, 16 Ill. 85; Taylor v. Robinson, 29 Maine 323; Commonwealth v. Kenney, 120 Mass. 387; Commonwealth v. Littlejohn, 15 Mass. 163; Vreeland v. Vreeland, 18 N. J. Eq. 43; Bullock v. Bullock, 85 Hun (N. Y.) 373, 32 N. Y. S. 1009, 66 N. Y. St. 493; Finn v. Finn, 12 Hun (N. Y.) 339; Odd Fellows Beneficial Assn. v. Carpenter, 17 R. I. 720, 24 Atl. 578; Fort Worth Ry. v. Robertson, 55 Tex. Civ. App. 309, 121 S. W. 202.

[34]Brewer v. Estate of Brewer, 68 Colo. 84, 188 Pac. 725; Commonwealth v. Johnson, 10 Allen (Mass.) 196; Commonwealth v. Hurley, 14 Gray (Mass.) 411; Ashford v. Metropolitan Ins. Co., 80 Mo. App. 638; In re Callery's Estate, 226 Pa. 469, 75 Atl. 672; Moore v. Moore, 102 Tenn. 148, 52 S. W. 778. But see Caldwell v. Williams (Ky.), 118 S. W. 932, where the reputation of marriage together with the man's holding himself out as husband and father were held sufficient.

[35]Campbell v. Campbell, L. R. 1 H. L. 182, 211.

is a manifestation of the parties having consented to contract that relation inter se. It is a holding forth to the world, by manner of daily life, by conduct, demeanor, and habit, that the man and woman who live together have agreed to take each other in marriage, and to stand in the mutual relation of husband and wife; and when credit is given by those among whom they live, by their relatives, neighbors, friends, and acquaintances, to these representations and this continued conduct, then habit and repute arise, and attend upon the cohabitation. The parties are holden and reputed to be husband and wife." Mr. Bishop approves this and adds: "The cohabitation must be matrimonial. The repute, to have its fullest effect, should be uniform. It then casts on the party denying the marriage the burden of proving it did not take place. Still in some circumstances a preponderating repute of marriage has been accepted as adequate."

But this cohabitation must be more than mere association or even illicit intercourse, and should be shown to be of such a continuous and open nature as to create a general reputation among relatives or neighbors that the parties are married.[36]

"In order to establish marriage by reputation there must be a consensus of opinion that the man and woman living together are husband and wife."[37]

"Whether common-law marriages are recognized or not, evi-

[36]Budington v. Munson, 33 Conn. 481; Love v. Love, 185 Iowa 930, 171 N. W. 257; O'Leary v. Lawrence, 138 Md. 147, 113 Atl. 638; Peet v. Peet, 52 Mich. 464, 18 N. W. 220; Jackson v. Jackson (N. J. Ch.), 113 Atl. 495; Gall v. Gall, 114 N. Y. 109, 21 N. E. 106; In re Strauss's Estate, 168 Pa. St. 561, 32 Atl. 98; Moore v. Moore, 102 Tenn. 148, 52 S. W. 778; Bobbitt v. Bobbitt (Tex. Civ. App.), 223 S. W. 478; In Bishop v. Brittain Inv. Co., 229 Mo. 699, 129 S. W. 668, Ann. Cas. 1912A, 868, it is held that platonic relations are not necessarily meretricious, and in South Carolina it has been held that those asserting marriage between a white man and a colored woman whose relations had an immoral beginning have the burden of proof. Tedder v. Tedder, 108 S. Car. 271, 94 S. E. 19, 2 A. L. R. 438.

[37]In re Hartman, 157 Cal. 206, 107 Pac. 105, 36 L. R. A. (N. S.), 530, 21 Ann. Cas. 1302; White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; Klipfel v. Klipfel, 41 Colo. 40, 92 Pac. 26, 124 Am. St. 96; Brisbin v. Huntington, 128 Iowa 166, 103 N. W. 144, 5 Ann. Cas. 931; Jackson v. Jackson, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773; Bishop v. Brittain Inv. Co., 229 Mo. 699, 129 S. W. 668, Ann. Cas. 1912A, 868; Schwingle v. Keifer (Tex.), 135 S. W. 194; Reynolds v. Adams, 125 Va. 295, 99 S. E. 695. See also Dahlquist v. Nevada Industrial Commission (Nev.), 206 Pac. 197. See notes, 124 Am. St. 119; L. R. A. 1915E, 39, 40, 73.

dence of cohabitation and repute are admissible as tending to show a valid marriage."[38]

The reputation must be general in the community. If there is a division in the same locality as to the character of the fact of marriage the evidence may be rejected as ambiguous.[39] Some courts admit the evidence as corroborative of other testimony.[40] The fact that a man may have a reputation as a bachelor among friends ignorant of the cohabitation and as a married man among others of his friends does not present a case of divided repute.[41]

The presumption thus arising is, however, but a presumption and therefore subject to being overcome by contrary evidence,[42] and may even be overcome by other legal presumptions such as continuance of life of former spouse or that there was no dissolution of a former marriage by divorce where the facts out of which these presumptions arise are particularly strong.[43]

When the relation is illicit in its inception the presumption of marriage is overcome,[44] and the illicit cohabitation is presumed to continue so.[45] So also when both parties admit a relation of concubinage, or one party admits concubinage and his admission is fortified by strong evidence.[46] But an admission merely that no ceremonial marriage was performed is not an admission that

[38]In re Bisbing's Estate, 266 Pa. 529, 109 Atl. 670; In re McLaughlin's Estate, 4 Wash. 570, 585, 30 Pac. 651, 16 L. R. A. 699. See also Hamlin v. Grogan, 257 Fed. 59; Ellis v. Kelsey, 195 N. Y. S. 126; In re Seymour, 113 Misc. 421, 185 N. Y. S. 373.

[39]Jackson v. Jackson, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773; Badger v. Badger, 88 N. Y. 546, 42 Am. Rep. 263; In re Hilton's Estate, 263 Pa. 16, 106 Atl. 69. See note, L. R. A. 1915E, 40.

[40]Bishop v. Brittain Inv. Co., 229 Mo. 699, 129 S. W. 668, Ann. Cas. 1912A, 868. See note, L. R. A. 1915E, 40.

[41]Badger v. Badger, 88 N. Y. 546, 42 Am. Rep. 263.

[42]In re Bisbing's Estate, 74 Pa. Super. Ct. 317; In re Bisbing's Estate, 266 Pa. 529, 109 Atl. 670.

[43]Turner v. Williams, 202 Mass. 500, 89 N. E. 110, 24 L. R. A. (N. S.) 1199, 132 Am. St. 511; Sullivan v. Grand Lodge, 97 Miss. 218, 52 So. 360; Reading Fire Ins. &c., Co.'s Appeal, 113 Pa. St. 204, 6 Atl. 60, 57 Am. Rep. 448; Grimm's Estate, 131 Pa. St. 199, 18 Atl. 1061, 6 L. R. A. 717, 17 Am. St. 796; Allen v. Hall, 2 Nott & McC. (S. Car.), 114, 10 Am. Dec. 578. See also Walton v. Walton (Tex. Com. App.), 228 S. W. 921. See notes, 89 Am. St. 204; 16 L. R. A. (N. S.) 98; 124 Am. St. 120.

[44]Reading Fire Ins. &c. Co.'s Appeal, 113 Pa. St. 204, 6 Atl. 60, 57 Am. Rep. 448; Hesseltine v. McLaughlin, 4 Wash. 570, 30 Pac. 651, 16 L. R. A. 699.

[45]Illinois Steel Co. v. Industrial Commission, 290 Ill. 594, 125 N. E. 252.

[46]See note, L. R. A. 1915E, 76.

there was no common-law marriage.[47] Subsequent ceremonial marriage may negative the presumption of a prior marriage, especially where the subsequent marriage is to a third party before divorce.[48]

Generally where the presumption of marriage raises a presumption of a greater crime such presumption will not prevail.[49] So, the presumption from cohabitation and repute will not be effective to show marriage where one of the parties had a lawful living spouse, for the law will not presume that one committed bigamy.[50]

It is proper to show by way of rebutting a claim of common-law marriage, that the woman, prior to the alleged common-law marriage, had been an inmate of a house of prostitution, but it is not proper to show that she had the reputation of being a prostitute.

The presumption of marriage as presented in the foregoing discussion prevails generally in civil proceedings involving the validity of a marriage. It is not, applicable to certain actions, however. Thus it has been quite uniformly held insufficient in actions for criminal conversation.[51] So, also in some jurisdictions in actions for bigamy,[52] although in the majority of states proof of habit, conduct, cohabitation and admissions if they establish a marriage will furnish a basis for a finding of guilt.[53] In

[47]Richard v. Brehm, 73 Pa. St. 140, 13 Am. Rep. 733.

[48]Weatherford v. Weatherford, 20 Ala. 548, 56 Am. Dec. 206; Jenkins v. Jenkins, 83 Ga. 283, 9 S. E. 541, 20 Am. St. 316; Jones v. Jones, 48 Md. 391, 30 Am. Rep. 466. See note, 124 Am. St. 121.

[49]Jenkins v. Jenkins, 83 Ga. 283, 9 S. E. 541, 20 Am. St. 316. See also O'Leary v. Lawrence, 138 Md. 147, 113 Atl. 638; In re Sloan, 50 Wash. 86, 96 Pac. 684, 17 L. R. A. (N. S.) 960. See note, 57 Am. Rep. 455.

[50]Petition of Frisby (Del. Orph.), 110 Atl. 673.

[51]Arthur v. Broadnax, 3 Ala. 557, 37 Am. Dec. 707; White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; Hiler v. People, 156 Ill. 511, 41 N. E. 181, 47 Am. St. 221; Sneed v. Ewing, 4 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41; Pratt v. Pierce, 36 Maine 448, 58 Am. Dec. 758; Sellman v. Bowen, 8 Gill & Johns (Md.) 50, 29 Am. Dec. 524; Hutchins v. Kimmell, 31 Mich. 126, 18 Am. Rep. 164; Fenton v. Reed, 4 Johns. (N. Y.) 52, 4 Am. Dec. 244. See notes, 57 Am. Rep. 452; 47 Am. St. 228; L. R. A. 1915E, 51.

[52]Patterson v. Gaines, 6 How. (U. S.) 550, 12 L. ed. 553; Hiler v. People, 156 Ill. 511, 41 N. E. 181, 47 Am. St. 221; Sneed v. Ewing, 4 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41; Pratt v. Pierce, 36 Maine 448, 58 Am. Dec. 758; People v. Lambert, 5 Mich. 349, 72 Am. Dec. 49. See notes, 57 Am. Rep. 452; L. R. A. 1915E, 14.

[53]Bynon v. State, 117 Ala. 80, 23 So. 640, 67 Am. St. 163; Parker v. State, 77 Ala. 47, 54 Am. Rep. 43;

some states the presumption does not hold in criminal cases of adultery and incest.

§ 137. **Cohabitation as proof of marriage when it begins unlawfully.**—Where cohabitation between a man and a woman began under illegal and illicit circumstances such illegal and illicit cohabitation, in the absence of contrary evidence, will be presumed to have continued.[54] This meretricious relationship may be proved to have ceased, however, and a lawful married life begun.[55] This change may be established by strong circumstantial evidence or more direct proof,[56] and the burden of this proof is on the party asserting a termination of the illicit cohabitation and the affirmative agreement to become husband and wife.[57]

Where the marriage was merely illegal because of some impediment and the parties in good faith entered into the marriage relation, with actual matrimonial intent, the better rule and weight

Williams v. State, 54 Ala. 131, 25 Am. Rep. 665; Halbrook v. State, 34 Ark. 511, 36 Am. Rep. 17; State v. Hughes, 35 Kans. 626, 12 Pac. 28, 57 Am. Rep. 195; Commonwealth v. Jackson, 11 Bush (Ky.) 679, 21 Am. Rep. 225; Dumas v. State, 14 Tex. Civ. App. 464, 46 Am. Rep. 241. See notes, 69 Am. Dec. 118; 47 Am. St. 228, 230.

[54]Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451, 15 L. R. A. (N. S.) 190; Sebree v. Sebree, 293 Ill. 228, 127 N. E. 392; Potter v. Clapp, 203 Ill. 592, 68 N. E. 81, 96 Am. St. 322; Cartwright v. McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. 105; Atlantic City R. Co. v. Goodin, 62 N. J. L. 394, 42 Atl. 333, 45 L. R. A. 671, 72 Am. St. 652; Badger v. Badger, 88 N. Y. 546, 42 Am. Rep. 263; Reading Fire Ins. &c. Co.'s Appeal, 113 Pa. St. 204, 6 Atl. 60, 57 Am. Rep. 448; Williams v. Williams, 46 Wis. 464, 1 N. W. 98, 32 Am. Rep. 722. See notes, 57 Am. Rep. 456-462; 19 Am. St. 409; 79 Am. St. 811; 124 Am. St. 114; 6 L. R. A. 364; L. R. A. 1915E, 77.

[55]Wells v. Allen, 38 Cal. App. 586, 177 Pac. 180; Jackson v. Jackson (N. J. Ch.), 113 Atl. 495; Schaffer v. Krestovnikow, 89 N. J. Eq. 549, 105 Atl. 239. See note, 124 Am. St. 114.

[56]White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 790; Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451, 15 L. R. A. (N. S.) 190; Schuchart v. Schuchart, 61 Kans. 597, 60 Pac. 311, 50 L. R. A. 180, 78 Am. St. 342; Hynes v. McDermott, 91 N. Y. 451, 43 Am. Rep. 677; Badger v. Badger, 88 N. Y. 546, 42 Am. Rep. 263; Williams v. Williams, 46 Wis. 464, 1 N. W. 98, 32 Am. Rep. 722. See notes, L. R. A. 1915E, 77, 79; 124 Am. St. 115.

[57]Sebree v. Sebree, 293 Ill. 228, 127 N. E. 392; Illinois Steel Co. v. Industrial Commission, 290 Ill. 594, 125 N. E. 252; O'Leary v. Lawrence, 138 Md. 147, 113 Atl. 638; Perkins v. Silverman, 284 Mo. 238, 223 S. W. 895; In re Stevenson's Estate, 272 Pa. 291, 116 Atl. 162.

of authority is that continued cohabitation after the impediment is removed will raise the presumption of subsequent marriage.[58] This has been held true even if the parties were ignorant of the impediment,[59] or if only one party was thus ignorant.[60] Where, however, there is lack of matrimonial intent such presumption does not arise,[61] and this would be the effect where the acts of the parties are open to the construction that they were intended to deceive the public, and make their illegal relations easier.[62]

There are authorities holding it necessary to evidence the subsequent marriage after the removal of the impediment, by formal marriage or an actual marriage contract proved to the exclusion of an inference that the prior relations still existed.[63]

A continuance of cohabitation after the removal of an obstacle to a valid marriage will not be sufficient to constitute such a

[58]Travers v. Reinhardt, 205 U. S. 423, 27 Sup. Ct. 563, 51 L. ed. 865; Poole v. People, 24 Colo. 510, 52 Pac. 1025, 65 Am. St. 245; Murchison v. Green, 128 Ga. 339, 57 S. E. 709, 11 L. R. A. (N. S.) 702; Cartwright v. McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. 105; Teter v. Teter, 101 Ind. 129, 51 Am. Rep. 742; Smith v. Fuller, 138 Iowa 91, 115 N. W. 912, 16 L. R. A. (N. S.) 98; Schuchart v. Schuchart, 61 Kans. 597, 60 Pac. 311, 50 L. R. A. 180, 78 Am. St. 342; Taylor v. Sweet, 3 La. 33, 22 Am. Dec. 156; Eaton v. Eaton, 66 Nebr. 676, 92 N. W. 995, 60 L. R. A. 605, 1 Ann. Cas. 199; Chamberlain v. Chamberlain, 68 N. J. Eq. 736, 62 Atl. 680, 3 L. R. A. (N. S.) 244, 111 Am. St. 658, 6 Ann. Cas. 483; North v. North, 1 Barb. Ch. (N. Y.) 241, 43 Am. Dec. 778. See notes, 57 Am. Rep. 456, 462; 2 Am. St. 117; 65 Am. St. 251; 84 Am. St. 584; 99 Am. St. 175; 109 Am. St. 645; 124 Am. St. 116; 14 L. R. A. 364, 365; 3 L. R. A. (N. S.) 244; L. R. A. 1915E, 92; 6 Ann. Cas. 484-486.

[59]Travers v. Reinhardt, 205 U. S. 423, 51 L. ed. 865, 27 Sup. Ct. 563, (common-law marriage); Smith v. Fuller, 138 Iowa 91, 115 N. W. 912, 16 L. R. A. (N. S.) 98 (prior consort living); Renfrow v. Renfrow, 60 Kans. 277, 56 Pac. 534, 72 Am. St. 350 (slaves after liberation); Turner v. Turner, 189 Mass. 373, 75 N. E. 612, 109 Am. St. 643; In re Fitzgibbons, 162 Mich. 416, 127 N. W. 313, 139 Am. St. 570; Eaton v. Eaton, 66 Nebr. 676, 92 N. W. 995, 60 L. R. A. 605, 1 Ann. Cas. 199. See notes, 124 Am. St. 117; 6 Ann. Cas. 485.

[60]Barker v. Valentine, 125 Mich. 336, 84 N. W. 297, 51 L. R. A. 787, 84 Am. St. 787; In re Fitzgibbons, 162 Mich. 416, 127 N. W. 313, 139 Am. St. 570. See note, 124 Am. St. 117.

[61]White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799.

[62]In re Stevenson's Estate, 272 Pa. 291, 116 Atl. 162,

[63]Klipfel v. Klipfel, 41 Colo. 40, 92 Pac. 26, 124 Am. St. 96; Hynes v. McDermott, 91 N. Y. 451, 43 Am. Rep. 677; Reading Fire Ins. &c. Co.'s Appeal, 113 Pa. St. 204, 6 Atl. 60, 57 Am. Rep. 448; Lanham v. Lanham, 136 Wis. 360, 117 N. W. 787, 17 L. R. A. (N. S.) 804, 128

marriage, where the cohabitation began under an illegal marriage entered into in good faith by one of the parties only.[64]

§ 138. **Eyewitnesses.**—Witnesses who were present and saw the parties united in marriage are competent to testify to that fact, and the marriage may be proved as fully in that manner as by any other evidence.[65] In such a case the marriage certificate referred to in the next section is not necessary.[66]

§ 139. **Marriage certificates.**—A certificate of marriage, signed by the clergyman, or magistrate who performed the marriage ceremony may be admitted as evidence of the marriage, though sometimes evidence of the proper execution and the identity of such person is demanded.[67] So, it has been held proper to receive testimony of witnesses to the effect that they have seen the certificate.[68] A marriage certificate is not necessary to establish the validity of a slave marriage which was entered into in the customary way and the evidence shows a recognition of the marriage by the parties and the people in the neighborhood.[69]

Am. St. 1085; Spencer v. Pollock, 83 Wis. 215, 53 N. W. 490, 17 L. R. A. 848; Williams v. Williams, 46 Wis. 464, 1 N. W. 98, 32 Am. Rep. 722. See notes, 124 Am. St. 116; 139 Am. St. 581; 14 L. R. A. 364; 6 Ann. Cas. 486.

[64]Collins v. Voorhees, 47 N. J. Eq. 555, 22 Atl. 1054, 14 L. R. A. 364, 24 Am. St. 412; Clark v. Barney, 24 Okla. 455, 103 Pac. 598. See notes, 52 Am. Rep. 452, 453; L. R. A. 1915E, 53.

[65]Patterson v. Gaines, 6 How. (U. S.) 550, 12 L. ed. 553; Smith v. Fuller, 138 Iowa 91, 115 N. W. 912, 16 L. R. A. (N. S.) 98; Watson v. Lawrence, 134 La. 194, 63 So. 873, L. R. A. 1915E, 121, Ann. Cas. 1916A, 651; Audibert v. Michaud, 119 Maine 295, 111 Atl. 305; Commonwealth v. Littlejohn, 15 Mass. 163; Commonwealth v. Norcross, 9 Mass. 492; Fleming v. People, 27 N. Y. 329; State v. Robbins, 28 N. Car. 23, 44 Am. Dec. 64.

[66]Smith v. Fuller, 138 Iowa 91, 115 N. W. 912, 16 L. R. A. (N. S.) 98; Watson v. Lawrence, 134 La. 194, 63 So. 873, L. R. A. 1915E, 121, Ann. Cas. 1916A, 651; Boling v. State, 91 Nebr. 599, 136 N. W. 1078; Lopez v. Missouri, K. & T. R. Co. (Tex. Civ. App.), 222 S. W. 695.

[67]Smith v. Heine Safety Boiler Co., 119 Maine 552, 112 Atl. 516; Jones v. Jones, 18 Maine 308, 36 Am. Dec. 723; People v. Imes, 110 Mich. 250, 68 N. W. 157; Hutchins v. Kimmell, 31 Mich. 126, 18 Am. Rep. 164; Gaines v. Green Pond Iron Mining Co., 32 N. J. Eq. 86; Commonwealth v. Stump, 53 Pa. St. 132, 91 Am. Dec. 198; Hill v. Hill, 32 Pa. St. 511; State v. Abbey, 29 Vt. 60, 67 Am. Dec. 754.

[68]In re Emmans' Estate, 117 Wash. 182, 200 Pac. 1117.

[69]Cabble v. Hawkins, 186 Ky. 114, 216 S. W. 345.

§ 140. **Records.**—The records kept by an official in accordance with legal requirements may be admitted to establish marriage in the same manner as in other cases and will have equal weight. But in order for a record, or a certified copy of a record, when such is admissible, to be considered as proving a marriage it must show clearly that there was a marriage performed between the parties by a competent official and that the legal prerequisites were complied with.[70] Where by reason of the death of the officiating clergyman a proper return of the license may not be made, then the fact of the marriage may be established by evidence of a survivor and other corroborating testimony.[71]

Certificates of births and marriages in a foreign country have been held insufficient to show marriage relationship of a claimant living in such foreign country to satisfy the requirements of the Workmen's Compensation Law of New York.[72]

§ 141. **Collateral and unofficial records.**—Collateral records such as maintenance decrees or probate papers are not admissible to prove marriage,[73] but regular entries such as are kept by the officiating minister and magistrate are competent when properly offered.[74] So also are entries in the family Bible if they were accessible to members of the family so as to take on the character of family admissions.[75]

§ 142. **Divorce as evidence of marriage.**—The validity of a marriage has been held to be established by the decree of a divorce from such marriage.[76]

[70]Gaines v. Relf, 12 How. (U. S.) 472, 13 L. ed. 1071; Hawes v. State, 88 Ala. 37, 7 So. 302; People v. Spitzer (Cal. App.), 208 Pac. 181; Hiler v. People, 156 Ill. 511, 41 N. E. 181, 47 Am. St. 221; Tucker v. People, 117 Ill. 88, 7 N. E. 51; Squire v. State, 46 Ind. 459; Verholf v. Van Houwenlengen, 21 Iowa 429; Commonwealth v. Hayden, 163 Mass. 453, 40 N. E. 846, 28 L. R. A. 318, 47 Am. St. 468; State v. Johnson, 12 Minn. 476, 93 Am. Dec. 241; Northfield v. Plymouth, 20 Vt. 582.

[71]Thomas v. Thomas, 150 Ark 43, 233 S. W. 808. See also Potter v. Stanley, 187 Ky. 292, 219 S. W. 167.

[72]Grillo v. Sherman-Stalter Co., 195 App. Div. 362, 186 N. Y. S. 810.

[73]American Woolen Co. v. Lesher, 267 Ill. 11, 107 N. E. 882; Berger v. Kirby (Tex. Civ. App.), 135 S. W. 1122.

[74]Blackburn v. Crawfords, 3 Wall. (U. S.) 175, 18 L. ed. 186; Kennedy v. Doyle, 10 Allen (Mass.) 161; Clark v. St. James' Church, 21 Hun (N. Y.) 95; Hubbard v. Lee, L. R. Ex. 255.

[75]Weaver v. Leiman, 52 Md. 708.

[76]Halbrook v. State, 34 Ark. 511, 36 Am. Rep. 17.

§ 143. **Testimony of persons officiating.**—The officiating clergyman or magistrate is a competent witness to the fact of the marriage, to the identity of the parties, and even to his legal capacity to perform the ceremony, and to such other facts as may come within his knowledge in the course of his duty as such officer.[77] The general rule does not require proof of the official character of the person celebrating the marriage unless such character is challenged. The matter may be obviated by proof of cohabitation and repute.[78]

Unless the officiating minister is required to keep a record of marriage ceremonies it would seem that his certificate would amount to no more than the statement of a private person and not admissible as evidence.[79]

§ 144. **Proof of foreign marriage.**—Foreign marriages may be proved most readily by copies of the record of such marriages properly attested.[80] The law of the place of marriage must usually be proved as a question of fact, in addition.[81] Where there is evidence of cohabitation, between competent parties with an intention to marry, the court may presume the foreign law to be complied with;[82] and without further proof the foreign law will be presumed to be the same as that of the state in which the rights of the parties are sought to be enforced.[83]

[77]Brewer v. State, 59 Ala. 101; Stark v. Johnson, 43 Colo. 243, 95 Pac. 930, 16 L. R. A. (N. S.) 674, 127 Am. St. 114, 15 Ann. Cas. 868; Dale v. State, 88 Ga. 552, 15 S. E. 287; Watson v. Lawrence, 134 La. 194, 63 So. 873, L. R. A. 1915E, 121, Ann. Cas. 1916A, 651; Commonwealth v. Hayden, 163 Mass. 453, 40 N. E. 846, 28 L. R. A. 318, 47 Am. St. 468; People v. Imes, 110 Mich. 250, 68 N. W. 157; State v. Kean, 10 N. H. 347, 34 Am. Dec. 162. See notes, L. R. A. 1915E, 125; Ann. Cas. 1916A, 655.

[78]Bolmer v. Edsall, 90 N. J. Eq. 299, 106 Atl. 646; Istincheyou v. Clark, 84 Okla. 125, 202 Pac. 305.

[79]Frederick v. Culler, 118 S. Car. 102, 109 S. E. 889.

[80]State v. Goodrich, 14 W. Va. 834; 1 Bishop Marriage and Divorce, 475.

[81]Wottrich v. Freeman, 71 N. Y. 601.

[82]Sy Joc Lieng v. Gregorio Sy Quia, 228 U. S. 335, 57 L. ed. 862, (upholding the presumption in favor of the validity of a Philippine marriage); Patterson v. Gaines, 6 How. (U. S.) 550, 12 L. ed. 553; Commonwealth v. Kenney, 120 Mass. 387; Hutchins v. Kimmell, 31 Mich. 126, 18 Am. Rep. 164; State v. Kean, 10 N. H. 347, 34 Am. Dec. 162; Lanctot v. State, 98 Wis. 136, 73 N. W. 575, 67 Am. St. 800. See also Reichert v. Jerome H. Sheip, Inc., 204 Ala. 86, 85 So. 267. See note, 16 L. R. A. (N. S.) 102.

[83]In re Harrington, 140 Cal. 244, 73 Pac. 1000, 98 Am. St. 51; Hutchins v. Kimmell, 31 Mich. 126, 18 Am. Rep. 164; Wingo v. Rudder (Tex.), 120 S. W. 1073. See note, 16 L. R. A. (N. S.) 102.

Proof of a ceremonial marriage in a foreign country will carry the presumption of compliance with the law of that country.[84]

A judgment by the highest court in a foreign state is admissible and conclusive as establishing the validity of a marriage between the same parties.[85]

[84]Lopez v. Missouri, K. & T. R. Co. (Tex. Civ. App.), 222 S. W. 695.

[85]Hilton v. Stewart, 15 Idaho 150, 96 Pac. 579, 128 Am. St. 48.

CHAPTER 12

ALIENATION OF AFFECTIONS

Section

150. Nature of action in general
151. Husband's right of action.
152. Wife's right of action.
153. Alienation from parental or family interference.
154. Parties to actions.
155. Validity of agreement not to prosecute suit for alienation.
156. Defenses.
157. Pleadings.
158. Presumptions and burden of proof.
159. Evidence in general.
160. Evidence—Declarations or admissions of husband or wife.
161. Evidence—Mitigation of damages.
162. Damages.

§ 150. **Nature of action in general.**—The law condemns any invasion of the marital relation by third persons. There is such an invasion and a cause of action for alienation of affections will accrue whenever a third person, by enticement, seduction or other wrongful and intentional interference with the marriage relation deprives either husband or wife of the consortium or conjugal fellowship of the other. The gist of the action is always the loss of the consortium,[1] and this without regard to whether the marriage is a statutory or a common-law marriage.[2] Consortium in this connection means society, companionship, conjugal affection, fellowship and assistance,[3] and, since there is always a possibility of the reunion of a separated couple, and as this possibility is encouraged by law, the action may lie for an interference by a

[1]Annarina v. Boland, 136 Md. 365, 111 Atl. 84; Jenness v. Simpson, 84 Vt. 127, 78 Atl. 886.

[2]Butterfield v. Ennis, 193 Mo. App. 638, 186 S. W. 1173.

[3]Lane v. Dunning, 186 Ky. 797, 218 S. W. 269; Rott v. Goehring, 33 N. Dak. 413, 157 N. W. 294, L. R. A. 1916E, 1086, Ann. Cas. 1918A, 643.

third party even after separation where this interference prevents such a reunion.[4]

§ 151. **Husband's right of action.**—The husband is entitled to the society, comfort and assistance of his wife and has always had the right to sue for damages in his own name, whoever, by alienation of her affections deprives him of his conjugal rights.[5] His action is for loss of consortium and not for loss of service.[6] The motive of defendant is the controlling element.[7] This requires that he should take an active and intentional part in causing the estrangement. There should be a conscious purpose to accomplish this end.[8] It is not everywhere required that the act of the defendant should be the sole cause of the loss of affections. It is enough that he contributed to bringing it about.[9] It is not necessary to a recovery by the husband that he show that the defendant had an adulterous purpose in mind,[10] or that the wife was actually debauched by the defendant.[11] The husband may allege and recover for anything occurring up to the filing of the suit.[12]

§ 152. **Wife's right of action.**—Under the common law the wife so long as the marriage existed, could not sue in her own name alone for the alienation of her husband's affections. The

[4]Davenport v. Holden, 95 N. J. L. 197, 112 Atl. 418.

[5]Lane v. Dunning, 186 Ky. 797, 218 S. W. 269; Francis v. Outlaw, 127 Md. 315, 96 Atl. 517; Hartpence v. Rogers, 143 Mo. 623, 45 S. W. 650; Allen v. Forsythe, 160 Mo. App. 262, 142 S. W. 820; Brame v. Clark, 148 N. Car. 364, 62 S. E. 418, 19 L. R. A. (N. S.) 1033, 16 Ann. Cas. 73.

[6]Pugsley v. Smyth, 98 Ore. 448, 194 Pac. 686.

[7]Hostetter v. Green, 150 Ky. 551, 150 S. W. 652; Ellsworth v. Shimer, 71 Misc. 576, 128 N. Y. S. 883.

[8]Hodge v. Brooks, 153 Ark. 222, 240 S. W. 2; Rash v. Pratt (Del. Super.), 111 Atl. 225; Smith v. Rice, 178 Iowa 673, 160 N. W. 6; Lilligren v. William J. Burns International Detective Agency, 135 Minn. 60, 160 N. W. 203, L. R. A. 1917B, 679; Curtis v. Miller, 269 Pa. 509, 112 Atl. 747.

[9]Sullivan v. Valiquette, 66 Colo. 170, 180 Pac. 91; Plourd v. Jarvis, 99 Maine 161, 58 Atl. 774; Linden v. McClintock (Mo. App.), 187 S. W. 82; Fratini v. Caslini, 66 Vt. 273, 29 Atl. 252, 44 Am. St. 843; Eklund v. Hackett, 106 Wash. 287, 179 Pac. 803.

[10]Cole v. Johnson, 103 Ore. 319, 205 Pac. 282.

[11]Rinehart v. Bills, 82 Mo. 534, 52 Am. Rep. 385; De Ford v. Johnson, 152 Mo. App. 209, 133 S. W. 393; Linden v. McClintock (Mo. App.), 187 S. W. 82; Cole v. Johnson, 103 Ore. 319, 205 Pac. 282; Ireland v. Ward, 51 Ore. 102, 93 Pac. 932; Keath v. Shiffer, 37 Pa. Super. Ct. 573.

[12]Slaton v. Milburn, 180 Ky. 655, 203 S. W. 529.

marriage practically operated as a suspension of her legal existence and she could sue in tort in her own behalf only after the termination of the marriage by death or divorce. The action for the redress of her personal injuries had to be prosecuted by her husband.[13] This defect in the law has been changed in practically all states by the enactment of the statutes, greatly enlarging the rights of married women and allowing them to sue alone for injuries to their persons and property. In these states the wife may sue for the alienation of the affections of her husband in the same manner as her husband sues for a similar invasion of his rights and it is not necessary to join him as co-plaintiff.[14] The action may be brought by a divorced woman,[15] or a woman living apart from her husband under a separation agreement.[16] The gist of her action is the loss of consortium.[17]

[13]Howard v. Howard, 120 Maine 479, 115 Atl. 259; Morgan v. Martin, 92 Maine 190, 42 Atl. 354; Smith v. Smith, 98 Tenn. 101, 38 S. W. 439, 60 Am. St. 838; Nieberg v. Cohen, 88 Vt. 281, 92 Atl. 214, L. R. A. 1915C, 483, Ann. Cas. 1916C, 476; Beach v. Brown, 20 Wash. 266, 55 Pac. 46, 43 L. R. A. 114, 72 Am. St. 98; Lonstorf v. Lonstorf, 118 Wis. 159, 95 N. W. 961.

[14]Parker v. Newman, 200 Ala. 103, 75 So. 479; Weber v. Weber, 113 Ark. 471, 169 S. W. 318, L. R. A. 1915A, 67, Ann. Cas. 1916C, 743; Codoni v. Donati, 6 Cal. App. 83, 91 Pac. 423; Williams v. Williams, 20 Colo. 51, 37 Pac. 614; Noxon v. Remington, 78 Conn. 296, 61 Atl. 963; Foot v. Card, 58 Conn. 1, 18 Atl. 1027, 6 L. R. A. 829, 18 Am. St. 258; Lupton v. Underwood, 3 Boyce (Del.) 519, 85 Atl. 965; Eliason v. Draper, 2 Boyce (Del.) 1, 77 Atl. 572; Price v. Price, 91 Iowa 693, 60 N. W. 202, 29 L. R. A. 150, 51 Am. St. 360; Wolf v. Frank, 92 Md. 138, 48 Atl. 132, 52 L. R. A. 102; Warren v. Warren, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545; Lockwood v. Lockwood, 67 Minn. 476, 70 N. W. 784; Nichols v. Nichols, 134 Mo. 187, 35 S. W. 577; Wendt v. Wendt, 106 Nebr. 554, 184 N. W. 66; Hodgkinson v. Hodgkinson, 43 Nebr. 269, 61 N. W. 577, 27 L. R. A. 120, 47 Am. St. 759; Sims v. Sims, 79 N. J. L. 577, 76 Atl. 1063, 29 L. R. A. (N. S.) 842; Rott v. Goehring, 33 N. Dak. 413, 157 N. W. 294, L. R. A. 1916E, 1086, Ann. Cas. 1918A, 643; King v. Hanson, 13 N. Dak. 85, 99 N. W. 1085; Gernerd v. Gernerd, 185 Pa. St. 233, 39 Atl. 884, 40 L. R. A. 549, 64 Am. St. 646. Statutes giving the right to sue for injuries to her person are in derogation of the common law and are strictly construed. Farrell v. Farrell, 118 Maine 441, 108 Atl. 648.

[15]Clow v. Chapman, 125 Mo. 101, 28 S. W. 328, 26 L. R. A. 412, 46 Am. St. 468; Roberts v. Cohen, 104 Ore. 177, 206 Pac. 293; Messervy v. Messervy, 82 S. Car. 559, 64 S. E. 753; Gross v. Gross, 70 W. Va. 317, 73 S. E. 961, 39 L. R. A. (N. S.) 261.

[16]Annarina v. Boland, 136 Md. 365, 111 Atl. 84.

[17]Valentine v. Pollak, 95 Conn. 556, 111 Atl. 869; Lupton v. Underwood, 3 Boyce (Del.) 519, 85 Atl. 965; Rott v. Goehring, 33 N. Dak.

The defendant must have acted with malice and with the intent to cause the estrangement;[18] and hence there is no liability where the husband acts on his own volition.[19] The acts of defendant must be contributing and controlling but not necessarily the sole cause of the alienation.[20]

The wife may sue different persons doing acts which alienated the affections of her husband where such persons did not act in concert.[21]

§ 153. **Alienation from parental or family interference.**—The law recognizes the right of parents, brothers and sisters to advise a married member of the family as to his or her domestic and marital affairs and holds them free from liability for such advice, honestly though not wisely given, though it may result in estrangement.[22]

A stronger case must be made where the defendant is a parent

413, 157 N. W. 294, Ann. Cas. 1918A, 643.

[18]Jennings v. Cooper (Mo. App.), 230 S. W. 325; Surbeck v. Surbeck (Mo. App.), 208 S. W. 645; Rott v. Goehring, 33 N. Dak. 413, 157 N. W. 294, Ann. Cas. 1918A, 643. Express malice need not be proved when defendant a stranger. Warren v. Warren, 174 Iowa 162, 156 N. W. 323.

[19]Bourne v. Bourne, 43 Cal. App. 516, 185 Pac. 489; Moelleur v. Moelleur, 55 Mont. 30, 173 Pac. 419.

[20]Warren v. Graham, 174 Iowa 162, 156 N. W. 323; Powers v. Sumbler, 83 Kans. 1, 110 Pac. 97; Nevins v. Nevins, 68 Kans. 410, 75 Pac. 492.

[21]Henry v. Henry, 192 Iowa 1346, 186 N. W. 639.

[22]Kleist v. Breitung, 232 Fed. 555; Dodge v. Rush, 28 App. D. C. 149, 8 Ann. Cas. 671; Betser v. Betser, 186 Ill. 537, 58 N. E. 249, 52 L. R. A. 630, 78 Am. St. 303; Huling v. Huling, 32 Ill. App. 519; Haynes v. Nowlin, 129 Ind. 581, 29 N. E. 389; Farneman v. Farneman, 46 Ind. App. 453, 90 N. E. 775, 91 N. E. 968; Gregg v. Gregg, 37 Ind. App. 210, 75 N. E. 674; Adams v. Main, 3 Ind. App. 232, 29 N. E. 792; Postlewaite v. Postlewaite, 1 Ind. App. 473, 28 N. E. 99; Moir v. Moir, 181 Iowa 1005, 165 N. W. 221; Pooley v. Dutton, 165 Iowa 745, 147 N. W. 154; Heisler v. Heisler, 151 Iowa 503, 131 N. W. 676; Cooper v. Cooper, 102 Kans. 378, 171 Pac. 5; Wilson v. Wilson, 115 Maine 341, 98 Atl. 938; Lannigan v. Lannigan, 222 Mass. 198, 110 N. E. 285; Nolin v. Pearson, 191 Mass. 283, 77 N. E. 890, 4 L. R. A. (N. S.) 643, 114 Am. St. 605; Tasker v. Stanley, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468; Smith v. Smith, 192 Mich. 566, 159 N. W. 349; Linden v. McClintock (Mo. App.), 187 S. W. 82; Barton v. Barton, 119 Mo. App. 507, 94 S. W. 574; Trumbull v. Trumbull, 71 Nebr. 186, 98 N. W. 683; Rath v. Rath, 2 Nebr. (Unof.) 600, 89 N. W. 612; Wolf v. Wolf, 194 App. Div. 33, 185 N. Y. S. 37; Luick v. Arends, 21 N. Dak. 614, 132 N. W. 353; Smith v. Lynn, 9 Ohio App. 141.

or a brother, or a sister, than where he or she is a stranger.[23] It must be shown that the advice and interference with the domestic affairs was inspired by malice or ill will.[24] There is such malice where a wrongful act is done intentionally and without just cause or excuse.[25] Of course the members of the family will be liable only where their interference caused the alienation,[26] and not where the alienation came about through the volition of the party whose affections are alleged to have been alienated.[27] A member of the family acting through improper motives may be liable for preventing a reconciliation, although not in any case responsible for the separation in the first instance.[28]

§ 154. **Parties to actions.**—The ordinary right of action is against the party or parties charged with the alienation alone,[29] and it is not necessary to include the spouse whose affections have been alienated.[30] It is held not necessary that a conspiracy exist between the different defendants charged with the alienation. They will be liable as joint tort feasors if the sum total of their

[23]Cripe v. Cripe, 170 Cal. 91, 148 Pac. 520; Hutcheson v. Peck, 5 Johns. (N. Y.) 196.

[24]Boland v. Stanley, 88 Ark. 562, 115 S. W. 163, 129 Am. St. 114; Ray v. Parsons, 183 Ind. 344, 109 N. E. 202; Briles v. Briles, 66 Ind. App. 444, 112 N. E. 449; Workman v. Workman, 43 Ind. App. 382, 85 N. E. 997; Smith v. Rice, 178 Iowa 673, 160 N. W. 6; Pooley v. Dutton, 165 Iowa 745, 147 N. W. 154; Price v. Price, 91 Iowa 693, 60 N. W. 202, 29 L. R. A. 150, 51 Am. St. 360; Allcock v. Allcock, 174 Ky. 665, 192 S. W. 853; Klein v. Klein, 31 Ky. L. 28, 101 S. W. 382; Multer v. Knibbs, 193 Mass. 556, 79 N. E. 762, 9 L. R. A. (N. S.) 322; Fronk v. Fronk, 159 Mo. App. 543, 141 S. W. 692; Melcher v. Melcher, 102 Nebr. 790, 169 N. W. 720; Wolf v. Wolf, 111 Misc. 391, 181 N. Y. S. 368; Powell v. Benthall, 136 N. Car. 145, 48 S. E. 598; Brown v. Brown, 124 N. Car. 19, 32 S. E. 320, 70 Am. St. 574; Holtz v. Dick, 42 Ohio St. 23, 51 Am. Rep. 791; Beisel v. Gerlach, 221 Pa. 232, 70 Atl. 721, 18 L. R. A. (N. S.) 516; Glass v. Bennett, 89 Tenn. 478, 14 S. W. 1085; Ratcliffe v. Walker, 117 Va. 569, 85 S. E. 575, Ann. Cas. 1917E, 1022; Gross v. Gross, 70 W. Va. 317, 73 S. E. 961, 39 L. R. A. (N. S.) 261; Jones v. Monson, 137 Wis. 478, 119 N. W. 179, 129 Am. St. 1082.

[25]Zimmerman v. Whiteley, 134 Mich. 39, 95 N. W. 989; Brown v. Brown, 124 N. Car. 19, 32 S. E. 320, 70 Am. St. 574.

[26]Stilwell v. Stilwell, 186 Iowa 177, 172 N. W. 177.

[27]Cripe v. Cripe, 170 Cal. 91, 148 Pac. 520.

[28]Hollinghausen v. Ade, 289 Mo. 362, 233 S. W. 39.

[29]Nieberg v. Cohen, 88 Vt. 281, 92 Atl. 214, L. R. A. 1915C, 483, Ann. Cas. 1916C, 476.

[30]Work v. Campbell, 164 Cal. 343, 128 Pac. 943, 43 L. R. A. (N. S.) 581; Meservey v. Meservey, 82 S. Car. 559, 64 S. E. 753; White v. White, 140 Wis. 538, 122 N. W. 1051, 133 Am. St. 1100.

acts caused the alienation.[31] Another case holds it necessary to charge both parents that it should be shown they co-operated with the intention of alienating the affections of their child.[32]

§ 155. **Validity of agreement not to prosecute suit for alienation.**—It is held that a wife will be bound by her agreement with her husband for a sufficient consideration not to sue for alienation of affections and that the former husband may intervene in an action brought by her in violation of an agreement and interpose the contract as a defense. The intervention though unusual, was justified on the ground that it prevented a multiplicity of suits.[33]

§ 156. **Defenses.**—It is a defense that the defendant did not cause the alienation but the husband or wife acted on his or her own initiative in the matter.[34] It may also be urged as a defense that the plaintiff consented to or connived at the acts claimed to have caused the alienation.[35] It is to be remembered, however, that a husband has a right to watch a suspected wife and leave open opportunities to commit adultery provided he creates none nor invites the evil doing.[36]

Among other things courts have held it not a good ground of defense to the action, that previous unhappy relations had existed between the husband and wife;[37] that the wife was entirely estranged from her husband before his acquaintance with defendant;[38] that the husband was the seducer of defendant;[39] that affections have not been entirely alienated;[40] that there was little

[31]Smith v. Smith, 42 S. Dak. 205, 173 N. W. 843.

[32]Pooley v. Dutton, 165 Iowa 745, 147 N. W. 154; Heisler v. Heisler, 151 Iowa 503 131 N. W. 676.

[33]McAllen v. Hodge, 92 Minn. 68, 99 N. W. 424.

[34]Scott v. O'Brien, 33 Ky. L. 450, 110 S. W. 260, 16 L. R. A. (N. S.) 742, 130 Am. St. 419.

[35]Woldson v. Larson, 164 Fed. 548; Prettyman v. Williamson, 1 Penn. (Del.) 224, 39 Atl. 731; Slaton v. Milburn, 180 Ky. 655, 203 S. W. 529; Milewski v. Kurtz, 77 N. J. L. 132, 71 Atl. 107; Schorn v. Berry, 63 Hun 110, 17 N. Y. S. 572; McAlpin v. Baird, 40 S. Dak. 180, 166 N. W. 639.

[36]Frank v. Berry, 128 Iowa 223, 103 N. W. 358.

[37]Rash v. Pratt (Del. Super.), 111 Atl. 225; Bailey v. Kennedy, 148 Iowa 715, 126 N. W. 181; Philpott v. Kirkpatrick, 171 Mich. 495, 137 N. W. 232; Moelleur v. Moelleur, 55 Mont. 30, 173 Pac. 419; Joseph v. Naylor, 257 Pa. 561, 101 Atl. 846.

[38]Miller v. Pearce, 86 Vt. 322, 85 Atl. 620, 43 L. R. A. (N. S.) 332.

[39]Hart v. Knapp, 76 Conn. 135, 55 Atl. 1021, 100 Am. St. 989.

[40]Nichols v. Nichols, 147 Mo. 387, 48 S. W. 947.

if any, affection between the husband and wife;[41] that the alienated spouse is more blameable than defendant;[42] that the parties were living together at the time of the suit;[43] that the plaintiff is divorced from the alienated spouse;[44] that the parties were living apart at the time,[45] though under a separation agreement;[46] that the reputation of the alienated wife for chastity at time of marriage was bad.[47]

§ 157. **Pleadings.**—The declaration must allege loss of consortium for that is the gist of the action.[48] The complaint need not set out in detail the means and language used to accomplish the alienation.[49] It is not necessary that plaintiff should allege freedom from fault on his or her part.[50]

The intent to alienate should be averred. This element was held sufficiently covered in one of the cases by allegations that defendant by his words and conduct did alienate the affection of plaintiff's husband and that such was his purpose when he used the words and committed the acts.[51] It has been held that the

[41]Lupton v. Underwood, 3 Boyce (Del.) 519, 85 Atl. 965; De Ford v. Johnson (Mo.), 177 S. W. 577. Lack of affection goes only in mitigation of damages. Morris v. Warwick, 42 Wash. 480, 85 Pac. 42, 7 Ann. Cas. 687.

[42]Rott v. Goehring, 33 N. Dak. 413, 157 N. W. 294, L. R. A. 1916E, 1086, Ann. Cas. 1918A, 643.

[43]Parker v. Newman, 200 Ala. 103, 75 So. 479.

[44]Prettyman v. Williamson, 1 Penn. (Del.) 224, 39 Atl. 731; Hostetter v. Green, 159 Ky. 611, 167 S. W. 919, L. R. A. 1915C, 870; Hollinghausen v. Ade, 289 Mo. 362, 233 S. W. 39; Pollard v. Ward, 289 Mo. 275, 233 S. W. 14; De Ford v. Johnson, 251 Mo. 244, 158 S. W. 29, 46 L. R. A. (N. S.) 1083, Ann. Cas. 1915A, 344; Keen v. Keen, 49 Ore. 362, 90 Pac. 147, 10 L. R. A. (N. S.) 504, 14 Ann. Cas. 45; Beach v. Brown, 20 Wash. 266, 55 Pac. 46, 43 L. R. A. 114, 72 Am. St. 98.

[45]Dey v. Dey, 94 N. J. L. 342, 110 Atl. 703; Cramer v. Cramer, 106 Wash. 681, 180 Pac. 915.

[46]Betser v. Betser, 87 Ill. App. 399; Jenkins v. Clusin, 25 Ky. L. 736, 76 S. W. 405; Annarina v. Boland, 136 Md. 365, 111 Atl. 84; Patterson v. Hill, 212 Mich. 635, 180 N. W. 352.

[47]White v. White, 76 Kans. 82, 90 Pac. 1087, 13 Ann. Cas. 981.

[48]Lane v. Dunning, 186 Ky. 797, 218 S. W. 269; Neville v. Gile, 174 Mass. 305, 54 N. E. 841; Knapp v. Wing, 72 Vt. 334, 47 Atl. 1075.

[49]Reavely v. Harris, 145 Ill. App. 545; Bockman v. Ritter, 21 Ind. App. 250, 52 N. E. 100; Jonas v. Hirschberg, 18 Ind. App. 581, 48 N. E. 656; Warnock v. Moore, 91 Kans. 262, 137 Pac. 959; Nevins v. Nevins, 68 Kans. 410, 75 Pac. 492; Jenkins v. Chism, 25 Ky. L. 736, 76 S. W. 405; Surbeck v. Surbeck (Mo. App.), 208 S. W. 645; Sturtevant v. Sturtevant, 10 Ohio App. 132.

[50]Townsend v. Cleveland Fire Proofing Co., 18 Ind. App. 568, 47 N. E. 707.

[51]Jenkins v. Chism, 25 Ky. L. 736, 76 S. W. 405.

intent to injure was sufficiently covered by an allegation that the defendant debauched and alienated the affections of the wife of plaintiff.[52] The fact of malice must be alleged in all cases where the defendant is a parent or member of the family of the estranged spouse.[53] The malice of defendant has been held sufficiently pleaded by an allegation that defendant wrongfully, wickedly, and unlawfully sought and courted the husband of plaintiff.[54]

Mental suffering may be shown though not pleaded.[55]

A joint and several liability was held sufficiently charged by an allegation in the complaint of a wife that the defendants, the children of her husband by a former marriage, had used every effort to prejudice her husband against, to drive her from the home, or to make it impossible for her to live therein, and that the acts of the defendants were with the joint intent and result of alienating the affection of her husband.[56]

As a general rule the allegation and proof of adultery is not required,[57] but proof of adultery can not be received unless alleged.[58]

Under a general denial the plaintiff may show that the act of the husband was entirely voluntary on his part.[59] There is authority that defendant may show facts in justification without having pleaded justification.[60]

§ 158. **Presumptions and burden of proof.**—Here, as elsewhere, the plaintiff has the burden of proof of the allegations in his or her complaint.[61] Thus, for example, the burden of proof

[52]McAlpin v. Baird, 40 S. Dak. 180, 166 N. W. 639.

[53]Reed v. Reed, 6 Ind. App. 317, 33 N. E. 638, 51 Am. St. 310.

[54]Sickler v. Mannix, 68 Nebr. 21, 93 N. W. 1018.

[55]Klein v. Klein, 31 Ky. L. 28, 101 S. W. 382. See also Roberts v. Cohen, 104 Ore. 177, 206 Pac. 293.

[56]Gooch v. Gooch, 108 Kans. 416, 195 Pac. 874.

[57]Higham v. Vanosdol, 101 Ind. 160; Adams v. Main, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. 266. See also Valentine v. Pollak, 95 Conn. 556, 111 Atl. 869. But see Houghton v. Rice, 174 Mass. 366, 54 N. E. 843, 47 L. R. A. 310, 75 Am. St. 351.

[58]Perry v. Lovejoy, 49 Mich. 529, 14 N. W. 485.

[59]Scott v. O'Brien, 129 Ky. 1, 110 S. W. 260, 16 L. R. A. (N. S.) 742, 130 Am. St. 419. See also Parker v. Newman, 200 Ala. 103, 75 So. 479.

[60]Baird v. Carle, 157 Wis. 565, 147 N. W. 834. See also Cutter v. Cooper, 234 Mass. 307, 125 N. E. 634.

[61]Jennings v. Cooper (Mo. App.), 230 S. W. 325; Loper v. Askin, 178 App. Div. 163, 164 N. Y. S. 1036.

is on the plaintiff to show that the alleged wrongful acts of defendant were the cause of the alienation.[62]

The loss of affection is not established by proof of adultery. "Wife or husband may have succumbed to a stronger will, to a sudden temptation, to persuasion or artifice, while the affection of neither was estranged or stifled by the adulterous act. Either may look back with dismay or even disgust upon their weakness and turn with renewed respect and affection to their loyal helpmate."[63]

The law indulges the presumption that motive of a parent, or brother, or sister, in advising a married child is good,[64] and places burden of proof of malice on the plaintiff.[65] There is a presumption that husband had conjugal affection for wife and defendant has burden to prove the contrary.[66] Malice may, however, be implied from the intention to alienate.[67] The defendant has the burden of establishing good faith in his acts.[68]

[62]Clark v. Clark, 187 Ind. 25, 118 N. E. 123; Strader v. Armstrong, 192 Iowa 1368, 186 N. W. 407; Welty v. Sparks, 179 Iowa 1390, 162 N. W. 614; Claxton v. Poole, 182 Mo. App. 13, 167 S. W. 623; Potter v. Howser, 104 Nebr. 367, 177 N. W. 169; Stewart v. Hagerty, 251 Pa. 603, 96 Atl. 1099, Ann. Cas. 1917D, 483; Jordan v. Greene (R. I.), 99 Atl. 82; Kenworthy v. Richmond, 95 Wash. 407, 163 Pac. 924.

[63]Valentine v. Pollak, 95 Conn. 556, 111 Atl. 869.

[64]Hall v. Hall, 174 Cal. 718, 164 Pac. 390; Daywitt v. Daywitt, 63 Ind. App. 444, 114 N. E. 694; Workman v. Workman, 43 Ind. App. 382, 85 N. E. 997; Moir v. Moir, 181 Iowa 1005, 165 N. W. 221; Busenbark v. Busenbark, 150 Iowa 7, 129 N. W. 332; Cornelius v. Cornelius, 233 Mo. 1, 135 S. W. 65; Miller v. Miller, 122 Mo. App. 693, 99 S. W. 757; Melcher v. Melcher, 102 Nebr. 790, 169 N. W. 720, 4 A. L. R. 492. Presumption not applicable to brothers and sisters. Hollinghausen v. Ade, 289 Mo. 362, 233 S. W. 39.

[65]Hall v. Hall, 174 Cal. 718, 164 Pac. 390; Moir v. Moir, 181 Iowa 1005, 165 N. W. 221; Pooley v. Dutton, 165 Iowa 745, 147 N. W. 154; Miller v. Miller, 154 Iowa 344, 134 N. W. 1058; Heisler v. Heisler, 151 Iowa 503, 131 N. W. 676; Bailey v. Kennedy, 148 Iowa 715, 126 N. W. 181; Francis v. Outlaw, 127 Md. 315, 96 Atl. 517; Brison v. McKellop, 41 Okla. 374, 138 Pac. 154; Gross v. Gross, 70 W. Va. 317, 73 S. E. 961, 39 L. R. A. (N. S.) 261; Baird v. Carle, 157 Wis. 565, 147 N. W. 834.

[66]Bourne v. Bourne, 43 Cal. App. 516, 185 Pac. 489; Crowell v. Jeffries (Ind. App.), 134 N. E. 908; Gregg v. Gregg, 37 Ind. App. 210, 75 N. E. 674; Knapp v. Knapp (Mo.), 183 S. W. 576; Roberts v. Cohen, 104 Ore. 177, 206 Pac. 293; Schneider v. Tapfer, 92 Ore. 520, 180 Pac. 107; Lyen v. Lyen, 98 Wash. 498, 167 Pac. 1113; Beach v. Brown, 20 Wash. 266, 55 Pac. 46, 43 L. R. A. 114, 72 Am. St. 98.

[67]Butterfield v. Ennis, 193 Mo. App. 638, 186 S. W. 1173.

[68]Boland v. Stanley, 88 Ark. 562, 115 S. W. 163, 129 Am. St. 114; Linden v. McClintock (Mo. App.),

§ 159. **Evidence in general.**—The alienation may be shown by circumstantial evidence,[69] especially to show illicit relations existing between the parties.[70] Evidence is competent, which tends to show the motive of the defendant,[71] as, for example, the existence of a feeling of hatred or malice of defendant toward plaintiff.[72] So, evidence of the wealth of parents charged with alienation is admissible as showing inducement for the alienation where threats of disinheritance were shown.[73] Malice may be shown by conduct.[74] It may be shown that defendant assisted the wife of plaintiff to procure a divorce.[75]

Evidence is admissible as to the conditions under which the husband and wife lived provided such evidence is limited to the period before the interference of defendant with the marital relation.[76] Accordingly, evidence of a property settlement between the husband and wife after the separation may not be received. It clearly has no bearing on the issues involved.[77] Declarations and statements of the defendant to third persons are competent where they show his intentions with reference to alleged alienation.[78] This evidence may take the form of letters addressed to the alienated spouse.[79] It may be shown that defendant rented a

187 S. W. 82; Luick v. Arends, 21 N. Dak. 614, 132 N. W. 353.

[69]Stilwell v. Stilwell, 186 Iowa 177, 172 N. W. 177; Linden v. McClintock (Mo. App.), 187 S. W. 82; Sturtevant v. Sturtevant, 10 Ohio App. 132.

[70]Rott v. Goehring, 33 N. Dak. 413, 157 N. W. 294, L. R. A. 1916E, 1086, Ann. Cas. 1918A, 643.

[71]Nevins v. Nevins, 68 Kans. 410, 75 Pac. 492; Tucker v. Tucker, 74 Miss. 93, 19 So. 955, 32 L. R. A. 623; Modisett v. McPike, 74 Mo. 636.

[72]White v. White, 76 Kans. 82, 90 Pac. 1087; Surbeck v. Surbeck (Mo. App.), 208 S. W. 645; Schneider v. Tapfer, 92 Ore. 520, 180 Pac. 107.

[73]Price v. Price, 91 Iowa 693, 60 N. W. 202, 51 Am. St. 360, 29 L. R. A. 150.

[74]Smith v. Smith, 192 Mich. 566, 159 N. W. 349; Wagner v. Wagner (Mo. App.), 215 S. W. 784; Jones v. Jones, 96 Wash. 172, 164 Pac. 757.

[75]Phelps v. Bergers, 92 Nebr. 851, 139 N. W. 632.

[76]Pooley v. Dutton, 165 Iowa 745, 147 N. W. 154 (mistreatment of wife by husband); Fratini v. Caslini, 66 Vt. 273, 29 Atl. 252, 44 Am. St. 843. See also Annarina v. Boland, 136 Md. 365, 111 Atl. 84 (wife charged with adultery by her husband).

[77]Harringer v. Keenan, 117 Wash. 311, 201 Pac. 306.

[78]Christensen v. Thompson, 123 Iowa 717, 99 N.W. 591; Leucht v. Leucht, 129 Ky. 700, 112 S. W. 845, 130 Am. St. 486; Mead v. Randall, 111 Mich. 268, 69 N. W. 506. See also Wagner v. Wagner (Mo. App.), 215 S. W. 784.

[79]Mercer v. Parsons, 95 N. J. L. 224, 112 Atl. 254 (letter intercepted before reaching addressee). See also Pratt v. Harrold, 45 Cal. App. 166, 190 Pac. 372. But see Barlow v. Barnes, 172 Cal. 98, 155 Pac. 457.

letter box for the deposit of the clandestine correspondence between the parties.[80] Acts of defendant after the alleged alienation is accomplished are admissible only to show relation of parties before the filing of the action.[81]

Where no improper relations are shown before separation, evidence of such relations thereafter are incompetent.[82] Evidence of misconduct between defendant and third persons may not be received.[83] Neither may inquiry be made as to the character of the plaintiff prior to the marriage.[84] The fact of the prosecution of the husband by the wife for ill treatment may be received to show how far her affections had been weaned.[85] A decree of divorce is admissible as showing severance of marital relations.[86]

On the question of the loss of consortium plaintiff may be asked as to cohabitation after the alleged separation.[87] Proof of adultery is admissible, not to establish cause of action but to aggravate the damages.[88] Where the cause of action is for alienation by other means than adultery, the plaintiff may not prove adultery to show relation of the parties.[89] The defendant may show the alleged alienation was due to other causes,[90] as, for example, the ill treatment by the plaintiff,[91] or that the alienated one acted voluntarily and not through the inducement or persuasion of the defendant.[92]

Very generally the wealth of the defendant is not a proper subject of evidence except where the allowance of exemplary damages is warranted.[93] Evidence of reputed wealth of parent of alienated spouse in action against him for alienation is admissible,

[80]Frank v. Berry, 128 Iowa 223, 103 N. W. 358.

[81]Slaton v. Milburn, 180 Ky. 655, 203 S. W. 529; Davenport v. Holden, 95 N. J. L. 197, 112 Atl. 418; Rose v. Mitchell, 21 R. I. 270, 43 Atl. 67. But see Eklund v. Hackett, 106 Wash. 287, 179 Pac. 803.

[82]Stewart v. Hagerty, 96 Atl. 1099, 251 Pa. St. 603, Ann. Cas. 1917D, 483.

[83]Sanders v. Burnham, 91 Vt. 480, 100 Atl. 905.

[84]Smith v. Smith, 42 S. Dak. 205, 173 N. W. 843.

[85]Rudd v. Rounds, 64 Vt. 432, 25 Atl. 438.

[86]Woldson v. Larson, 164 Fed. 548.

[87]Watson v. Davidson, 141 Ark. 591, 217 S. W. 777.

[88]Merritt v. Cravens, 168 Ky. 155, 181 S. W. 970, L. R. A. 1917F, 935.

[89]Merrill v. Leisenring, 149 Mich. 423, 112 N. W. 1072.

[90]Humphrey v. Pope, 1 Cal. App. 374, 82 Pac. 223; Keeler v. Russum, 68 Colo. 196, 189 Pac. 255.

[91]Lowell v. Vaughn, 85 Mo. App. 206.

[92]Frank v. Berry, 128 Iowa 223, 103 N. W. 358.

[93]Nichols v. Nichols, 147 Mo. 387, 48 S. W. 947; Leavell v. Leavell, 114 Mo. App. 24, 89 S. W. 55; Love v. Love, 98 Mo. App. 562, 73 S. W. 255; Miller v. Pearce, 86 Vt. 322, 85

if at all, only to show the state of mind of the child whose affections are claimed to have been alienated.[94] Evidence of the financial condition of the alienated husband is admissible on the question of loss of support sustained by the plaintiff.[95]

§ 160. **Evidence—Declarations or admissions of husband or wife.**—Very generally evidence of statements and declarations of the husband or wife may be received where they show the state of mind of the parties toward each other, and it is no objection to such testimony that the declarations were not made in the presence of the defendant. Such testimony will not be received for any other purpose.[96] The declarations of the alienated spouse may be received to show his or her affection for the plaintiff before estrangement,[97] or the lack of such affection.[98] Such evidence is also admissible to show the effect that the conduct of the defendant had on the estranged husband or wife.[99]

This testimony may be given by third persons who heard the

Atl. 620, 43 L. R. A. (N. S.) 332; Phillips v. Thomas, 70 Wash. 533, 127 Pac. 97, 42 L. R. A. (N. S.) 582, Ann. Cas. 1914B, 800.

[94]Bourne v. Bourne, 43 Cal. App. 516, 185 Pac. 489; Derham v. Derham, 125 Mich. 109, 83 N. W. 1005; Cramer v. Cramer, 106 Wash. 681, 180 Pac. 915.

[95]Harvey v. Harvey, 75 Nebr. 557, 106 N. W. 660.

[96]De Bock v. De Bock, 43 Cal. App. 283, 184 Pac. 890; Clark v. Clark, 187 Ind. 25, 118 N. E. 123; Kraeger v. Kraeger (Ind. App.), 125 N. E. 484; Moir v. Moir, 181 Iowa 1005, 165 N. W. 221; Smith v. Rice, 178 Iowa 673, 160 N. W. 6; Hardwick v. Hardwick, 130 Iowa 230, 106 N. W. 639; Roesner v. Darrah, 65 Kans. 599, 70 Pac. 597; Hillers v. Taylor, 116 Md. 165, 81 Atl. 286; Sweikhart v. Hanraham, 184 Mich. 201, 150 N. W. 833; Derham v. Derham, 125 Mich. 109, 83 N. W. 1005; McKenzie v. Lautenschlager, 113 Mich. 171, 71 N. W. 489; Fuller v. Robinson, 230 Mo. 22, 130 S. W. 343, Ann. Cas. 1912A, 938; Wagner v. Wagner (Mo. App.), 215 S. W. 784; McGinnis v. McGlothlan, 192 Mo. App. 141, 180 S. W. 405; Allen v. Forsythe, 160 Mo. App. 262, 142 S. W. 820; Saxton v. Barber, 71 Ore. 230, 139 Pac. 334; Ickes v. Ickes, 237 Pa. 582, 85 Atl. 885, 44 L. R. A. (N. S.) 1118; Rose v. Mitchell, 21 R. I. 270, 43 Atl. 67; Smith v. Smith, 42 S. Dak. 205, 173 N. W. 843.

[97]Snyder v. Snyder (Ind. App.) 131 N. E. 248; Leucht v. Leucht, 129 Ky. 700, 112 S. W. 845, 130 Am. St. 486; Schneider v. Tapfer, 92 Ore. 520, 180 Pac. 107.

[98]Rash v. Pratt (Del.), 111 Atl. 225; Spangenberg v. Christian 151 Minn. 356, 186 N. W. 700; Cole v. Johnson, 103 Ore. 319, 205 Pac. 282; Button v. Knight (Vt.), 115 Atl. 499.

[99]Melcher v. Melcher, 102 Nebr. 790, 169 N. W. 720, 4 A. L. R. 492; Pugsley v. Smyth, 98 Ore. 448, 194 Pac. 686; Jones v. Jones, 96 Wash. 172, 164 Pac. 757.

declarations,[1] or it may be in the form of letters passing between the parties.[2]

§ 161. **Evidence—Mitigation of damages.**—As bearing on the question of mitigation of the damages the defendant, among other things, may show that the alienated spouse had but little affection for the plaintiff;[3] or that there had been domestic trouble and unhappy relations before the alleged alienation,[4] or that there had been a prior alienation of the affections;[5] or that the husband and wife were living apart at the time of the alienation;[6] or that the plaintiff had in divorce proceedings charged another person with improper relations with the alienated spouse.[7]

§ 162. **Damages.**—The recovery in this form of action is for damages which are the natural and probable consequences of the act complained of.[8] In the case of the husband, the recovery may include the value of the services of the wife, the loss of her society and assistance, less the performance of the duty of the husband to support, clothe, and care for her.[9]

The term "loss of services" may cover the case of the lessened value of these services caused by the act of the defendant where the wife remains with husband.[10] He may recover for loss of consortium regardless of the question of loss of service.[11] In the

[1]Willey v. Howell, 159 Ky. 805, 169 S. W. 519.

[2]Ash v. Prunier, 105 Fed. 722; Perry v. Lovejoy, 49 Mich. 529, 14 N. W. 485; Cottle v. Johnson, 179 N. Car. 426, 102 S. E. 769; Noll v. Carlin (Ore.), 199 Pac. 596; Curtis v. Miller, 269 Pa. 509, 112 Atl. 747; Harringer v. Keenan, 117 Wash. 311, 201 Pac. 306; Backman v. Holman, 92 Wash. 227, 159 Pac. 125; Beach v. Brown, 20 Wash. 266, 55 Pac. 46, 43 L. R. A. 114, 72 Am. St. 98. A letter before marriage not admissible. Erickson v. Erickson, 98 Kans. 244, 158 Pac. 48.

[3]Williamson v. Osenton, 220 Fed. 653; Lupton v. Underwood, 3 Boyce (Del.) 519, 85 Atl. 965; Cutter v. Cooper, 234 Mass. 307, 125 N. E. 634; De Ford v. Johnson, 152 Mo. App. 209, 133 S. W. 393; Lewis v. Roby, 79 Vt. 487, 65 Atl. 524, 118 Am. St. 984; Baird v. Carle, 157 Wis. 565, 147 N. W. 834.

[4]Parker v. Newman, 200 Ala. 103, 75 So. 479; Humphrey v. Pope, 1 Cal. App. 374, 82 Pac. 223; Prettyman v. Williamson, 1 Penn. (Del.) 224, 39 Atl. 731; Moelleur v. Moelleur, 55 Mont. 30, 173 Pac. 419.

[5]Matteson v. Curtis, 11 Wis. 424.

[6]McAlpin v. Baird, 40 S. Dak. 180, 166 N. W. 639.

[7]Annarina v. Boland, 136 Md. 365, 111 Atl. 84.

[8]Lane v. Spence, 70 Nebr. 204, 97 N. W. 299.

[9]Rash v. Pratt (Del.), 111 Atl. 225; Prettyman v. Williamson, 1 Penn. (Del.) 224, 39 Atl. 731.

[10]Adams v. Maine, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. 266.

[11]Gregg v. Gregg, 37 Ind. App. 210, 75 N. E. 674.

case of the wife the damages will include loss of her husband's affection, comfort and society, and also loss of his support and protection.[12] There must be some evidence of the value of the loss of support.[13] Mental anguish,[14] and injury to character[15] are proper elements of damages. The rank or condition of defendant is not to be considered.[16]

Exemplary damages may be awarded where the alienation was the malicious and wanton act of the defendant.[17] and such malice and wantonness are both alleged and proved.[18] The amount of the exemplary damages is within the sound discretion of the jury.[19]

On the question of mitigation of damages the jury may give consideration to such facts shown by the evidence as that the husband had mistreated the plaintiff;[20] or that the plaintiff had obtained a divorce;[21] or that the marriage had been annulled because the alienated spouse was under age.[22] Criminal conversation may be pleaded in aggravation by a husband of the alienated wife.[23]

[12]Waldron v. Waldron, 45 Fed. 315; Noxon v. Remington, 78 Conn. 296, 61 Atl. 963; Lupton v. Underwood, 3 Boyce (Del.) 519, 85 Atl. 965; Daywitt v. Daywitt, 63 Ind. App. 444, 114 N. E. 694; Hollinghausen v. Ade, 289 Mo. 362, 233 S. W. 39; Stanley v. Stanley, 32 Wash. 489, 73 Pac. 596.

[13]Rice v. Rice, 104 Mich. 371, 62 N. W. 833.

[14]Valentine v. Pollak, 95 Conn. 556, 111 Atl. 869; Nevins v. Nevins, 68 Kans. 410, 75 Pac. 492; Adkins v. Kendrick, 131 Ky. 779, 115 S. W. 814.

[15]Hartpence v. Rogers, 143 Mo. 623, 45 S. W. 650; Linck v. Vorhauer, 104 Mo. App. 368, 79 S. W. 478.

[16]Bailey v. Bailey, 94 Iowa 598, 63 N. W. 341.

[17]Woldson v. Larson, 164 Fed. 548; Williams v. Williams, 20 Colo. 51, 37 Pac. 614; Lupton v. Underwood, 3 Boyce (Del.) 519, 85 Atl. 965; Prettyman v. Williamson, 1 Penn. (Del.) 224, 39 Atl. 731; Nevins v. Nevins, 68 Kans. 410, 75 Pac. 492; Scott v. O'Brien, 129 Ky. 1, 110 S. W. 260, 16 L. R. A. (N. S.) 742, 130 Am. St. 419; Smith v. Smith, 192 Mich. 566, 159 N. W. 349; Leavell v. Leavell, 114 Mo. App. 24, 89 S. W. 55; Moelleur v. Moelleur, 55 Mont. 30, 173 Pac. 419; Cottle v. Johnson, 179 N. Car. 426, 102 S. E. 769; Button v. Knight (Vt.), 115 Atl. 499.

[18]Yowell v. Vaughn, 85 Mo. App. 206.

[19]De Ford v. Johnson (Mo.), 177 S. W. 577; Powell v. Strickland, 163 N. Car. 393, 79 S. E. 872, Ann. Cas. 1915B, 709; White v. White, 140 Wis. 538, 122 N. W. 1051, 133 Am. St. 1100.

[20]Phelps v. Berger, 92 Nebr. 851, 139 N. W. 632.

[21]McNamara v. McAllister, 150 Iowa 243, 130 N. W. 26, 34 L. R. A. (N. S.) 436, Ann. Cas. 1912D, 463; Powell v. Strickland, 163 N. Car. 393, 79 S. E. 872, Ann. Cas. 1915B, 709.

[22]Wolf v. Wolf, 111 Misc. 391, 181 N. Y. S. 368.

[23]Sullivan v. Valiquette, 66 Colo. 170, 180 Pac. 91.

CHAPTER 13

NULLITY OF MARRIAGE

Section

165. Void and voidable marriages in general.
166. Distinction between "divorce" and "nullity."
167. Grounds—Want of mental capacity.
168. Grounds—Duress.
169. Grounds—Marriage under age of consent.
170. Grounds—Marriage of persons within prohibited degrees of affinity.
171. Grounds—Disease or incapacity—Impotency.
172. Grounds—Mock marriage.
173. Grounds—Fraud and misrepresentation.
174. Grounds—Mistake.
175. Grounds—Prior existing marriage—Absence for statutory period.
176. Grounds—Pregnancy by another at time of marriage.
177. Grounds—Marriage with intent not to consummate.
178. Grounds—Intoxication of one of the parties.
179. Effect of statutes forbidding remarriage of guilty party after decree of divorce
180. Jurisdiction of nullity suits.
181. Parties to nullity suit.
182. Delay in bringing suit.
183. Pleading
184. Evidence.
185. Alimony in nullity suits.
186. Custody of children.
187. Determination of property rights.
188. Damages for fraudulently inducing marriage.

§ 165. **Void and voidable marriages in general.**—There is a distinction at law between a void and voidable marriage.

A void marriage confers no legal rights, and, when it is determined that the marriage is void, it is as if no marriage had ever been performed. The grounds for declaring a marriage void are based usually upon some incapacity of the parties to

contract marriage, owing to their relationship, their mental or physical capacity, or some other express prohibition.[1]

A voidable marriage differs from a void marriage in that it may be afterwards ratified by the parties and become valid and usually is treated as a valid marriage until it is decreed void. The issue of a voidable marriage declared void is legitimate. The tendency is to construe a marriage voidable rather than void, when such a construction is possible.[2] A voidable marriage is valid until it is annulled.[3] It must be avoided during the life of the parties for at death all proceedings come to an end, leaving the parties and their offspring as though the marriage had been absolutely valid from the beginning.[4]

A void marriage, on the contrary, may be attacked collaterally and even after the death of the parties.[5] Where, however, one of the parties to the marriage, has by false representations as to existence of a legal impediment, induced the other to enter into the relation, the party so representing, may, where the other has continued to act upon such representation after the impediment has been removed be estopped to deny the truth of such representations.[6]

§ 166. **Distinction between "divorce" and "nullity."**—Although the term "divorce" is sometimes used to designate a suit for the annulment of a marriage, it is generally conceded that such use is a misnomer. There can not possibly be a decree of divorce or a change in the legal status where no marriage existed, while a suit for annulment determines what the status of the parties is without changing it. "Divorce means a dissolution of the bonds of matrimony based upon the theory of a valid marriage, for some cause arising after the marriage, while an annulment proceeding is maintained upon the theory that, for some cause existing at the time of marriage, no valid marriage ever existed."[7]

[1]Schneider v. Schneider, 183 Cal. 335, 191 Pac. 533, 11 A. L. R. 1386; Wiley v. Wiley, 75 Ind. App. 456, 123 N. E. 252.

[2]See Infants, infra § 95; mistaken identity, post § 174; fraudulent marriage, post § 173; duress, post § 168; mistake, post § 174.

[3]In re Martinez's Estate, 181 N. Y. S. 907.

[4]1 St. 32 Hen. VIII, ch. 38; In re Guthery's Estate, 205 Mo. App. 664, 226 S. W. 626. See note, L. R. A. 1916C, 693, 758.

[5]Bruns v. Cope, 182 Ind. 289, 105 N. E. 471; Henderson v. Ressor, 265 Mo. 718, 178 S. W. 175.

[6]Sims v. Sims, 122 Miss. 745, 85 So. 73; Brokeshoulder v. Brokeshoulder, 84 Okla. 249, 204 Pac. 284.

[7]Millar v. Millar, 175 Cal. 797, 167

Various legislatures, however, have not made this distinction and have provided for "divorce" where common law reasons for "nullity" exist, frequently making no distinction except in the form of relief granted and not always in that particular.[8]

It is always to be borne in mind that the marriage contract creates a civil status, and is not subject to dissolution by mere consent of the parties as in the case of ordinary contracts or in any other way except through the sovereign power of the state.[9]

§ 167. **Grounds—Want of mental capacity.**—Marriage is a civil contract and may be annulled for want of sufficient mental capacity in the parties to enter into the contract.[10] The incapacity must have existed at the time of the marriage[11] and not after.[12] The test is whether the party was capable of understanding the obligations assumed by the contract of marriage and giving a valid assent thereto.[13] The case seems clear where one of the parties was unconscious at the time of the marriage and dies a few hours later.[14] Mere weakness of mind will not suffice unless it amounts to idiocy or insanity.[15]

The contract may be ratified by the insane person on return to a lucid interval.[16] It has been held not ground for annulment at the suit of the sane spouse that the other party concealed the fact

Pac. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184.

[8]See statutes of particular state.

[9]Hilton v. Roylance, 25 Utah 129, 69 Pac. 660, 58 L. R. A. 723, 95 Am. St. 821.

[10]Liske v. Liske, 135 N. Y. S. 176; Cole v. Cole, 5 Sneed (Tenn.) 57, 70 Am. Dec. 275.

[11]Henderson v. Ressor, 141 Mo. App. 540, 126 S. W. 203; Forman v. Forman, 24 N. Y. S. 917; Goodheart v. Ransley, 11 Ohio Dec. 655.

[12]Ryals v. Ryals, 130 La. 244, 57 So. 904.

[13]Rawdon v. Rawdon, 28 Ala. 565; Dunphy v. Dunphy, 161 Cal. 380, 119 Pac. 512, 38 L. R. A. (N. S.) 818, Ann. Cas. 1913B, 1230; Green v. Green, 77 Fla. 101, 80 So. 739; Baughman v. Baughman, 32 Kans. 538, 4 Pac. 1003; Chapline v. Stone, 77 Mo. App. 523; Adams v. Scott, 93 Nebr. 537, 141 N. W. 148; Kutch v. Kutch, 88 Nebr. 114, 129 N. W. 169; Kemmelick v. Kemmelick, 114 Misc. 198, 186 N. Y. S. 3; Meekins v. Kinsella, 152 App. Div. 32, 136 N. Y. S. 806; Hempel v. Hempel, 174 Wis. 332, 181 N. W. 749, 183 N. W. 258.

[14]Guthery v. Ball, 206 Mo. App. 570, 228 S. W. 887.

[15]Elzey v. Elzey, 1 Houst. (Del.) 308; Svanda v. Svanda, 93 Nebr. 404, 140 N. W. 777, 47 L. R. A. (N. S.) 666.

[16]Wightman v. Wightman, 4 Johns. Ch. (N. Y.) 343; Waughop v. Waughop, 82 Wash. 69, 143 Pac. 444.

that he was affected with a taint of hereditary insanity;[17] or that one of the parties otherwise sane was a kleptomaniac.[18] The party may, however, be estopped to seek annulment where he has lived with a wife claimed to have been insane for several years and children have been born to them.[19] In New York the action can only be brought in behalf of the insane person by a next friend, or by him in his own behalf after restoration to sound mind.[20] In Georgia mental incapacity is ground for divorce but not for a decree of nullity.[21]

§ 168. **Grounds—Duress.**—A marriage procured by duress and not afterwards ratified may be set aside,[22] but the duress must have been such as to disable the one influenced from acting as a free agent[23] and must be exercised when the contract is entered into.[24] The will must be destroyed through fear.[25]

The duress may be by friends and relatives of defendant,[26] or by a magistrate.[27] Mere fear of bodily harm in case of refusal to marry a seduced girl does not warrant annulment where there have been no actual threats of bodily harm.[28]

[17]Allen v. Allen, 85 N. J. Eq. 55, 95 Atl. 363. But see Smith v. Smith, 112 Misc. 371, 184 N. Y. S. 134.

[18]Lewis v. Lewis, 44 Minn. 124, 46 N. W. 323, 9 L. R. A. 505, 20 Am. St. 559.

[19]Watters v. Watters, 168 N. Car. 411, 84 S. E. 703.

[20]Kemmelick v. Kemmelick, 114 Misc. 198, 186 N. Y. S. 3; Smith v. Smith, 112 Misc. 371, 184 N. Y. S. 134; Reed v. Reed, 106 Misc. 85, 175 N. Y. S. 264; Hempel v. Hempel, 174 Wis. 332, 181 N. W. 749.

[21]Brown v. Westbrook, 27 Ga. 102.

[22]Kelley v. Kelley, 206 Ala. 334, 89 So. 508; Bassett v. Bassett, 9 Bush. (Ky.) 696; Corder v. Corder (Md.), 117 Atl. 119; Marsh v. Whittington, 88 Miss. 400, 40 So. 326; Fratello v. Fratello, 118 Misc. 584, 193 N. Y. S. 865; Vazakas v. Vazakas, 109 N. Y. S. 568; Sloan v. Kane, 10 How. Pr. (N. Y.) 66; Collins v. Collins, 2 Brews. (Pa.) 515; Willard v. Willard, 6 Baxt. (Tenn.) 297, 32 Am. Rep. 529.

[23]Beeks v. Beeks, 66 Fla. 256, 63 So. 444; Simmons v. Stevens, 132 La. 675, 61 So. 734 (threat of death); Quealy v. Waldron, 126 La. 258, 52 So. 479, 27 L. R. A. (N. S.) 803, 20 Ann. Cas. 1374; Shoro v. Shoro, 60 Vt. 268, 14 Atl. 177, 6 Am. St. 118. See also Hawkins v. Hawkins, 142 Ala. 571, 38 So. 640, 110 Am. St. 53.

[24]Marre v. Marre, 184 Mo. App. 198, 168 S. W. 636.

[25]Pray v. Pray, 128 La. 1037, 55 So. 666.

[26]Marks v. Crume, 16 Ky. L. 707, 29 S. W. 707; Anderson v. Anderson, 74 Hun 56, 26 N. Y. S. 492.

[27]Smith v. Smith, 51 Mich. 607, 17 N. W. 76.

[28]Kelley v. Kelley, 206 Ala. 334, 89 So. 508; Honnett v. Honnett, 33 Ark. 156, 34 Am. Rep. 39; Sherman v. Sherman, 174 Iowa 145, 156 N. W. 301; Pray v. Pray, 128 La. 1037, 55

Likewise duress may not be claimed by one who chooses to marry a woman to avoid a prosecution for bastardy,[29] or when lawfully arrested he marries the woman to procure his discharge.[30] So, a marriage will not be set aside on ground that consent was procured by threats of prosecution for a crime of which party was guilty.[31] The mere fact that the parents of a girl forced her to consent to be married has been held not alone sufficient to warrant an annulment of the marriage. Where, however, there has been no consummation, other than the ceremony, it will require but little additional evidence of duress to sanction the annulment.[32] The proof in one cause disclosed that the relatives of the defendant insisted upon the plaintiff's marrying her, believing that he had seduced and ruined her, and that to marry her was his duty under the circumstances; and further that the plaintiff upon due consideration of the pressure which was brought to bear on him, and of his duty to repair a wrong he had done the girl, yielded a reluctant and passive consent to the performance of a marriage ceremony. It was held that a case was not presented which justified a court in annulling the marriage which was thus brought about.[33] Cohabitation may amount to a waiver of the duress.[34]

§ 169. **Grounds—Marriage under age of consent.**—Marriage under the age of consent fixed by statute is generally held void unless ratified after that age is attained, in which case it will be valid from the time it was entered into.[35]

So. 666; Ingle v. Ingle (N. J. Eq.), 38 Atl. 953.

[29]Jacobs v. Jacobs, 146 Ark. 45, 225 S. W. 22; Collins v. Ryan, 49 La. Ann. 1710, 22 So. 920, 43 L. R. A. 814; Wimbrough v. Wimbrough, 125 Md. 619, 94 Atl. 168, Ann. Cas. 1916E, 920; Sickles v. Carson, 27 N. J. Eq. 440; Scott v. Shufeldt, 5 Paige (N. Y.) 43; Johns v. Johns, 44 Tex. 40; Gass v. Gass (Tex. Civ. App.), 182 S. W. 1195; Thome v. Farrar, 57 Wash. 441, 107 Pac. 347, 27 L. R. A. (N. S.) 385, 135 Am. St. 975.

[30]Marvin v. Marvin, 52 Ark. 425, 12 S. W. 875, 20 Am. St. 191; Day v. Day, 236 Mass. 362, 128 N. E. 411.

[31]Lacoste v. Guidroz, 47 La. Ann. 205, 16 So. 836.

[32]Fratello v. Fratello, 118 Misc. 584, 193 N. Y. S. 865.

[33]Collins v. Ryan, 49 La. Ann. 1710, 22 So. 920, 43 L. R. A. 814. See generally on duress in marriage contracts; Quealy v. Waldron, 126 La. 258, 52 So. 479, 27 L. R. A. (N. S.) 803, 20 Ann. Cas. 1374. See notes, 79 Am. St. 370; 27 L. R. A. (N. S.) 803; 12 Eng. Rul. Cas. 736.

[34]Thompson v. Thompson, 148 La. 499, 87 So. 250.

[35]Johnson v. Alexander, 39 Cal. App. 117, 178 Pac. 297 (in California age is under 15); Dunson v. State, 25 Ga. App. 172, 102 S. E.

It is generally held not ground for annulment that the license was obtained by false and fraudulent representation as to age.[36]

Under the laws of New York an infant under 18 years of age who marries with the consent of her parents but does not ratify the marriage after reaching that age may have the marriage annulled.[37] The suit may be maintained by the parents of a child marrying under the age of consent[38] unless they have lost their right by acquiescence.[39] The annulment has the effect of making the marriage void from the beginning.[40] The court may make orders for the custody and support of children born to marriages of this character, having in mind the best interests of such children.[41] The want of consent of the parents of a minor is not ground for annulment in Louisiana.[42]

§ 170. **Grounds—Marriage of persons within prohibited degrees of affinity.**—Marriages within the prohibited degrees of relationship are void and may be annulled at the instance of either party,[43] though the applicant may have knowingly and wilfully entered into the same.[44] Annulment was denied, however, in the case of the marriage of an uncle and a niece where the relation had existed for fourteen years and two children were born

899; Henneger v. Lomas, 145 Ind. 287, 44 N. E. 462, 32 L. R. A. 848; Wiley v. Wiley, 75 Ind. App. 456, 123 N. E. 252; Jimenez v. Jimenez, 93 N. J. Eq. 257, 116 Atl. 788; Fodor v. Kunie, 92 N. J. Eq. 301, 112 Atl. 598; Robertson v. Cole, 12 Tex. 356; Perkey v. Perkey, 87 W. Va. 656, 106 S. E. 40. See also Wolf v. Wolf, 111 Misc. 391, 181 N. Y. S. 368.

[36]Johnson v. Alexander, 39 Cal. App. 177, 178 Pac. 297; Browning v. Browning, 89 Kans. 98, 130 Pac. 852, L. R. A. 1916C, 737, Ann. Cas. 1914C, 1288; Melcher v. Melcher, 102 Nebr. 790, 169 N. W. 720, 4 A. L. R. 492; Bays v. Bays, 105 Misc. 492, 174 N. Y. S. 212; Marone v. Marone, 105 Misc. 371, 174 N. Y. S. 151.

[37]Mundell v. Coster, 80 Misc. 337, 142 N. Y. S. 142; Kruger v. Kruger, 137 App. Div. 289, 122 N. Y. S. 23. See also Wander v. Wander, 111 App. Div. 189, 97 N. Y. S. 586; Silveira v. Silveira, 34 Misc. 267, 69 N. Y. S. 634.

[38]Kuykendall v. Kuykendall, 112 Misc. 12, 182 N. Y. S. 308.

[39]Magee v. Nealon, 108 Misc. 396, 177 N. Y. S. 517.

[40]Wolf v. Wolf, 111 Misc. 391, 181 N. Y. S. 368.

[41]Nealon v. Nealon, 195 App. Div. 694, 187 N. Y. S. 295. But see Magee v. Nealon, 108 Misc. 396, 177 N. Y. S. 517.

[42]Lacoste v. Guidroz, 47 La. Ann. 295, 16 So. 836.

[43]Stapelberg v. Stapelberg, 77 Conn. 31, 58 Atl. 233; Martin v. Martin, 54 W. Va. 301, 46 S. E. 120; Levesque v. Ouellet, 22 Quebec Super. Ct. 181; Andrews v. Ross, 14 P. D. 15, 59 L. T. Rep. N. S. 900.

[44]Martin v. Martin, 54 W. Va. 301, 46 S. E. 120.

as the result of the marriage.[45] Where the parties have entered into the marriage in good faith, the court may make an equitable division of property jointly accumulated by the parties while living together as husband and wife.[46]

§ 171. **Grounds—Disease or incapacity—Impotency.**—The courts very generally are agreed that there is fraud warranting a decree of nullity where one of the parties conceals the fact of being affected with a loathesome or contagious disease[47] such as gonorrhea[48] or syphilis in an incurable form,[49] but not after cohabitation where the syphilis is not contagious.[50] In like manner there may be an annulment for fraudulent concealment of spouse that he was afflicted with tuberculosis.[51]

It has been held that a representation by an epileptic that she had not had an attack for eight years was not, although false, such fraud as would justify the annulment of a marriage with her entered into in reliance thereon.[52]

Again nullity may be decreed where the physical condition of the husband is such that sexual intercourse with a normal woman is impossible.[53] Impotency existing at the time of the marriage and incurable is generally a ground for nullity.[54] Impotency refers to lack of power of copulation[55] and not to mere sterility.[56]

[45]Weisberg v. Weisberg, 112 App. Div. 231, 98 N. Y. S. 260.

[46]Krauter v. Krauter, 70 Okla. 30, 190 Pac. 1088.

[47]Jordan v. Missouri &c. Tel. Co., 136 Mo. App. 192, 116 S. W 432. This is true though there has been a recovery before the application for the annulment. Svenson v. Svenson, 178 N. Y. 54, 70 N. E. 120.

[48]C..... v. C....., 158 Wis. 301, 148 N. W. 865, 5 A. L. R. 1013.

[49]Smith v. Smith, 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 Am. St. 440; Crane v. Crane, 62 N. J. Eq. 21, 49 Atl. 734. See also Kaufman v. Kaufman, 86 N. J. Eq. 132, 97 Atl. 490, where the evidence of fraudulent concealment was held insufficient.

[50]Vondal v. Vondal, 175 Mass. 383, 56 N. E. 586, 78 Am. St. 502; Ryder v. Ryder, 66 Vt. 158, 28 Atl. 1029, 44 Am. St. 833. See also Koehler v. Koehler, 137 Ark. 302, 209 S. W. 283 (not ground for divorce in Arkansas.)

[51]Sobol v. Sobol, 88 Misc. 277, 150 N. Y. S. 248.

[52]Lyon v. Lyon, 230 Ill. 366, 82 N. E. 850, 13 L. R. A. (N. S.) 996, 12 Ann. Cas. 25.

[53]Fehr v. Fehr, 92 N. J. Eq. 316, 112 Atl. 486.

[54]Devanbaugh v. Devanbaugh, 5 Paige (N. Y.) 554, 28 Am. Dec. 443. See also Anonymous, 24 N. J. Eq. 19.

[55]Schroter v. Schroter, 56 Misc. 69, 106 N. Y. S. 22; Devanbaugh v. Devanbaugh, 5 Paige (N. Y.) 554, 28 Am. Dec. 443. See also Anonymous v. Anonymous, 69 Misc. 489, 126 N. Y. S. 149.

[56]Turney v. Avery, 92 N. J. Eq. 473, 113 Atl. 710.

It would seem the duty of a woman knowing herself to be sterile to disclose that fact to her intended husband.[57] There is a doctrine much applied in England and by some courts in this country called the doctrine of "triennial cohabitation." The essence of the doctrine is that, if the wife be a virgin and apt after three years cohabitation, the husband will be presumed to be impotent, and the burden will be upon him to overcome the presumption by proof that he is not at fault. This is a rule of presumption and does not prevent proof of impotency by any other proper evidence.[58]

§ 172. **Grounds—Mock marriages.**—A pretended marriage, though legal in form but entered into in jest, with no intention of entering into the actual marriage status, and with a clear understanding that the parties are not to be bound, and the ceremony is not followed by any conduct indicating a purpose to enter into such a relation is held subject to annulment at the suit of the parties to such pretended marriage.[59]

§ 173. **Grounds—Fraud and misrepresentation.**—The contract of marriage is a civil contract and not a sacrament,[60] and where one of the parties is imposed upon by the fraud or false representations of the other in a material matter an annulment of the marriage may be decreed unless to do so would be against good policy and sound morality.[61]

The fraud, however, must be of such a character as to go to the very essence of the marriage and affect the free consent

[57]Turney v. Avery, 92 N. J. Eq. 473, 113 Atl. 710.

[58]Bissell v. Bissell, 93 N. J. Eq. 537, 117 Atl. 252; Tompkins v. Tompkins, 92 N. J. L. 113, 111 Atl. 599.

[59]Crouch v. Wartenberg, 91 W. Va. 91, 112 S. E. 234; Crouch v. Wartenberg, 86 W. Va. 664, 104 S. E. 117. See also Barclay v. Commonwealth, 116 Ky. 275, 76 S. W. 4 (marriage by unauthorized person).

[60]Gatto v. Gatto, 79 N. H. 177, 106 Atl. 493; Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, 95 Am. St. 609.

[61]Farley v. Farley, 94 Ala. 501, 10 So. 646, 33 Am. St. 141; Koehler v. Koehler, 137 Ark. 302, 209 S. W. 283; Browning v. Browning, 89 Kans. 98, 130 Pac. 852, L. R. A. 1916C, 737, Ann. Cas. 1914C, 1288; Corder v. Corder (Md.), 117 Atl. 119; Brown v. Scott, 140 Md. 258, 117 Atl. 114; Leavitt v. Leavitt, 13 Mich. 452; Dooley v. Dooley, 93 N. J. Eq. 22, 115 Atl. 268; Davis v. Davis, 90 N. J. Eq. 158, 106 Atl. 644; Carris v. Carris, 24 N. J. Eq. 516; Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, 95 Am. St. 609; Sheridan v. Sheridan, 186 N. Y. S. 470; Price v. Tompkins, 108 Misc. 535, 177 N. Y. S. 548. See note, 12 Eng. Rul. Cas. 736.

thereto of the injured person.[62] It must be material to the making of the contract and of such a character that without the fraud the party deceived would not have consented to the marriage.[63] "In determining what facts will constitute such a fraud there appears to be no rule more definite than this, that is, that where the misrepresentations or fraud relate to accidental matters such as rank, fame, fortune, habits, temperament, or the like, they do not go to the essence of the contract, and are not sufficient, but where the fraud relates to essential matters necessarily affecting the health or well-being of the parties themselves or any offspring from the marriage it is sufficient."[64] Consideration is given to the whole status of both parties, including the age, character, and degree of maturity of mind of the complainant, and the question whether the marriage has been consummated or not.[65]

Fraud sufficient to cause annulment has been held to exist in cases where the husband represented himself to a confiding young woman as an honest, industrious man, when in fact he was a professional thief,[66] or drunkard and seducer of women;[67] where

[62]Brown v. Scott, 140 Md. 258, 117 Atl. 114; Chipman v. Johnston, 237 Mass. 502, 130 N. E. 65, 14 A. L. R. 119; Foss v. Foss, 12 Allen (Mass.) 26; Reynolds v. Reynolds, 3 Allen (Mass.) 605; Boehs v. Hanger, 69 N. J. Eq. 10, 59 Atl. 904; Crane v. Crane, 62 N. J. Eq. 21, 49 Atl. 734; Sheridan v. Sheridan, 186 N. Y. S. 470; Jakar v. Jakar, 113 S. Car. 295, 102 S. E. 337.

[63]Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, 95 Am. St. 609; Rosza v. Rosza, 117 Misc. 728, 191 N. Y. S. 868; Bahrenburg v. Bahrenburg, 88 Misc. 272, 150 N. Y. S. 589.

[64]Hawkins v. Hawkins, 142 Ala. 571, 38 So. 640, 110 Am. St. 53; Benton v. Benton, 1 Day (Conn.) 114; Brown v. Scott, 140 Md. 258, 117 Atl. 114; Leavitt v. Leavitt, 13 Mich. 452; Lewis v. Lewis, 44 Minn. 124, 46 N. W. 323, 20 Am. St. 559, 9 L. R. A. 505; Clarke v. Clarke, 11 Abb. Pr. (N. Y.) 228; Taylor v. White, 160 N. Car. 38, 75 S. E. 941, L. R. A. 1916C, 704. See also on the subject of fraud and duress in marriage contracts as void or voidable. Farley v. Farley, 94 Ala. 501, 10 So. 646, 33 Am. St. 141; In re Gregorson, 160 Cal. 21, 116 Pac. 60, L. R. A. 1916C, 697, Ann. Cas. 1912D, 1124; Tomppert v. Tomppert, 13 Bush (Ky.) 326, 26 Am. Rep. 197; Batty v. Greene, 206 Mass. 561, 92 N. E. 715, 138 Am. St. 407; Williams v. Williams, 63 Wis. 58, 23 N. W. 110, 53 Am. Rep. 253. See notes, 79 Am. St. 371; L. R. A. 1916C, 706; 79 Am. St. 370.

[65]Brown v. Scott, 140 Md. 258, 117 Atl. 114; Ysern v. Horter, 91 N. J. Eq. 189, 110 Atl. 31.

[66]Brown v. Scott, 140 Md. 258, 117 Atl. 114; Keyes v. Keyes, 6 Misc. 355, 26 N. Y. S. 910. But see Wier v. Still, 31 Iowa 107 (fact that husband concealed from wife that he had served a term in the penitentiary not sufficient).

[67]Ysern v. Horter, 91 N. J. Eq. 189, 110 Atl. 31. See also Corder v Corder (Md.), 117 Atl. 119.

the party represents himself to be in good health when in fact he is afflicted with a communicable venereal disease,[68] or chronic tuberculosis;[69] where the husband represents that he is not addicted to the use of drugs and he is in fact a physical wreck and drug addict beyond the hope of reformation;[70] where a woman falsely represents that she had been the wife of another who was the father of her child while the fact was that she had been his mistress;[71] where the husband refused to fulfill a promise to have a religious ceremony in addition to the civil ceremony and such ceremony was necessary under their faith to make the marriage binding;[72] and where a man falsely represented to a girl that her parents consented to marriage and such marriage was not followed by cohabitation.[73]

It has been held not ground for annulment that a party misrepresents his age;[74] or that the man was untruthful in his protestations of love;[75] or that the misrepresentations referred to an amiability of temper;[76] or that there was an untruthful representation as to previous chastity,[77] particularly where the complaining party knew the representation to be untrue;[78] or that the wife concealed from her husband the fact that she was a kleptomaniac;[79] or that the woman represented that she had never been married and the facts were that she had been married but divorced;[80] or that the man entered into it to prevent the woman from appearing against him in a prosecution for seduction with the intention of

[68]Anonymous, 21 Misc. 765, 49 N. Y. S. 331.

[69]Davis v. Davis, 90 N. J. Eq. 158, 106 Atl. 644.

[70]O'Connell v. O'Connell, 199 App. Div. 958, 191 N. Y. S. 165.

[71]Domschke v. Domschke, 138 App. Div. 454, 122 N. Y. S. 892.

[72]Rosza v. Rosza, 117 Misc. 728, 191 N. Y. S. 868; Rubinson v. Rubinson, 110 Misc. 114, 181 N. Y. S. 28.

[73]Moot v. Moot, 37 Hun (N. Y.) 288.

[74]Lyannes v. Lyannes, 171 Wis. 381, 177 N. W. 683.

[75]Schaeffer v. Schaeffer, 160 App. Div. 48, 144 N. Y. S. 774.

[76]Williamson v. Williamson, 34 App. D. C. 536, 30 L. R. A. (N. S.) 301.

[77]Wilcox v. Wilcox, 171 Cal. 770, 155 Pac. 95; Hull v. Hull, 191 Ill. App. 307; Varney v. Varney, 52 Wis. 120, 8 N. W. 739, 38 Am. Rep. 726.

[78]Donnelly v. Strong, 175 Mass. 157, 55 N. E. 157.

[79]Lewis v. Lewis, 44 Minn. 124, 46 N. W. 323, 20 Am. St. 559, 9 L. R. A. 505.

[80]Trask v. Trask, 114 Maine 60, 95 Atl. 352; Fisk v. Fisk, 6 App. Div. 432, 39 N. Y. S. 537. See also Clarke v. Clarke, 11 Abb. Pr. (N. Y.) 228.

abandoning her afterwards.[81] The marriages here considered are voidable only and hence valid and binding until set aside and annulled by a court of competent jurisdiction.[82]

The innocent party must disaffirm promptly on knowledge of the fraud practiced.[83] The right to annulment will be lost where the parties cohabit with knowledge of the fraud and falsity of the representations of which they complain.[84]

§ 174. **Grounds—Mistake.**—Mistake as to the person is made a ground for annulment under the Louisiana code, but it is held that the term does not cover the case of the unchastity of a wife before marriage.[85]

In a Vermont case where a marriage ceremony was had under a mistake of one of the parties and was not intended as a marriage but was to be followed by a future public marriage ceremony, and no cohabitation or consummation ever actually followed, a decree of nullity was granted on the application of one of the parties.[86]

§ 175. **Grounds—Prior existing marriage—Absence for statutory period.**—At common law and under the statutes if either party to a marriage has a husband or wife living by a prior mar-

[81]Johnson v. Johnson, 176 Ala. 449, 58 So. 418, 39 L. R. A. (N. S.) 518, Ann. Cas. 1915A, 828; Benton v. Benton, 1 Day (Conn.) 111.

[82]Tyson v. State, 83 Fla. 7, 90 So. 622; Heminger v. Lomas, 145 Ind. 287, 44 N. E. 462, 32 L. R. A. 848; Cox v. Cox (N. J.), 110 Atl. 924; Murphy v. Murphy, 194 App. Div. 395, 185 N. Y. S. 536.

[83]Ysern v. Horter, 91 N. J. Eq. 189, 110 Atl. 31.

[84]Koehler v. Koehler, 137 Ark. 302, 209 S. W. 283 (husband cohabited with knowledge of wife's infection with syphilis); Taylor v. Taylor, 181 N. Y. S. 894; Steimer v. Steimer, 37 Misc. 26, 74 N. Y. S. 714; Wendel v. Wendel, 30 App. Div. 447, 52 N. Y. S. 72 (husband knew that wife's ovaries were removed before marriage); Westfall v. Westfall, 100 Ore. 224, 197 Pac. 271, 13 A. L. R. 1428.

[85]Delpil v. Young, 51 La. Ann. 923, 25 So. 547.

[86]Clark v. Field, 13 Vt. 460.

riage and undivorced the subsequent marriage is absolutely void and may be annulled.[87] Such marriages are bigamous.[88]

This rule applies to common-law marriages as well as to marriages under a statute,[89] and this is true although the parties acted in good faith in contracting the second marriage.[90] The rule is the same under the civil law.[91] It is held to make no difference that the innocent party could have learned the facts by diligence.[92]

[87]Hines v. Hines, 203 Ala. 633, 84 So. 712; Halbrook v. State, 34 Ark. 511, 36 Am. Rep. 17; Pennaman v. Pennaman, 153 Ga. 647, 112 S. E. 829; Park v. Barron, 20 Ga. 702, 65 Am. Dec. 641; Cartwright v. McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. 105; Browning v. Browning, 89 Kans. 98, 130 Pac. 852, L. R. A. 1916C, 737, Ann. Cas. 1914C, 1288; Fuller v. Fuller, 33 Kans. 582, 7 Pac. 241; Barth v. Barth, 102 Ky. 56, 42 S. W. 1116, 80 Am. St. 335; Monnier v. Coutejean, 45 La. Ann. 419, 12 So. 623; Batty v. Greene, 206 Mass. 561, 92 N. E. 715, 138 Am. St. 407; Kelley v. Kelley, 161 Mass. 111, 36 N. E. 837, 25 L. R. A. 806, 42 Am. St. 389; Boyce v. McKenna, 211 Mich. 204, 178 N. W. 701; People v. Mendenhall, 119 Mich. 404, 78 N. W. 325, 75 Am. St. 408; Vigno v. Vigno, 79 N. H. 108, 106 Atl. 285; Chamberlin v. Chamberlin, 68 N. J. Eq. 736, 62 Atl. 680, 3 L. R. A. (N. S.) 244, 111 Am. St. 658, 6 Ann. Cas. 483; Brown v. Brown, 153 App. Div. 645, 138 N. Y. S. 602; Appleton v. Warner, 51 Barb. (N. Y.) 270; Fenton v. Reed, 4 Johns (N. Y.) 52, 4 Am. Dec. 244; State v. Patterson, 24 N. Car. 346, 38 Am. Dec. 699; Hornbake v. Hornbake, 72 Pa. Super. Ct. 605; Payne v. Payne, 142 Tenn. 320, 219 S. W. 4; Medrano v. State, 32 Tex. Cr. 214, 22 S. W. 684, 40 Am. St. 775; Beyerle v. Bartsch, 111 Wash. 287, 190 Pac. 239; Buckley v. Buckley, 50 Wash. 213, 96 Pac. 1079, 126 Am. St. 900; Stewart v. Vandervort, 34 W. Va. 524, 12 S. E. 736, 12 L. R. A. 50. But see Gardner v. Gardner, 232 Mass. 253, 122 N. E. 308. Second marriage void where entered into before rendition of divorce decree in first marriage. Woodward Iron Co. v. Bradford, 206 Ala. 447, 90 So. 803. See notes, 46 Am. Dec. 130; 79 Am. St. 378; Ann. Cas. 1914C, 1296.

[88]McCaig v. State, 16 Ala. App. 581, 80 So. 155; Irving v. Irving, 152 Ga. 174, 108 S. E. 540, 18 A. L. R. 88.

[89]People v. Seaman, 107 Mich. 348, 65 N. W. 203, 61 Am. St. 326; Applegate v. Applegate, 118 Misc. 359, 193 N. Y. S. 494; In re Wright's Estate, 180 N. Y. S. 635; In re Wogin-up's Estate, 57 Utah 29, 192 Pac. 267.

[90]Gordan v. Gordan, 141 Ill. 160, 30 N. E. 446, 21 L. R. A. 387, 33 Am. St. 294. Clover v. Clover (Tex. Civ. App.), 224 S. W. 916; Lopez v. Missouri, K. & T. R. Co. (Tex. Civ. App.), 222 S. W. 695; Cunningham v. Cunningham (Tex. Civ. App.), 210 S. W. 242. But see Wolf v. Wolf, 109 Misc. 366, 178 N. Y. S. 726. See note, 79 Am. St. 378.

[91]Wiley v. Stewart, 145 La. 1081, 83 So. 260; Succession of Thomas, 144 La. 25, 80 So. 186.

[92]Freda v. Bergman, 77 N. J. Eq. 46, 76 Atl. 460.

Continued cohabitation after removal of the disability may validate the marriage as a common-law marriage.[93]

The doctrine of estoppel may not be invoked to prevent the assertion of the invalidity of the second marriage, for this doctrine may not be applied to establish a matrimonial relation under conditions prohibited by law.[94]

The courts will, however, hesitate to decree nullity in cases where the legitimacy of children is involved.[95] Where good faith has been exercised the courts will ordinarily protect property rights that have arisen during the time of the invalid marriage.[96]

Statutes have been passed by many states raising a presumption of death from absence from the state for a term of years and protecting parties who marry after the term expires.[97] In South Carolina a woman is not guilty of fraud warranting the annulment of her marriage, in failing to disclose to her intended husband the fact of her previous marriage to one who has been absent and unheard of for a period of seven years, where the husband makes no inquiry of her as to her past life.[98]

§ 176. **Grounds—Pregnancy by another at time of marriage.**—Unless condoned, it is sufficient ground for annulment that the wife at the time of the marriage was pregnant by another man without the knowledge of the husband.[99] So, very generally, the marriage may be annulled where it was induced by the false claim of the wife that the husband was the father of her unborn

[93]Poole v. People, 24 Colo. 510, 52 Pac. 1025, 65 Am. St. 245; Smith v. Reed, 145 Ga. 724, 89 S. E. 815, L. R. A. 1917A, 492; Land v. Land, 206 Ill. 288, 68 N. E. 1109, 99 Am. St. 171.

[94]Penneman v. Penneman, 153 Ga. 647, 112 S. E. 829; Ashdown v. Ashdown, 178 N. Y. S. 565. See also, In re Hilton's Estate, 263 Pa. 16, 106 Atl. 69. But see Shrader v. Shrader, 119 Miss. 526, 81 So. 227.

[95]French v. French, 74 Misc. 626, 131 N. Y. S. 1053.

[96]Miller v. Wiggins, 149 La. 720, 90 So. 109.

[97]Rhea v. Rhenner, 1 Pet. (U. S.) 105, 7 L. ed. 72; Strode v. Strode, 3 Bush (Ky.) 227, 96 Am. Dec. 211; Hiram v. Pierce, 45 Maine 367, 71 Am. Dec. 555; Snuffer v. Karr, 197 Mo. 182, 94 S. W. 983, 7 Ann. Cas. 780; Pitcairn v. Pitcairn, 195 N. Y. S. 275. See notes, 46 Am. Dec. 132; 79 Am. St. 374; L. R. A. 1916C, 717.

[98]Davis v. Whitlock, 90 S. Car. 233, 73 S. E. 171, Ann. Cas. 1913D, 538.

[99]Gonduin v. Gonduin, 14 Cal. App. 285, 111 Pac. 756; Donovan v. Donovan, 91 Mass. 140; Gard v. Gard, 204 Mich. 255, 169 N. W. 908, 11 A. L. R. 923; Sinclair v. Sinclair, 57 N. J. Eq. 222, 40 Atl. 679; Carris v. Carris, 24 N. J. Eq. 516; Fontana v. Fontana, 77 Misc. 28, 135 N. Y. S. 220.

child.[1] Some of the courts with seemingly good reason deny the annulment where there has been sexual intercourse between the husband and wife before marriage.[2] The fact of pregnancy will generally be held condoned where the husband, after knowledge of the facts, continues to cohabit with the wife.[3]

§ 177. **Grounds—Marriage with intent not to consummate.**—The cases are not in harmony on the question of the right to annulment where one of the parties enters into the contract with the reservation not to consummate the marriage by cohabitation. The New Jersey courts taking the view that sexual intercourse is not only a marital right, but also a marital obligation holds that annulment should be granted in a case where a party to the marriage determines that he or she will not engage in sexual intercourse after marriage and does not disclose it to the other and carries out such determination. The reason is that a fraud has been practiced.[4] In Massachusetts, however, the wife's denial of sexual intercourse is held not to go to the original validity of the marriage and hence is not ground for annulling the marriage. It may authorize a divorce, but not annulment.[5]

§ 178. **Grounds—Intoxication of one of the parties.**—Intoxication of one of the parties at the time of the marriage is generally held not a ground for nullification of the marriage unless the intoxication is such as to deprive the party of his reason.[6]

§ 179. **Effect of statutes forbidding remarriage of guilty party after decree of divorce.**—An absolute divorce renders the innocent party free to contract a second marriage.[7] In many states the guilty party has the right to remarry. In others he or

[1]Jackson v. Ruby, 120 Maine 391, 115 Atl. 90; Reynolds v. Reynolds, 85 Mass. 605; Harrison v. Harrison, 94 Mich. 559, 54 N. W. 275, 34 Am. St. 364; Sissung v. Sissung, 65 Mich. 168, 31 N. W. 770; Winner v. Winner, 171 Wis. 413, 177 N. W. 680, 11 A. L. R. 919.

[2]Franke v. Franke, 96 Cal. xvii, 31 Pac. 571, 18 L. R. A. 375; Westfall v. Westfall, 100 Ore. 244, 197 Pac. 271. See also Crehore v. Crehore, 97 Mass. 330, 93 Am. Dec. 98; Foss v. Foss, 94 Mass. 26.

[3]Lenoir v. Lenoir, 24 App. D. C. 160.

[4]Bolmer v. Edsall, 90 N. J. Eq. 258, 106 Atl. 646.

[5]Sasserno v. Sasserno (Mass.), 134 N. E. 239; Cowles v. Cowles, 112 Mass. 298.

[6]Prine v. Prine, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87. See also Elzey v. Elzey, 1 Houst. (Del.) 308.

[7]Whitesell v. Mills, 6 Ind. 231; Barber v. Root, 10 Mass. 260; Hunt v. Thompson, 61 Mo. 148.

she is prohibited from contracting another marriage for a certain length of time. And in still others he or she is prohibited from marrying altogether. But this prohibition applies only to a marriage contracted in the state and would not affect the legality of a marriage contracted in another state, for the courts have no extra-territorial jurisdiction; they can not place restraint upon persons beyond the state's borders.[8]

Dole says, "Whether divorce should free the guilty from the bond of matrimony as well as the innocent is a question upon which there is much difference of opinion. Persons for whose gross misconduct divorces have been decreed certainly have no just ground of complaint if they are not permitted to marry again. On the other hand, such persons frequently find new and more congenial companions, and make exemplary husbands and wives, and perhaps the public good may require that they should not be turned loose upon society, deprived of that right, for, unless they are better than the average of mankind—an absurd presumption in such cases—they almost invariably form illicit connections if marriage is denied them."[9]

Where a statute prohibits the guilty divorced person from remarrying, such remarriage is held voidable or valid depending upon whether the remarriage took place within or without the state where such statute operates. These statutes have no extra-territorial effect.[10]

§ 180. **Jurisdiction of nullity suits.**—Jurisdiction in nullity suits is usually conferred by statute in specific terms, as distinct from that of divorce suits, or in terms giving jurisdiction to both classes of suits, generally, and as inclusive in the general powers of a court of equity. Unless such jurisdiction is expressly conferred, it will not be inferred from a statute giving general jurisdiction to courts.[11]

[8]Wilson v. Holt, 83 Ala. 528, 3 So. 321, 3 Am. St. 768; Fuller v. Fuller, 40 Ala. 301; Putnam v. Putnam, 8 Pick. (Mass.) 433.

[9]E. P. Dole, Talks About Law, p. 161.

[10]Succession of Hernandez, 46 La. Ann. 962, 15 So. 461, 24 L. R. A. 831; State v. Weatherby, 43 Maine 258, 69 Am. Dec. 59; Thorp v. Thorp, 90 N. Y. 602, 43 Am. Rep. 189.

[11]Ridgely v. Ridgely, 79 Md. 298, 29 Atl. 597, 25 L. R. A. 800; Kelley v. Kelley, 161 Mass. 111, 36 N. E. 837, 25 L. R. A. 806, 42 Am. St. 389; Magee v. Nealon, 108 Misc. 396, 177 N. Y. S. 517; Reed v. Reed, 106 Misc. 85, 175 N. Y. S. 264; Pitcairn v. Pitcairn, 201 Pa. 368, 50 Atl. [illegible]; LeBarron v. LeBarron, 35 Vt. [illegible]; Lyannes v. Lyannes, 171 Wis. [illegible], 177 N. W. 683. In New Hampshire jurisdiction to annul marriages is in

It is sometimes held that courts of equity in the exercise of their general jurisdiction may annul marriages for such causes as would be ground for annulling any other void contract, such as fraud, duress, insanity,[12] or similar cause.[13] As impotency renders the marriage voidable only, it has been held that equity will not assume jurisdiction and annul such a marriage on the ground of fraud.[14]

The domicil of the parties and not the place of marriage determines where the suit for nullity must be brought.[15] In some jurisdictions a nullity suit is allowed where the marriage was contracted, on the theory that only the jurisdiction in which the marriage was contracted should have authority to annul it.[16]

As a general rule nullity suits are abated by the death of one of the parties.[17]

§ 181. **Parties to nullity suit.**—A petition for the annulment of a marriage should be brought by one of the parties and defended by the other party to the marriage. But in case of persons under legal incapacity because of insanity, infancy, or other cause, the suit may sometimes be begun and defended by the

the Superior Court. Gatto v. Gatto, 79 N. H. 177, 106 Atl. 493; Bickford v. Bickford, 74 N. H. 448, 69 Atl. 579. The orphans' court of Pennsylvania has no jurisdiction to annul a marriage license after marriage is consummated. In re Pfoutz, 40 Pa. Super. Ct. 130.

[12]And in this case the marriage has been held absolutely void. Eichhoff's Case, 101 Cal. 600, 36 Pac. 11; Wiley v. Wiley, 75 Ind. App. 456, 123 N. E. 252; Meredith v. Meredith, 79 Mo. App. 636; Ysern v. Horter, 91 N. J. Eq. 189, 110 Atl. 31; Davis v. Davis, 90 N. J. Eq. 158, 106 Atl. 644; Avakian v. Avakian, 69 N. J. Eq. 89, 60 Atl. 521; Crouch v. Wartenberg, 86 W. Va. 664, 104 S. E. 117, 11 A. L. R. 212.

[13]Le Brun v. Le Brun, 55 Md. 496; Maier v. Lillibridge, 112 Mich. 491, 70 N. W. 1032; True v. Ranney, 21 N. H. 52, 53 Am. Dec. 164; Sinclair v. Sinclair, 57 N. J. Eq. 222, 40 Atl. 679; McClurg v. Terry, 21 N. J. Eq. 225; Ward v. Bailey, 118 N. Car. 55, 23 S. E. 926.

[14]Anonymous, 24 N. J. Eq. 19. In Missouri it has been held that the marriage may be annulled on the ground of fraud where at the time of the marriage one party had a loathesome disease unknown to the other. Jordan v. M. & K. Telephone Co., 136 Mo. App. 192, 116 S. W. 432.

[15]Jimenez v. Jimenez, 93 N. J. Eq. 257, 116 Atl. 788; Blumenthal v. Tannenholz, 31 N. J. Eq. 194; Dixon v. Dixon, 107 Misc. 666, 177 N. Y. S. 63; Barney v. Cunes, 68 Vt. 51, 33 Atl. 897.

[16]Levy v. Downing, 213 Mass. 334, 100 N. E. 638; Cummington v. Belchertown, 149 Mass. 223, 21 N. E. 435, 4 L. R. A. 131; Garcia v. Garcia, 25 S. Dak. 645, 127 N. W. 586, 32 L. R. A. (N. S.) 424.

[17]Eichhoff's Case, 101 Cal. 600, 36 Pac. 11.

guardian of such party, either when appointed as guardian ad litem or generally. In some states it is provided by statute that certain public officers or attorneys specially appointed shall appear and represent the interests of the state or of one of the parties.[18]

An heir may sue to annul a marriage performed while the man was unconscious.[19] Action by the father to annul marriage of a daughter under age of consent requires that the daughter should be made a party to the suit.[20] Suit may be brought by common-law wife to annul second marriage of husband.[21] A woman suing for annulment for a cause prior to solemnization should sue in her maiden name, followed by the words, "falsely called ———."[22]

§ 182. **Delay in bringing suit.**—The same rule that applies to delay in divorce suits[23] applies to suits for annulment, and where the delay is of such length and character as to cause suspicion of the good faith of the party, unless the same is capable of explanation, the suit will be dismissed. For example, after a wife has lived with her husband for ten years, it is too late to bring a bill for annulment on the ground of impotency.[24] Again, the lapse of twenty-two[25] and thirty-three years after the discovery of the alleged insanity, before filing a bill to avoid the marriage on that ground is a bar to the relief sought.[26]

So also where one party has deceived the other as to the validity of the marriage he is estopped from contesting its validity.[27]

[18]Cowan v. Cowan, 139 Mass. 377, 1 N. E. 152; Garnett v. Garnett, 114 Mass. 379, 19 Am. Rep. 369; Denny v. Denny, 8 Allen (Mass.) 311. Under the New York code a sane person may sue to annul his marriage with an insane person. Reed v. Reed, 106 Misc. 85, 175 N. Y. S. 264.

[19]Guthery v. Ball, 206 Mo. App. 570, 228 S. W. 887.

[20]Wood v. Baker, 43 Misc. 310, 88 N. Y. S. 854.

[21]Procita v. Procita, 190 N. Y. S. 21.

[22]Dooley v. Dooley, 93 N. J. Eq. 22, 115 Atl. 268.

[23]People v. Case, 241 Ill. 279, 284, 89 N. E. 638, 25 L. R. A. (N. S.) 578.

[24]Lorenz v. Lorenz, 93 Ill. 376. But see Kirschbaum v. Kirschbaum, 92 N. J. Eq. 7, 111 Atl. 697.

[25]Rawdon v. Rawdon, 28 Ala. 565.

[26]Price v. Price, 142 Ala. 631, 38 So. 802.

[27]Knaps v. Graugnard, 10 Rob. (La.) 21; Shrader v. Shrader, 119 Miss. 526, 81 So. 227; Coad v. Coad, 87 Nebr. 290, 127 N. W. 455; Chamberlin v. Chamberlin, 68 N. J. Eq. 736, 62 Atl. 680, 3 L. R. A. (N. S.) 244, 111 Am. St. 658; Chamberlin v. Chamberlin, 68 N. J. Eq. 414, 59 Atl. 813. Contra, In re Sloan's Estate, 50 Wash. 86, 96 Pac. 84, 17 L. R. A. (N. S.) 960.

One may be estopped by representations made to public officials and may also be estopped from asserting the validity of a marriage where he has been guilty of cohabitation with a third party.[28] However, where the marriage is absolutely void there can be no estoppel since the state is an interested party.[29]

In many states there is an express statute of limitations as to such suits, which statute, as a rule is narrowly construed.

§ 183. **Pleading.**—The complaint in an action to annul a marriage on the ground that consent thereto had been obtained by fraud should set forth such fraud as is contemplated by the statute, the time and place where the marriage was celebrated, and the date of the discovery of the fraud.[30]

§ 184. **Evidence.**—The proof of the marriage in a nullity suit is the same and no more than is required in a suit for divorce where there has been a valid marriage. There must be corroboration in the nullity suit of three things: first, marriage; second, residence; and third, cause of action.[31] It must appear to the satisfaction of the court that there has been no collusion.[32]

The grounds for nullification must be sustained by satisfactory evidence, irrespective of the declarations, confessions and admissions of the parties.[33] The uncorroborated statements of a party are generally held not sufficient.[34] The burden of proof is on the plaintiff to show the existence of an undivorced living husband or wife,[35] and to establish a claim of no cohabitation and hence no ratification.[36] A court may disregard the testimony of one of the parties that there had been no cohabitation where the evidence shows that the parties occupied the same room for several

[28]In re Spondre, 98 Misc. 524, 162 N. Y. S. 943, (immigrants on landing); In re Hilton's Estate, 263 Pa. 16, 106 Atl. 69.

[29]Arado v. Arado, 281 Ill. 123, 117 N. E. 816, 4 A. L. R. 28; Szlauzis v. Szlauzis, 255 Ill. 314, 99 N. E. 640, L. R. A. 1916C, 741, Ann. Cas. 1913D, 454; Snell v. Snell, 191 Ill. App. 239; Davis v. Green, 91 N. J. Eq. 17, 108 Atl. 772.

[30]Kawabata v. Kawabata (N. Dak.), 189 N. W. 237.

[31]Bolmer v. Edsall, 90 N. J. Eq. 299, 106 Atl. 646. See also Cogswell v. Cogswell, 49 App. D. C. 31, 258 Fed. 287.

[32]Bolmer v. Edsall, 90 N. J. Eq. 299, 106 Atl. 646.

[33]Dawson v. Dawson, 18 Mich. 335.

[34]Crane v. Crane, 62 N. J. Eq. 21, 49 Atl. 734; Bange v. Bange, 46 Misc. 196, 94 N. Y. S. 8.

[35]Alexander v. Alexander, 36 App. D. C. 78; McConnell v. McConnell, 211 Mich. 483, 179 N. W. 33.

[36]Kanaly v. Bronson, 97 Nebr. 322, 149 N. W. 781.

days.[37] So, it has been held admitted that there was cohabitation where the complaint alleges that plaintiff left defendant the next day after the marriage ceremony "and has never since cohabited with him."[38]

§ 185. **Alimony in nullity suits.**—Strictly speaking the right to alimony depends on a valid marriage, for it is only under such a marriage that support may be legally claimed. The action of nullity proceeds on the theory that there has been no valid marriage The allowance of alimony or suit money in nullity suits is made only in those cases where the validity of the marriage is contested and continues in doubt and ends with the entry of a final decree.[39] Where the wife institutes the suit herself the case would seem clear against any allowance.[40] In Kentucky the rule is relaxed in favor of a wife who married a man in ignorance of the fact that he had a wife living in another state and alimony pendente was allowed.[41]

§ 186. **Custody of children.**—Under some statutes the court may award custody and support of children upon decreeing nullity of marriage. This is commonly allowable only where the marriage was the result of force or fraud, however.[42]

[37]Jakar v. Jakar, 113 S. Car. 295, 102 S. E. 337.

[38]Lyannes v. Lyannes, 171 Wis. 381, 177 N. W. 683.

[39]Dunphy v. Dunphy, 161 Cal. 87, 118 Pac. 445; Millar v. Millar, 51 Cal. App. 718, 197 Pac. 811; Taylor v. Taylor, 7 Colo. App. 549, 44 Pac. 675; Prine v. Prine, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87; Sims v. Sims, 122 Miss. 745, 85 So. 73; McMurray v. McMurray, 58 Mont. 229, 190 Pac. 924; State ex rel. v. District Court of Silver Bow County, 57 Mont. 517, 189 Pac. 233, 9 A. L. R. 1212; Poupart v. District Court, 34 Nev. 336, 123 Pac. 769; Vroon v. Marsh, 29 N. J. Eq. 15; Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460; Griffin v. Griffin, 47 N. Y. 134; Meo v. Meo, 22 Abb. (N. C.) 58, 2 N. Y. S. 569; Appleton v. Warner, 51 Barb. (N. Y.) 270; North v. North, 1 Barb. Ch. (N. Y.) 241, 43 Am. Dec. 778; Walton v. Walton, 178 N. Car. 73, 100 S. E. 176; Taylor v. Taylor, 70 Ore. 510, 140 Pac. 999; Stewart v. Vandervort, 34 W. Va. 524, 12 S. E. 736, 12 L. R. A. 50. See also Procita v. Procita, 190 N. Y. S. 21.

[40]People, on Complaint of Heinle v. Heinle, 115 Misc. 469, 188 N. Y. S. 399; Bartlett v. Bartlett, Clarke Ch. (N. Y.) 460.

[41]Strode v. Strode, 3 Bush (Ky.) 227, 96 Am. Dec. 211.

[42]State v. Barilleau, 128 La. 1033, 55 So. 664. See Caulk v. Caulk, 91 Nebr. 638, 136 N. W. 845 (parent of minor husband can not be ordered to support child); Park v. Park, 24 Misc. 372, 53 N. Y. S. 677; Michels v. Fennell, 15 N. Dak. 188, 107 N. W. 53.

§ 187. **Determination of property rights.**—It is very generally held that the court in the adjudication of nullity may direct the restitution to the wife of her property which the defendant has become possessed of by reason of the illegal marriage due to the fraud of the husband.[43] Where this is not done in the nullity proceedings the wife may recover such property in an action at law.[44] In states where the community property principle obtains the court may decree a division of property acquired by the couple during the existence of the relation and before its invalidity has been decreed.[45]

Where the marriage has been entered into in good faith and is annulled, the wife may be reimbursed for the loss she has suffered by reason of the marriage.[46] It seems very clear on principle that a defendant in a nullity suit would be barred by his wrong from insisting on a reconveyance of property conveyed by him to the wronged wife before marriage.[47]

§ 188. **Damages for fraudulently inducing marriage.**—Where one fraudulently induces another to marry him he is liable in damages for the wrong done.[48] If both parties are guilty of il-

[43]Coats v. Coats, 160 Cal. 671, 18 Pac. 441, 36 L. R. A. (N. S.) 844 (nullity for physical incapacity); Murchison v. Green, 128 Ga. 339, 57 S. E. 709, 11 L. R. A. (N. S.) 702; In re Eysel's Estate, 65 Misc. 432, 121 N. Y. S. 1095 (joint account presumed joint property although marriage unlawful); Young v. Naylor, 1 Hill Eq. (S. Car.) 383; Powers v. Powers, 117 Wash. 248, 200 Pac. 1080; Wheeler v. Wheeler, 79 Wis. 303, 48 N. W. 260. See also Szlauzis v. Szlauzis, 255 Ill. 314, 99 N. E. 640, L. R. A. 1916C, 741, Ann. Cas. 1913D, 454; Werner v. Werner, 59 Kans. 399, 53 Pac. 127, 41 L. R. A. 349, 68 Am. St. 372. But see Schmitt v. Schneider, 109 Ga. 628, 35 S. E. 145; Davis v. Cummins (Mo.), 195 S. W. 752. With reference to the evidence to prove the existence of a marriage, see Forbes v. Burgess, 158 N. Car. 131, 73 S. E. 792.

[44]Lawson v. Shotwell, 27 Misc. 630.

[45]Schneider v. Schneider, 189 Cal. 335, 191 Pac. 533; Coats v. Coats, 160 Cal. 671, 118 Pac. 441, 36 L. R. A. (N. S.) 844; Werner v. Werner, 59 Kans. 399, 53 Pac. 127, 41 L. R. A. 349, 68 Am. St. 372; Buckley v. Buckley, 50 Wash. 213, 96 Pac. 1079, 126 Am. St. 900. See also Barkley v. Dumke, 99 Tex. 150, 87 S. W. 1147.

[46]Barber v. Barber, 74 Iowa 301, 37 N. W. 381.

[47]Szlauzis v. Szlauzis, 255 Ill. 314, 99 N. E. 640, L. R. A. 1916C, 741, Ann. Cas. 1913D, 454.

[48]Beach v. Beach, 160 Iowa 346, 141 N. W. 921, 46 L. R. A. (N. S.) 98, Ann. Cas. 1915D, 216; Batty v. Greene, 206 Mass. 561, 92 N. E. 715, 138 Am. St. 407; Piper v. Hoard, 107 N. Y. 73, 13 N. E. 626, 1 Am. St. 789; Colt v. O'Connor, 59 Misc. 83, 109 N. Y. S. 689; Larson v. McMillan, 99 Wash. 626, 170 Pac. 324 (damages based on financial condition of defendant at date of verdict).

legality in entering into the marriage contract the law will leave them where it finds them, and neither party is entitled to restoration of property.[49]

Where a man has fraudulently induced a woman to marry him, he being incapacitated, she is entitled to damages.[50] And where a man relied on the false representations made by another man as to a woman's chastity, such representations having been made to induce the marriage, and where it further appeared that the party making the false representations had himself seduced the woman, who was at that time pregnant by him, he was liable to the husband in damages.[51] So also a third party is liable in damages for fraudulent misrepresentation of the financial standing and ability of the other party to the marriage where such misrepresentation was made to induce the marriage.[52]

[49]Szlauzis v. Szlauzis, 255 Ill. 314, 99 N. E. 640, L. R. A. 1916C, 741, Ann. Cas. 1913D, 454.

[50]Deeds v. Strode, 6 Idaho 317, 55 Pac. 656, 43 L. R. A. 207, 96 Am. St. 263; Doe v. Horn, 1 Ind. 363, 50 Am. Dec. 470; Batty v. Greene, 206 Mass. 561, 92 N. E. 715, 138 Am. St. 407; Cooper v. Cooper, 147 Mass. 370, 17 N. E. 892, 9 Am. St. 721; Sears v. Wegner, 150 Mich. 388, 114 N. W. 224, 14 L. R. A. (N. S.) 819; Blossom v. Barrett, 37 N. Y. 434, 97 Am. Dec. 747; Morrill v. Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411; Pollock v. Sullivan, 53 Vt. 507, 38 Am. Rep. 702. See notes, 96 Am. St. 277; Ann. Cas. 1915D, 220.

[51]Kujek v. Goldman, 150 N. Y. 176, 44 N. E. 773, 34 L. R. A. 156, 55 Am. St. 670.

[52]Beach v. Beach, 60 Iowa 346, 141 N. W. 921, 46 L. R. A. (N. S.) 98, Ann. Cas. 1915D, 216.

CHAPTER 14

DIVORCE AND SEPARATION GENERALLY

Section

195. Origin and development of modern laws.
196. State control of divorce.
197. Judicial character of divorce proceedings.
198. Divorce and public policy—State as third party.
199. Partial divorce—Divorce from bed and board.
200. Divorce from bed and board under the civil law of Louisiana.
201. Application of doctrine of lis pendens to divorce proceedings.
202. Appointment of receiver.
203. Injunction to protect rights.
204. Contracts to facilitate divorce.

§ 195. **Origin and development of modern laws.**—Modern divorce laws in the United States have developed in the various state jurisdictions out of the application of American social and religious conceptions and theories to the Jewish and Ecclesiastical law of family relations.

The old Jewish law recognized the right of a husband to divorce his wife at will and without appeal to the state or church. Christ's teachings, however, seem to have limited the right of divorce to adultery.[1]

The laws of England at the time of the colonization of America recognized two forms of divorce, viz.: absolute divorce—known as divorce a vinculo matrimonii—and temporary separation—known as divorce a mensa et thoro. The law was administered by the ecclesiastical court and did not become a part of the common law of England at the time of the Revolution and never became a part of the common law of this country.[2]

The first divorces granted in America were by special legisla-

[1] See note, 65 Am. Dec. 708.

[2] Cotter v. Cotter, 225 Fed. 471; Fornshill v. Murray, 1 Bland (Md.) 54 Am. Rep. 488; Burtis v. Burtis, 1 Hopk. (N. Y.) 557, 14 Am. Dec. 479, 18 Am. Dec. 344; Robbins v. Robbins, 140 Mass. 528, 5 N. E. 837, 563. See note, 11 L. R. A. 443.

tive acts, there being no courts with jurisdiction. Out of this combined lack of a common law of divorce and the unsatisfactory state of the ecclesiastical law, the various states developed the very diversified set of divorce laws that we now have. Such a situation of diversified divorce laws was the inevitable result of the application of a very confused and divergent religious and social philosophy to an unsatisfactory and admittedly inadequate set of inherited divorce laws. Each state, impregnated as it was with its own peculiar religious faith and social philosophy, made laws believed by the law givers to be necessary to promote permanency of family relations and protect the social fabric. Most of these laws had some counterpart in the English absolute divorce law or the law concerning temporary separation. They vary from those allowing divorce for adultery only, to those granting divorce for mere "incompatibility of temper."

The principles and practices of our courts in this matter have been very largely borrowed from the ecclesiastical courts.[3] Analogies have been freely adopted from these English courts and their theories applied by our courts under our statutes.[4]

§ 196. **State control of divorce.**—In this country where the state and church are completely separated, the state has always exercised complete control over the marital relations. As pointed out in the chapter on marriage[5] the state has the greatest interest in promoting healthy family life. It has an even greater interest in maintaining the family than in creating it. It has, therefore, hedged the home about with a system of divorce laws, tending to the permanency of the marital relation. Divorce is prima facie prejudicial to the public interest.[6]

[3]Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460, per Folger, J. whose statement is quoted with approval in Hawkins v. Hawkins, 193 N. Y. 409, 86 N. E. 468, 19 L. R. A. (N. S.) 468, 127 Am. St. 979, 15 Ann. Cas. 371. In Maryland the divorce courts are governed by the rules of the English ecclesiastical courts so far as they are consistent with the code. Emerson v. Emerson, 120 Md. 524, 87 Atl. 1033.

[4]Ring v. Ring, 118 Ga. 183, 44 S. E. 861, 62 L. R. A. 878; J. G. v. H. G. 33 Md. 401, 3 Am. Rep. 183; Morrison v. Morrison, 142 Mass. 361, 8 N. E. 59, 56 Am. Rep. 688; Robbins v. Robbins, 140 Mass. 528, 5 N. E. 837, 54 Am. Rep. 488; Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95; Devanbaugh v. Devanbaugh, 5 Paige (N. Y.) 554, 28 Am. Dec. 443; Nogees v. Nogees, 7 Tex. 538, 58 Am. Dec. 78.

[5]Luitwieler v. Luitwieler (Cal. App.), 207 Pac. 931.

[6]Hawley v. Hawley, 101 Ore. 640, 199 Pac. 589.

This power of regulation the states have generally placed in the legislatures, reserving in some instance, through the state constitutions, certain fundamental rights of control.[7] The power to decree a divorce is purely statutory, and whatever the statute does not authorize, the court though with broad equity powers, can not assume,[8] unless it is necessarily incidental to the exercise of the power given by the statute.[9] There is no common law governing divorce.[10]

The statutory regulations do not come within the constitutional restraint against impairing the obligation of contracts.[11] This power does not, however, extend to the point of allowing the legislature to impose one kind of property right growing out of divorce, on a person of one religious faith and another kind on persons of a different faith.[12]

As has been noted, in early times divorces were granted by the legislature, and may be now[13] unless the constitution of the state

[7]Burtis v. Burtis, 1 Hopk. (N. Y.) 557, 14 Am. Dec. 563; Cooke v. Cooke, 164 N. Car. 272, 80 S. E. 178, 49 L. R. A. (N. S.) 1034; State v. Duket, 90 Wis. 272, 63 N. E. 83, 31 L. R. A. 515, 48 Am. St. 928.

[8]Main v. Main, 168 Iowa 353, 150 N. W. 590; Williams v. Williams, 136 Ky. 71, 123 S. W. 337; Outlaw v. Outlaw, 118 Md. 498, 84 Atl. 383; Sell v. Sell, 58 Mont. 329, 193 Pac. 561; Rumping v. Rumping, 36 Mont. 39, 91 Pac. 1057, 12 L. R. A. (N. S.) 1197, 12 Ann. Cas. 1090; Ackerman v. Ackerman, 200 N. Y. 72, 93 N. E. 192; Scolardi v. Scolardi, 42 R. I. 456, 108 Atl. 651; Gilbert v. Hayward, 37 R. I. 303, 92 Atl. 625; Blankenship v. Blankenship, 125 Va. 595, 100 S. E. 538; Towns v. Towns, 171 Wis. 32, 176 N. W. 216; Ex parte Grbic, 170 Wis. 201, 174 N. W. 546, 8 A. L. R. 325.

[9]White v. White, 154 App. Div. 250, 138 N. Y. S. 1082; De Vall v. De Vall, 57 Ore. 128, 109 Pac. 755, 110 Pac. 705.

[10]Lincoln v. Riley, 217 Ill. App. 571; Crouch v. Crouch, 193 App. Div. 221, 183 N. Y. S. 657.

[11]Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. 723; Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629; Green v. State, 58 Ala. 190, 29 Am. Rep. 739; Tolen v. Tolen, 2 Blackf. (Ind.) 407, 21 Am. Dec. 742; Berthelemy v. Johnson, 3 B. Mon. (Ky.) 90, 38 Am. Dec. 179; Harding v. Alden, 9 Greenl. (Maine) 140, 23 Am. Dec. 549; Clark v. Clark, 10 N. H. 380, 34 Am. Dec. 165; Cooke v. Cooke, 164 N. Car. 272, 80 S. E. 178, 49 L. R. A. (N. S.) 1034; Frasher v. State, 3 Tex. App. 263, 30 Am. Rep. 131.

[12]State v. Duket, 90 Wis. 272, 63 N. W. 83, 31 L. R. A. 515, 48 Am. St. 928.

[13]Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. 723; Stanton v. Willson, 3 Day (Conn.) 37, 3 Am. Dec. 255; Wright v. Wright, 2 Md. 429, 56 Am. Dec. 723; Fornshill v. Murray, 1 Bland (Md.) 479, 18 Am. Dec. 344; Crane v. Meginnis, 1 Gill & J. (Md.) 463, 19 Am. Dec. 237; Parsons v. Parsons, 9 N. H. 309, 32 Am. Dec. 362; Jones v. Jones, 12 Pa. St. 350, 51 Am. Dec. 611; Hickman v. Hickman, 1 Wash. 257, 24 Pac.

prohibits it. But as a rule this power has become obsolete, being looked upon with disfavor and expressly prohibited in nearly all of the states.[14] In those states where they are not prohibited, the legislatures can usually only grant divorces for causes outside of those laid down in the divorce statutes.[15] It has also been held that a special divorce can not be granted by the legislature without the consent of both parties where property interests would be affected.[16]

§ 197. **Judicial character of divorce proceedings.**—Divorce proceedings are judicial in character, and civil rather than criminal.[17] The usual due process requirements of civil suits apply.[18] Even in code states divorce proceedings are conducted under the rules of equity unless specifically limited by statute.[19]

In some respects the proceeding is in the nature of a proceeding in rem and in others in personam. Where the only question involved is that of the relation itself, the inquiry is one in rem,[20] but where the defendant appears and questions a property right involved, it is a proceeding in personam.[21] Whether the pro-

445, 22 Am. St. 148; State v. Duket, 90 Wis. 272, 63 N. W. 83, 31 L. R. A. 515, 48 Am. St. 928; McGoon v. Irvin, 1 Pin. (Wis.) 526, 44 Am. Dec. 409. See notes, 48 Am. Dec. 439; 18 L. R. A. 95.

[14]Winkles v. Powell, 173 Ala. 46, 55 So. 536; Teft v. Teft, 3 Mich. 67; Clark v. Clark, 10 N. H. 380, 34 Am. Dec. 165; Middleton v. Middleton, 54 N. J. Eq. 692, 35 Atl. 1065, 37 Atl. 1106, 36 L. R. A. 221, 55 Am. St. 602; Jones v. Jones, 12 Pa. St. 350, 51 Am. Dec. 611; Higbee v. Higbee, 4 Utah 19, 5 Pac. 693; State v. Duket, 90 Wis. 272, 63 N. W. 83, 31 L. R. A. 515, 48 Am. St. 928. See notes, 48 Am. Dec. 437; 18 L. R. A. 95.

[15]Jones v. Jones, 95 Ala. 443, 11 So. 11, 18 L. R. A. 95.

[16]Gaines v. Gaines, 9 B. Mon. (Ky.) 295, 48 Am. Dec. 425.

[17]Clark v. Clark, 10 N. H. 380, 34 Am. Dec. 165; Cohen v. Cohen, 3 Boyce (Del.) 361, 84 Atl. 122. See note, Ann. Cas. 1913B, 1217.

[18]In re Christensen's Estate, 17 Utah 412, 53 Pac. 1003, 41 L. R. A. 504, 70 Am. St. 794. See also Milster v. Milster, 200 Mo. App. 603, 209 S. W. 620.

[19]Gaston v. Gaston, 114 Cal. 542, 46 Pac. 609, 55 Am. St. 86; Wadsworth v. Wadsworth, 81 Cal. 182, 22 Pac. 648, 15 Am. St. 38; People ex rel. v. Shea, 201 N. Y. 471, 94 N. E. 1060; Johannessen v. Johannessen, 70 Misc. 361, 128 N. Y. S. 892; Scolardi v. Scolardi, 42 R. I. 456, 108 Atl. 651. See, however, Emerson v. Emerson, 120 Md. 584, 87 Atl. 1033, where the rules of the ecclesiastical court are in force.

[20]Rigney v. Rigney, 127 N. Y. 408, 28 N. E. 405, 24 Am. St. 462.

[21]Rigney v. Rigney, 127 N. Y. 408, 28 N. E. 405, 24 Am. St. 462; Houston v. Timmerman, 17 Ore. 499, 21 Pac. 1037, 4 L. R. A. 716, 11 Am. St. 848; Bater v. Bater, (1906) P. (Eng.) 209, 4 Ann. Cas. 854.

ceeding is one in rem or in personam becomes important as a jurisdictional question where the defendant is a resident of a foreign state and service has been had by publication only. For in such case a proceeding in personam would be ineffectual with respect to any property owned by defendant where the property was not situated within the state of the plaintiff where suit was brought. There will always be the question whether such a proceeding will have extra-territorial effect even with respect to the dissolution of the marriage contract or relation.[22]

§ 198. **Divorce and public policy—State as third party.**—The fundamental interest of the state in the family requires it to become a party to all actions for divorce brought by any of its citizens. Ordinarily where there is an actual adversary proceeding the state is quite sufficiently protected. But where the defendant does not appear or where there is collusion or fraud the court is charged with a duty to protect the interests of society. Divorce is not a right of the individual but a privilege granted by the state and is therefore not dependent upon the wishes of the parties to the marriage but upon the causes sanctioned by the law.[23] The Supreme Court of the United States has said, "other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed the law steps in and holds the parties to various obligations and liabilities. It is an institution in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."[24]

[22]Haddock v. Haddock, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. 525.

[23]Andrews v. Andrews, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. 237; Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. 723; Green v. State, 58 Ala. 190, 29 Am. Rep. 739; Grannis v. Superior Court, 146 Cal. 245, 79 Pac. 891, 106 Am. St. 23; Allen v. Allen, 73 Conn. 54, 46 Atl. 242, 49 L. R. A. 142, 84 Am. St. 135; Helms v. Franciscus, 2 Bland (Md.) 544, 20 Am. Dec. 402; Blank v. Nohl, 112 Mo. 159, 20 S. W. 477, 18 L. R. A. 550; Milster v. Milster, 200 Mo. App. 603, 209 S. W. 620; Worthington v. District Court, 37 Nev. 212, 142 Pac. 230, L. R. A. 1916A, 696, Ann. Cas. 1916E, 1097; Clark v. Clark, 10 N. H. 380, 34 Am. Dec. 165; Wade v. Kalbfleisch, 58 N. Y. 282, 16 Abb. Prac. (N. S.) 104, 17 Am. Rep. 250; McCreery v. Davis, 44 S. Car. 195, 22 S. E. 178, 28 L. R. A. 655, 51 Am. St. 794; Hilton v. Roylance, 25 Utah 129, 69 Pac. 660, 58 L. R. A. 723, 95 Am. St. 821.

[24]Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. 723.

It follows that the state is a third party in interest in every divorce proceeding, and the law should be administered in view of public good as well as private right.[25] But though it is the policy of the law to sustain the marriage relation, it is the duty of courts to decree the dissolution where the statutory conditions therefor are clearly met and the grounds established by convincing evidence.[26]

§ 199. **Partial divorce—Divorce from bed and board.**—An absolute divorce (a vinculo matrimonii—from the bond of matrimony), is a full and complete dissolution of the marriage tie, abrogating all marital rights and obligations and leaving both parties to all intents and purposes, single persons.[27] The power to grant this form of divorce is purely statutory and the court may grant the divorce only on the grounds set out in the statute.[28]

A partial divorce does not dissolve the marriage tie. It is a mere legal separation, a divorce from bed and board only, simply freeing the innocent party from the presence and control of the

[25]Whitford v. Whitford, 100 Ark. 63, 139 S. W. 653; Rehfuss v. Rehfuss, 169 Cal. 86, 145 Pac. 1020; Deyoe v. Superior Court, 140 Cal. 476, 74 Pac. 28, 98 Am. St. 73; Hyser v. Hyser, 53 Colo. 199, 124 Pac. 346, Ann. Cas. 1914B, 356; Garver v. Garver, 52 Colo. 227, 121 Pac. 165, Ann. Cas. 1913D, 674; Allen v. Allen, 73 Conn. 54, 46 Atl. 242, 49 L. R. A. 142, 84 Am. St. 135; Hancock v. Hancock, 55 Fla. 680, 45 So. 1020, 15 L. R. A. (N. S.) 670; People ex rel. v. Case, 241 Ill. 279, 89 N. E. 638, 25 L. R. A. (N. S.) 578; Dunham v. Dunham, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70; Yeager v. Yeager, 43 Ind. App. 313, 87 N. E. 144; Bunger v. Bunger, 85 Kans. 564, 117 Pac. 1017, 25 L. R. A. (N. S.) 578, Ann. Cas. 1913A, 126; Fisher v. Fisher, 95 Md. 314, 52 Atl. 898, 93 Am. St. 334; People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260; In re Ellis, 55 Minn. 401, 56 N. W. 1056, 23 L. R. A. 287, 43 Am. St. 514; Franklin v. Franklin, 40 Mont. 348, 106 Pac. 353, 26 L. R. A. (N. S.) 490, 20 Ann. Cas. 339; Willits v. Willits, 76 Nebr. 228, 107 N. W. 379, 5 L. R. A. (N. S.) 767, 14 Ann. Cas. 883; Davis v. Hinman, 73 Nebr. 850, 103 N. W. 668, 11 Ann. Cas. 376; Grant v. Grant, 84 N. J. Eq. 81, 92 Atl. 791; Lyon v. Lyon, 39 Okla. 111, 134 Pac. 650; Jones v. Jones, 59 Ore. 308, 117 Pac. 414; Palmer v. Palmer, 26 Utah 31, 72 Pac. 3, 61 L. R. A. 641, 99 Am. St. 820. See note, 30 Am. Dec. 544.

[26]Allfree v. Allfree, 175 Mo. App. 344, 162 S. W. 650; Meyer v. Meyer, 158 Mo. App. 299, 138 S. W. 70; Hansen v. Hansen, 103 Ore. 17, 198 Pac. 207, 203 Pac. 613.

[27]Barber v. Root, 10 Mass. 260; Hunt v. Thompson, 61 Mo. 148. Richardson v. Wilson, 8 Yerg. (Tenn.) 67.

[28]Etheridge v. Etheridge, 120 Md. 11, 87 Atl. 497. But see McClintock v. McClintock, 147 Ky. 409, 144 S. W. 68, 39 L. R. A. (N. S.) 1127.

guilty one until they agree to renew cohabitation.[29] And if the innocent party is the wife, the court will ordinarily give her a suitable allowance from the income and estate of her husband.

Kent says these qualified divorces are regarded as rather hazardous to the morals of the parties. The English courts have said it is throwing the parties back upon society in the undefined and dangerous characters of a husband without a wife, and a wife without a husband.

Such a divorce neither dissolves the marriage tie nor gives either party the right to marry again.[30] It does not always even divest the guilty party of his or her interest as husband or wife in the estate of the other.[31] It is no defense to a civil or criminal charge of adultery, or an indictment for bigamy. After a divorce from bed and board it is presumed that the marital relations between the parties have ceased and if children are born they will be considered illegitimate until proof to the contrary appears. They will, however, upon proof of subsequent cohabitation be held to be legitimate.[32]

Legal separations are expressly prohibited in some states, and in others are unknown. It has been a disputed question whether they serve any useful purpose. The weight of argument and authority is against them. To be sure, they may possibly secure a judicial settlement of matrimonial troubles and give an innocent wife protection from a cruel or drunken husband; but the same result could be obtained by divorce, alimony, and a restraining order or injunction, and leave the parties in a much better position for themselves and before the community.[33] A legal separation deprives the parties to the marriage of the rights of cohabitation, and the procreation of legitimate children. As Mr. Justice Swift says, "it places them in a situation where there is an irresistible temptation to the commission of adultery, unless they possess more frigidity, or more virtue than generally falls to the share of human beings."[34]

Mr. Bishop says, "It is destitute of justice and one of the most corrupting devices ever imposed by serious natures on blindness

[29]Meehan v. Meehan, 2 Barb. (N. Y.) 377; Freeman v. Belfer, 173 N. Car. 581, 92 S. E. 486, L. R. A. 1917E, 886; Nathans v. Nathans, 2 Phila. (Pa.) 393.

[30]Ellison v. Mobile, 53 Ala. 558.

[31]Clark v. Clark, 6 Watts & S. (Pa.) 85.

[32]2 Bishop, Marriage and Divorce, §§ 726-741.

[33]Ellison v. Mobile, 53 Ala. 558.

[34]Swift's System of Laws (Conn.), 193.

and credulity. It was tolerated only because men believed as a part of their religion that dissolution would be an offence against God, whence the slope was easy towards any compromise with good sense, and as the fruits of compromise we have this ill-begotten monster. It not only punishes the guilty party but it punishes the innocent party as well and should be done away with on the ground that it is against public policy."[35] In South Carolina this is the only kind of a separation granted.[36]

§ 200. **Divorce from bed and board under the civil law of Louisiana.**—The civil law as it exists in Louisiana allows an absolute divorce in the first instance on the ground of adultery alone.[37]

The procedure in that state is to grant a divorce from bed and board on other grounds prescribed by statute, and not to decree the absolute divorce until a year for reconciliation has elapsed and then on petition and citation.[38] It is necessary to show on this hearing that no reconciliation between the parties has taken place.[39] It is the policy of the law to promote a reconciliation,[40] which is equivalent to the condonation of common-law states.[41]

The right to apply for the absolute divorce belongs exclusively to the party in whose favor the judgment of separation is rendered.[42]

§ 201. **Application of doctrine of lis pendens to divorce proceedings.**—The doctrine of lis pendens does not ordinarily apply to a divorce proceeding, there being ordinarily no specific property right in question. Thus creditors are not prevented from bringing suit on accounts and prosecuting the same to judgments and attaching property of a husband even though they have prior notice of a prior suit filed by the wife for divorce and alimony.[43] However, where title to specific property is in issue along with the question of divorce the doctrine in so far as the particular

[35]Bishop, Marriage and Divorce, § 29.

[36]S. Car. Const. (1895), art. 17, § 3. See also McCreery v. Davis, 44 S. Car. 195, 22 S. E. 178, 28 L. R. A. 655, 51 Am. St. 794.

[37]Adams v. Hurst, 9 La. 243; De Pass. v. Winter, 23 La. Ann. 422.

[38]Donato v. Frillot, 116 La. 199, 40 So. 634; Hill v. Hill, 114 La. 117, 38 So. 77; Ellerbusch v. Kogel, 108 La. 51, 32 So. 191; Nicholas v. Maddox, 52 La. Ann. 1493, 27 So. 966; Gernon v. Hickley, 18 La. Ann. 454.

[39]Daspit v. Ehringer, 32 La. Ann. 1174.

[40]Perkins v. Potts, 8 La. Ann. 14.

[41]Hill v. Hill, 112 La. 770, 36 So. 678.

[42]Johnston v. Johnston, 32 La. Ann. 1139.

[43]Houston v. Timmerman, 17 Ore. 499, 21 Pac. 1037, 4 L. R. A. 716, 11 Am. St. 848.

title is concerned, applies and strangers must take notice as in other cases.[44] There are some other cases involving specific property right to which the doctrine has been held to apply.[45]

§ 202. **Appointment of receiver.**—Under proper showing of such necessity for the protection of the plaintiff's rights, the court may appoint a receiver to take over the defendant's property.[46] Such a receiver has no power to sell the property to pay a money judgment for alimony at the termination of the hearing on divorce unless he has taken possession of the property.[47]

§ 203. **Injunction to protect rights.**—Injunction will also issue to protect the plaintiff against threatened wrong where proper showing is made for such equitable relief.[48] This may take the form of an injunction to prevent the husband and those cooperating with him from alienating his property to defeat alimony.[49]

§ 204. **Contracts to facilitate divorce.**—For the same reason that the state will not tolerate collusion and fraud in the procurement of a divorce it looks with severe disfavor upon all contracts and agreements looking to the dissolution of the marriage relation or in which dissolution of marriage is the moving consideration.[50]

[44]Kremer v. Schutz, 82 Kans. 175, 107 Pac. 780, 27 L. R. A. (N. S.) 735.

[45]Wilkinson v. Elliott, 43 Kans. 590, 23 Pac. 614, 19 Am. St. 158; W. H. Gallaspy's Sons Co. v. Massey, 99 Miss. 208, 54 So. 805, Ann. Cas. 1913D, 947; Powell v. Campbell, 20 Nev. 232, 20 Pac. 156, 2 L. R. A. 615, 19 Am. St. 350. See note, 56 Am. St. 865.

[46]Anderson v. Anderson, 124 Cal. 48, 56 Pac. 630, 57 Pac. 81, 71 Am. St. 17; Murray v. Murray, 115 Cal. 266, 47 Pac. 37, 37 L. R. A. 626, 56 Am. St. 97; Stallings v. Stallings, 127 Ga. 464, 56 S. E. 469, 9 L. R. A. (N. S.) 593. See notes, 64 Am. Dec. 495; 72 Am. St. 67; 14 Ann. Cas. 362.

[47]White v. White, 130 Cal. 597, 62 Pac. 1062, 80 Am. St. 150.

[48]Lyon v. Lyon, 102 Ga. 453, 31 S. E. 34, 42 L. R. A. 194, 66 Am. St. 189; Kern v. Field, 68 Minn. 317, 71 N. W. 393, 64 Am. St. 479; Vanduzer v. Vanduzer, 6 Paige (N. Y.) 366, 31 Am. Dec. 257.

[49]In re White, 113 Cal. 282, 45 Pac. 323; Gray v. Gray, 65 Ga. 193; Ricketts v. Ricketts, 4 Gill (Md.) 105; Smith v. Waalkes, 109 Mich. 16, 66 N. W. 679; Vermilyea v. Vermilyea, 14 How. Pr. (N. Y.) 470; Uhl v. Irwin, 3 Okla. 388, 41 Pac. 376; Warren v. Warren, 36 R. I. 167, 89 Atl. 651; Thomason v. Thomason, 73 S. Car. 129, 52 S. E. 870; Hunt v. Hunt, (Tex. Civ. App.), 215 S. W. 228; Turner v. Turner, 47 Tex. Civ. App. 391, 105 S. W. 237.

[50]Pereira v. Pereira, 156 Cal. 1, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. 107; Birch v. Anthony, 109 Ga. 349, 34 S. E. 561, 77 Am. St. 379; Stokes v. Anderson, 118 Ind. 533, 21 N. E. 331, 4 L. R. A. 313; Muckenburg v. Holler, 29 Ind. 139, 92 Am. Dec. 345; Donaldson v. Eaton, 136 Iowa 650, 114 N.

So contracts to procure divorce, or in which the contracting party agrees to pay a sum of money, or pass title to property, where the consideration is a promise to procure or aid in procuring a divorce for the promisee, are void, as against public policy.[51] So an attorney who advertises that he will procure a divorce with speed and promises a successful termination is guilty of unethical practices and subject to proceeding in disbarment.[52]

But there is no illegality in offering to give counsel to, or render services for one who wishes advice or service in matters of family relations where an action for divorce is contemplated so long as compensation for such services is not dependent upon success in procuring such a divorce.[53]

Where the contract is not intended to, and as a matter of fact does not tend to the suppression of evidence in the divorce proceeding nor induce the parties or either of them, in any manner to urge causes for divorce beyond the facts or set up less causes in defense than would be otherwise set up and where such a contract does not otherwise tend to promote unfairness or collusion. the contract will be upheld even though it is made to depend in some manner on the successful termination of a suit for divorce.[54]

W. 19, 14 L. R. A. (N. S.) 1168, 125 Am. St. 275; Barngrover v. Pettigrew, 128 Iowa 533, 104 N. W. 904, 2 L. R. A. (N. S.) 260, 111 Am. St. 206; Johnson v. Johnson, 122 Ky. 13, 90 S. W. 964, 121 Am. St. 449; Belden v. Munger, 5 Minn. 211, 80 Am. Dec. 407; Blank v. Nohl, 112 Mo. 159, 20 S. W. 477, 18 L. R. A. 550; Davis v. Hinman, 73 Nebr. 850, 103 N. W. 668, 11 Ann. Cas. 376; Sayles v. Sayles, 21 N. H. 312, 53 Am. Dec. 208; Noice v. Brown, 38 N. J. L. 228, 20 Am. Rep. 388; Pierce v. Cobb, 161 N. Car. 300, 77 S. E. 350, 44 L. R. A. (N. S.) 379; Henderson v. Henderson, 37 Ore. 141, 60 Pac. 597, 61 Pac. 136, 48 L. R. A. 766, 82 Am. St. 741; Palmer v. Palmer, 26 Utah 31, 72 Pac. 3, 61 L. R. A. 641, 99 Am. St. 820.

[51]McConnell v. McConnell, 98 Ark. 193, 136 S. W. 931, 33 L. R. A. (N. S.) 1074; Newman v. Freitas, 129 Cal. 283, 61 Pac. 907, 50 L. R. A. 548; Donaldson v. Eaton, 136 Iowa 650, 114 N. W. 19, 14 L. R. A. (N. S.) 1168, 125 Am. St. 275; Barngrover v. Pettigrew, 128 Iowa 533, 104 N. W. 904, 2 L. R. A. (N. S.) 260, 111 Am. St. 206; Jordan v. Westerman, 62 Mich. 170, 28 N. W. 826, 4 Am. St. 836; Lynde v. Lynde, 64 N. J. Eq. 736, 52 Atl. 694, 58 L. R. A. 471, 97 Am. St. 692; Pierce v. Cobb, 161 N. Car. 300, 77 S. E. 350, 44 L. R. A. (N. S.) 379.

[52]Ingersoll v. Coal Creek Coal Co., 117 Tenn. 263, 98 S. W. 178, 9 L. R. A. (N. S.) 282, 119 Am. St. 1003, 10 Ann. Cas. 829; People v. Goodrich, 79 Ill. 148.

[53]Hare v. McGue, 178 Cal. 740, 174 Pac. 663, L. R. A. 1918F, 1099.

[54]Storey v. Storey, 125 Ill. 608, 18 N. E. 329, 1 L. R. A. 320, 8 Am. St. 417; Snow v. Gould, 74 Maine 540, 43 Am. Rep. 604; Nelson v. Vassenden, 115 Minn. 1, 131 N. W. 794, 35 L. R. A. (N. S.) 1167; Appleby v.

But if it tends to aid in any way in procuring a divorce it is void.[55] So an agreement not to file a motion for a new trial or appeal is void.[56]

Where the consideration for the agreement is to compromise the divorce proceedings and dismiss the case, or where a contract is conditioned on such event, it is clearly legal as promoting marriage relations instead of destroying them.[57]

It has been held, however, that the state has such an interest in a nullity proceeding that it may refuse to dismiss a suit for nullity where the marriage was absolutely null and void. This rule is based on the interest the state has in protecting the interest of the offspring from the void marriage.[58]

Appleby, 100 Minn. 408, 111 N. W. 305, 10 L. R. A. (N. S.) 590, 117 Am. St. 709, 10 Ann. Cas. 563; Henderson v. Henderson, 37 Ore. 141, 60 Pac. 597, 61 Pac. 136, 48 L. R. A. 766, 82 Am. St. 741. See note, 44 L. R. A. (N. S.) 387.

[55]Stokes v. Anderson, 118 Ind. 533, 21 N. E. 331, 4 L. R. A. 313.

[56]Blank v. Nohl, 112 Mo. 159, 20 S. W. 477, 18 L. R. A. 350; Comstock v. Adams, 23 Kans. 513, 33 Am. Rep. 191. See note, 11 Ann. Cas. 379.

[57]Phillips v. Meyers, 82 Ill. 67, 25 Am. Rep. 295; Moayon v. Moayon, 114 Ky. 855, 24 Ky. L. 1641, 72 S. W. 33, 60 L. R. A. 415, 102 Am. St. 303; Mack v. Mack, 87 Nebr. 819, 128 N. W. 527, 31 L. R. A. (N. S.) 441; Adams v. Adams, 91 N. Y. 381, 43 Am. Rep. 675; Darcey v. Darcey, 29 R. I. 384, 71 Atl. 595, 23 L. R. A. (N. S.) 886. See notes, 60 L. R. A. 409; 31 L. R. A. (N. S.) 441.

[58]Ginther v. Ginther, 56 N. Y. L. J. 132.

CHAPTER 15

SEPARATION AGREEMENTS

Section

210. Nature in general.
211. Validity of agreements.
212. Construction of agreements.
213. Interposition of trustee.
214. Consideration.
215. Support of wife after agreement.
216. Surviving interest.
217. Effect of divorce on agreement.
218. Termination of the agreement.
219. Actions on agreements.

§ 210. **Nature in general.**—Although the early English cases frowned on any attempt of the parties to enter into agreements whereby they settled their property rights without the aid of the court and upon agreements of separation, later there was a change in attitude and such agreements were generally allowed in the interest of privacy. So in America it is the general rule that such settlements are legal if separation itself is an accomplished fact or is contemporaneous with the agreement and suitable provision for the support of the wife is made[1] in such agree-

[1]Walker v. Walker, 9 Wall. (U. S.) 743, 19 L. ed. 814; Koehler v. Koehler, 137 Ark. 302, 209 S. W. 283; Hood v. Roleson, 125 Ark. 30, 187 S. W. 1059, Ann. Cas. 1918E, 900; McConnell v. McConnell, 98 Ark. 193, 136 S. W. 931, 33 L. R. A. (N. S.) 1074; Pryor v. Pryor, 88 Ark. 302, 114 S. W. 700, 129 Am. St. 102; Hensley v. Hensley, 179 Cal. 284, 183 Pac. 445; McCahan v. McCahan (Cal. App.), 190 Pac. 460; Melton v. Hubbard, 135 Ga. 128, 68 S. E. 110; In re Taylor's Estate, 5 Ind. Ter. 219, 82 S. W. 727, 5 Ann. Cas. 226; Tallmon v. Tallmon, 166 Iowa 370, 147 N. W. 746; Blair v. Blair, 106 Kans. 151, 186 Pac. 746; Gaines v. Poor, 3 Metc. (Ky.) 503, 79 Am. Dec. 559; Carey v. Mackey, 82 Maine 516, 20 Atl. 84, 9 L. R. A. 113, 17 Am. St. 500; Helms v. Franciscus, 2 Bland (Md.) 544, 20 Am. Dec. 402; Winn v. Sanford, 148 Mass. 39, 18 N. E. 677, 1 L. R. A. 512; Nichols v. Nichols, 169 Mich. 540, 135 N. W. 328; Buttlar v. Buttlar, 57 N. J. Eq. 645, 42 Atl. 755, 73 Am. St. 648; Emery v. Neighbour, 7 N. J. L. 142, 11 Am. Dec. 541; In re Yard's Estate, 116 Misc. 19, 189 N. Y. S. 190; Clark v. Fosdick, 118

ment. There are decisions to the contrary, however.[2]

Although in England there need be no other circumstances than the agreement of separation, in America it is generally required that the promising party should be guilty of acts which would entitle the other party to a divorce, or at least that the parties are not acting in mere caprice and reckless disregard of their marital obligations.[3] The rule would seem not so strict where the provision is for the maintenance, support, and custody of the children.[4]

§ 211. **Validity of agreements.**—The agreement for future separation while the parties are living together is everywhere held void as contrary to public policy.[5] The agreement must be made

N. Y. 7, 22 N. E. 1111, 6 L. R. A. 132, 16 Am. St. 733; Mercein v. People, 25 Wend. (N. Y.) 64, 35 Am. Dec. 653; Morris v. Patterson, 180 N. Car. 484, 105 S. E. 25; Archbell v. Archbell, 158 N. Car. 408, 74 S. E. 327, Ann. Cas. 1913D, 261; Ellett v. Ellett, 157 N. Car. 161, 72 S. E. 861, 39 L. R. A. (N. S.) 1135, Ann. Cas. 1913B, 1215; Henderson v. Henderson, 37 Ore. 141, 60 Pac. 597, 61 Pac. 136, 48 L. R. A. 766, 82 Am. St. 741; Singer's Estate, 233 Pa. St. 55, 81 Atl. 898, Ann. Cas. 1913A, 1326; Lehr v. Beaver, 8 Watts & Serg. (Pa.) 102, 42 Am. Dec. 271; Moreland v. Moreland, 108 Va. 93, 60 S. E. 730; Krug v. Krug, 81 Wash. 461, 142 Pac. 1136; Rolette v. Rolette, 1 Pin. (Wis.) 370, 40 Am. Dec. 782. See notes, 90 Am. Dec. 367; 83 Am. St. 860; 60 L. R. A. 407; 12 L. R. A. (N. S.) 848; 6 Eng. Rul. Cas. 374, 375; 12 Eng. Rul. Cas. 814.

[2]Hard v. Splain, 45 App. D. C. 1; Hill v. Hill, 74 N. H. 288, 67 Atl. 406, 12 L. R. A. (N. S.) 848, 124 Am. St. 966; Foote v. Nickerson, 70 N. H. 496, 48 Atl. 1088, 54 L. R. A. 554, explaining Sayles v. Sayles, 21 N. H. 312, 53 Am. Dec. 208, and containing an exhaustive review of the early English cases; Collins v. Collins, 62 N. Car. 153, 93 Am. Dec. 606. See note, 93 Am. Dec. 609.

[3]Archbell v. Archbell, 158 N. Car. 408, 74 S. E. 327, Ann. Cas. 1913D, 261. See notes, 83 Am. St. 866; 12 L. R. A. (N. S.) 852. For English rule see note, 12 Eng. Rul. Cas. 814

[4]Chamberlin v. Chamberlin, 193 App. Div. 784, 184 N. Y. S. 464.

[5]Boyd v. Boyd, 188 Ill. App. 136; Laufer v. Laufer, 61 Ind. App. 508, 112 N. E. 106; Gaines v. Poor, 3 Metc. (Ky.) 503, 79 Am. Dec. 559; Helmes v. Franciscus, 2 Bland (Md.) 544, 20 Am. Dec. 402; Terkleson v. Peterson, 216 Mass. 531, 104 N. E. 351; Fox v. Davis, 113 Mass. 255, 18 Am. Rep. 476; In re Berner, 217 Mich. 612, 187 N. W. 377; Appleby v. Appleby, 100 Minn. 498, 111 N. W. 305, 10 L. R. A. (N. S.) 590, 117 Am. St. 709, 10 Ann. Cas. 563; Hill v. Hill, 74 N. H. 288, 67 Atl. 406, 12 L. R. A. (N. S.) 848, 124 Am. St. 966; Winter v. Winter, 191 N. Y. 462, 84 N. E. 382, 16 L. R. A. (N. S.) 710; Tirrell v. Tirrell, 107 Misc. 179, 177 N. Y. S. 357; Montgomery v. Montgomery, 170 N. Y. S. 867; Winton v. Winton, 161 N. Y. S. 405; Rogers v. Rogers, 4 Paige (N. Y.) 516, 27 Am. Dec. 84; Archbell v. Archbell, 158 N. Car. 408, 74 S. E. 327, Ann. Cas. 1913D, 261; Howell v. Howell, 42 Okla.

contemporaneous with or after separation,[6] and must be fair and free from taint of imposition, fraud, duress, or overreaching by the husband.[7]

The agreement is enforcible only in equity to the extent that it is just.[8] Such agreements do not contravene public policy.[9] An agreement, however, violated public policy under which a husband conveyed property to his wife and she executed to him a note and mortgage on consideration that he does not contest her divorce suit if further prosecuted, and that they would abandon

286, 141 Pac. 412; McKennan v. Phillips, 6 Whart. (Pa.) 571, 37 Am. Dec. 438; Cumming v. Cumming, 127 Va. 16, 102 S. E. 572. See notes, 83 Am. St. 863; 12 L. R. A. (N. S.) 851.

[6]Rowe v. Young, 123 Ark. 303, 185 S. W. 438; Hughes v. Leonard, 66 Colo. 500, 181 Pac. 200, 5 A. L. R. 817; Watson v. Burnley, 150 Ga. 460, 104 S. E. 220; Kerr v. Kerr, 236 Mass. 353, 128 N. E. 409; Harrison v. Harrison, 201 Mo. App. 465, 211 S. W. 708; Banner v. Banner, 184 Mo. App. 396, 171 S. W. 2; Amspoker v. Amspoker, 99 Nebr. 122, 155 N. W. 602; Davis v. Davis, 195 App. Div. 430, 186 N. Y. S. 805; Tirrell v. Tirrell, 107 Misc. 179, 177 N. Y. S. 357; Hann v. De Freest, 178 N. Y. S. 414; Weeks v. L'Ecluse, 177 N. Y. S. 284; Reischfield v. Reischfield, 100 Misc. 561, 166 N. Y. S. 898; Wheat v. Wheat (Tex. Civ. App.), 239 S. W. 667.

[7]McConnell v. McConnell, 98 Ark. 193, 136 S. W. 931, 33 L. R. A. (N. S.) 1074; Bailey v. Bailey, 157 Ill. App. 74; Luttmer v. Luttmer, 143 Ky. 844, 137 S. W. 777; Branch v. Branch, 30 Ky. L. 417, 98 S. W. 1004; In re Jeannot's Estate, 212 Mich. 442, 180 N. W. 482; Van Valkenburgh v. Van Valkenburgh (Minn.), 188 N. W. 276; Speiser v. Speiser, 188 Mo. App. 328, 175 S. W. 122; Lee v. Lee, 55 Mont. 426, 178 Pac. 173; In re Lauderback's Estate, 106 Nebr. 461, 184 N. W. 128; Archbell v. Archbell, 158 N. Car. 408, 74 S. E. 327, Am. Cas. 1913D, 261. Agreement unfair where husband paid $8,400 as a lump sum for support of wife and it appeared that he was in receipt of an income of $10,000 a year. Tirrell v. Tirrell, 232 N. Y. 224, 133 N. E. 569.

[8]Halstead v. Halstead, 74 N. J. Eq. 596, 70 Atl. 928; Montgomery v. Montgomery, 41 Okla. 581, 139 Pac. 288.

[9]Baldwin v. Kingston, 247 Fed. 163; In re Clover's Estate, 179 Cal. 313, 176 Pac. 452; In re Yoell's Estate, 164 Cal. 540, 129 Pac. 999; Watson v. Burnley, 150 Ga. 460, 104 S. E. 220; Melton v. Hubbard, 135 Ga. 128, 68 S. E. 1101; Shankland v. Shankland, 301 Ill. 524, 134 N. E. 67; Melrose v. Besser (Ind. App.), 133 N. E. 27; Carpenter v. Carpenter, 171 Mich. 572, 137 N. W. 250; Vanderburgh v. Vanderburgh (Minn.), 188 N. W. 276; In re Hoffman's Estate, 108 Misc. 612, 177 N. Y. S. 905; Benesch v. Benesch, 106 Misc. 395, 173 N. Y. S. 629; Fleischman v. Furgueson, 174 App. Div. 310, 160 N. Y. S. 387; Levy v. Goldsoll, 62 Tex. Civ. App. 257, 131 S. W. 420. Contract for division of property between aged couple and their going to live with children by former marriages, held not against public policy, Bradley v. Burges, 109 Kans. 347, 198 Pac. 967.

their marital relations.[10] A separation agreement is not invalid because of giving the wife custody of a child on the theory that the husband is without right to contract for custody of children of the marriage.[11]

§ 212. **Construction of agreements.**—Where there are statutory provisions for an agreement of separation these provisions must be strictly complied with.[12] They should be strictly construed so far as they may tend to limit the rights of the wife,[13] and to avoid a permanent separation if a different construction is possible.[14]

The agreement is governed by the law of the jurisdiction where made.[15]

The general rule is that where there has been no breach of the agreement by the husband the wife may not sue for separation and alimony in excess of the amount stipulated in the agreement.[16] Where the agreement provides for a specified percentage of the annual income to be paid in monthly installments, the amount of the monthly payment will depend on the income during the twelve months previous to such payment and not on the amount of income received during the month for which payment is made.[17] The husband may relinquish his right of courtesy or the wife her right of dower.[18] A provision by which wife releases all claims in property which her husband "now owns or at any time has owned" since the marriage releases claims to property acquired by the husband after the execution of the agreement.[19]

There is no implied agreement that either party will remain chaste and it has been generally held that adultery is no defense

[10]Bergevin v. Bergevin, 168 Wis. 466, 170 N. W. 820. See also Moore v. Moore, 255 Fed. 497. Beardsley v. Bass, 287 Mo. 393, 229 S. W. 1092.

[11]Lee v. Lee, 93 Misc. 677, 157 N. Y. S. 821.

[12]Archbell v. Archbell, 158 N. Car. 408, 74 S. E. 327, Ann. Cas. 1913D, 261.

[13]In re Wood's Estate, 288 Mo. 588, 232 S. W. 671.

[14]Carl v. Carl, 166 N. Y. S. 961.

[15]Shaw v. Saxman, 46 App. D. C. 526; Coe v. Hill, 201 Mass. 15, 86 N. E. 949.

[16]Gutmann v. Gutmann, 178 N. Y. S. 833; Benesch v. Benesch, 182 App Div. 221, 169 N. Y. S. 561; Landes v. Landes, 94 Misc. 486, 159 N. Y. S. 586. See also Edleson v. Edleson, 179 Ky. 300, 200 S. W. 625, 2 A. L. R. 689.

[17]Hoffstaedter v. Hoffstaedter, 188 N. Y. S. 251.

[18]Pinkston v. McLemore, 31 Ala. 308.

[19]In re Wylie's Estate, 187 App. Div. 840, 176 N. Y. S. 367.

to an action on the contract.[20] The separation agreement does not prevent a suit for criminal conversation or alienation of affections, though it may become important on the question of damages.[21]

§ 213. **Interposition of trustee.**—Where common law disabilities between husband and wife have not been removed, it would seem necessary to enter into an agreement with a trustee for the benefit of the wife.[22] Now, however, under the enlarged statutory rights granted to women, the contract may be made immediately between the husband and the wife.[23] Where a trustee is used the contract may be so drawn as to make the trustee a guarantor of the payments stipulated for in the agreement.[24]

§ 214. **Consideration.**—As in other contracts a consideration is an essential,[25] but where the contract is otherwise valid the courts will usually find sufficient consideration.[26] This consideration may consist in the mutual promises of the parties.[27] It is also a sufficient consideration that the husband is released from all other claims for the support of the wife.[28] The courts found no want of consideration in an agreement by a husband on separation from his wife that if she did not disturb his peace for a given

[20]Galusha v. Galusha, 116 N. Y. 635, 22 N. E. 1114, 6 L. R. A. 487, 15 Am. St. 453; Whittle v. Schlemm, 93 N. J. L. 78, 106 Atl. 819. See notes, 90 Am. Dec. 370; 12 Eng. Rul. Cas. 815.

[21]See note, 46 L. R. A. (N. S.) 1086.

[22]Wallingsford v. Allen, 10 Pet. (U. S.) 583, 9 L. ed. 542; Jones v. Clifton, 101 U. S. 225, 25 L. ed. 908; Coombs v. Coombs, 120 Maine 103, 113 Atl. 20. See notes, 90 Am. Dec. 269; 83 Am. St. 864; 60 L. R. A. 415; 12 L. R. A. (N. S.) 850; 6 Eng. Rul. Cas. 375; 12 Eng. Rul. Cas. 814.

[23]Santmyer v. Santmyer, 48 App. D. C. 310; Edleson v. Edleson, 179 Ky. 300, 200 S. W. 625, 2 A. L. R. 689; Harrison v. Harrison, 201 Mo. App. 465, 211 S. W. 708; Winter v. Winter, 191 N. Y. 462, 84 N. E. 382, 16 L. R. A. (N. S.) 710; Barnes v. Klug, 129 App. Div. 192, 113 N. Y. S. 325; Moreland v. Moreland, 108 Va. 93, 60 S. E. 730.

[24]Brown v. Cleveland Trust Co., 187 N. Y. S. 85.

[25]In re Taylor, 5 Ind. Ter. 219, 82 S. W. 727, 5 Ann. Cas. 226; Coombs v. Coombs, 120 Maine 103, 113 Atl. 20. See notes, 83 Am. St. 867; 12 Eng. Rul. Cas. 815.

[26]Hogg v. Maxwell, 233 Fed. 290; Shankland v. Shankland, 301 Ill. 524, 134 N. E. 67; Cisco v. Cisco, 178 Ky. 745, 199 S. W. 1057; In re Hoffman's Estate, 108 Misc. 612, 177 N. Y. S. 905; Cain v. Cain, 188 App. Div. 780, 177 N. Y. S. 178. See note, 83 Am. St. 867.

[27]Fleischman v. Furgueson, 174 App. Div. 310, 160 N. Y. S. 387.

[28]Vanderburgh v. Vanderburgh (Minn.), 188 N. W. 276.

time that a sum of money deposited in bank by him should be paid over to her.[29]

But the amount fixed for payment to the wife may be so inadequate in view of the wealth of the husband as to amount to an entire want of consideration. This was held to be the case where a husband worth two and one-half million dollars stipulated for the payment of twenty-four hundred dollars a year to his wife.[30]

§ 215. **Support of wife after agreement.**—Where the agreement contains a provision for a suitable payment of money for the wife's support and the amount is paid the wife, the husband is not further liable for necessities, even to third parties.[31] The amount provided must be sufficient for suitable support and proportionate to the means of the husband.[32] But a mere separation agreement, where no provision is made for support, will not relieve the husband from his obligation to provide for his wife's necessities in like measure as though there were no agreement,[33] especially after she has offered to return to him and he has refused.[34]

As a matter of law it is very doubtful whether a wife can contract to relieve her husband from his liability to support her.[35]

The agreement for separate support exists only so long as both parties acquiesce in the living apart.[36] A request for the resumption of marital relations must be made in good faith to work a revocation of an agreement that payments were to be made so long as the parties lived apart.[37]

§ 216. **Surviving interest.**—A separation agreement does not necessarily affect the rights of the surviving party, but such

[29]Forsland v. Forsland, 46 Cal. App. 405, 189 Pac. 327.

[30]In re Wood's Estate, 288 Mo. 588, 232 S. W. 671.

[31]Alley v. Winn, 134 Mass. 77, 45 Am. Rep. 297; Crittenden v. Schermerhorn, 39 Mich. 661, 33 Am. Rep. 440; Ashmead v. Sullivan, 198 App. Div. 885, 191 N. Y. S. 205; Baker v. Barney, 8 Johns. (N. Y.) 72, 5 Am. Dec. 326. See note, 83 Am. St. 873.

[32]Glusker v. Glusker, 177 N. Y. S. 582.

[33]Labbe v. Abat, 2 La. 553; Alley v. Winn, 134 Mass. 77, 45 Am. Rep. 297; Buttlar v. Buttlar, 57 N. J. Eq. 645, 42 Atl. 755, 73 Am. St. 648; Emery v. Neighbour, 7 N. J. L. 142, 11 Am. Dec. 541. See notes, 83 Am. St. 872; 10 Am. Dec. 458.

[34]Cunningham v. Irwin, 7 Serg. & Raw. (Pa.) 247, 10 Am. Dec. 458.

[35]Reischfield v. Reischfield, 100 Misc. 561, 166 N. Y. S. 898. See also Crim v. Crim, 176 N. Y. S. 68.

[36]Devine v. Devine, 89 N. J. Eq. 51, 104 Atl. 370.

[37]Vanderburgh v. Vanderburgh (Minn.), 188 N. W. 276.

language may be used in the contract as will have that effect, both with respect to present and future acquired property.[38] The agreement is generally held not terminated by death of husband but to bind the personal representatives of the husband.[39] Where both parties have abided by the terms of the agreement, the survivor will generally be held estopped to have the agreement set aside after the death of his spouse.[40]

§ 217. **Effect of divorce on agreement.**—The separation agreement does not in general prevent either party from securing a divorce.[41]

A subsequent divorce will not ordinarily terminate the agreement unless it is so provided therein, and upon such divorce being granted the court has no right to interfere with the agreement against the will of the parties. It may, however, require the parties to annul the agreement as a condition to allowing alimony.[42] The court granting the divorce may use the separation

[38]In re McClelland's Estate, 181 Cal. 227, 183 Pac. 798; In re Edelman, 148 Cal. 233, 82 Pac. 962, 113 Am. St. 231; Jones v. Lamont, 118 Cal. 499, 50 Pac. 766, 62 Am. St. 251; Stephenson v. Osborne, 41 Miss. 119, 90 Am. Dec. 358; overruled on another point by Lessley v. Phipps, 49 Miss. 790; Fleischman v. Furguson, 174 App. Div. 310, 160 N. Y. S. 387; May v. Hess, 11 Ohio App. 213. See notes, 90 Am. Dec. 367; 12 Am. St. 92; 83 Am. St. 878.

[39]Barnes v. Klug, 129 App. Div. 192, 113 N. Y. S. 325; In re Reed's Estate, 247 Pa. 441, 93 Atl. 502.

[40]Hughes v. Leonard, 66 Colo. 500, 181 Pac. 200, 5 A. L. R. 817; In re Lawton's Estate, 266 Pa. 558, 109 Atl. 699. See also Bradley v. Burgess, 109 Kans. 347, 198 Pac. 967.

[41]Franklin v. Franklin, 154 Mass. 515, 28 N. E. 681, 13 L. R. A. 843, 26 Am. St. 266; Clark v. Fosdick, 118 N. Y. 7, 22 N. E. 1111, 6 L. R. A. 132, 16 Am. St. 733; Cain v. Cain, 177 N. Y. S. 178; Archbell v. Archbell, 158 N. Car. 408, 74 S. E. 327, Ann. Cas. 1913D, 261. See note, 83 Am. St. 873.

[42]Whitney v. Whitney Elevator &c. Co., 180 Fed. 187; Pryor v. Pryor, 88 Ark. 302, 114 S. W. 700, 129 Am. St. 102; Jackson v. Jackson, 149 Ga. 803, 102 S. E. 348; Siddens v. Siddens, 31 Ky. L. 66, 101 S. W. 377; Carey v. Mackey, 82 Maine 516, 20 Atl. 84, 9 L. R. A. 113, 17 Am. St. 500; Emery v. Emery, 181 Mich. 146, 147 N. W. 452; Halstead v. Halstead, 74 N. J. Eq. 596, 70 Atl. 928; Atherton v. Atherton, 155 N. Y. 129, 49 N. E. 933, 40 L. R. A. 291, 63 Am. St. 650 (reversed on other grounds, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. 544). Clark v. Fosdick, 118 N. Y. 7, 22 N. E. 1111, 6 L. R. A. 132, 16 Am. St. 733; Galusha v. Galusha, 116 N. Y. 635, 22 N. E. 1114, 6 L. R. A. 487, 15 Am. St. 453; Boate v. Boate, 190 N. Y. S. 914; Crim v. Crim, 176 N. Y. S. 68; Benesch v. Benesch, 106 Misc. 395, 173 N. Y. S. 629; In re Muhr's Estate, 59 Pa. Super. Ct. 393. See notes, 90 Am. Dec. 370; 83 Am. St. 874.

agreement as a basis for fixing the alimony, but is not required to do so.[43]

§ 218. **Termination of the agreement.**—As a general rule a return of the parties to marital relations will annul a separation agreement.[44] An offer to renew marital relations may not terminate the agreement where it was to continue for a definite period irrespective of future cohabitation.[45] Where there is a provision in the contract extending throughout the life of the wife, the death of the husband does not terminate the agreement.[46]

If, however, there is no separation at all immediately following the agreement, the consideration fails and with it the agreement.[47] In the case of a separated couple where the consideration of a note by the husband was a promise of the wife to resume cohabitation and faithfully perform her duties as a wife, the contract was held void as against public policy.[48]

The agreement may be rescinded in a proper proceeding for fraud in securing its execution or for the inadequacy of its provision for support.[49] But the parties may estop themselves by

[43]Kerr v. Kerr, 236 Mass. 353, 128 N. E. 409; Hires v. Hires, 91 N. J. Eq. 366, 110 Atl. 513; Van Horn v. Van Horn, 196 App. Div. 472, 188 N. Y. S. 98.

[44]Carter v. Younger, 112 Ark. 483, 166 S. W. 547; Brown v. Brown, 170 Cal. 1, 147 Pac. 1168; In re Matteote's Estate, 59 Colo. 566, 151 Pac. 448; Young v. Young, 150 Ga. 515, 104 S. E. 149; Boyd v. Boyd, 188 Ill. App. 136; Hartl v. Hartl, 155 Iowa 329, 135 N. W. 1007; Harrison v. Harrison, 201 Mo. App. 465, 211 S. W. 708; Dillon v. Dillon, 103 Nebr. 322, 171 N. W. 917; Gaster v. Gaster, 90 Nebr. 529, 134 N. W. 235; Graves v. Graves, 174 N. Y. S. 615; Archbell v. Archbell, 158 N. Car. 408, 74 S. E. 327, Ann. Cas. 1913D, 261; Ahrens v. Ahrens (Okla), 169 Pac. 486; Haile v. Hale, 40 Okla. 101, 135 Pac. 1143. But see Bulke v. Bulke, 173 Ala. 138, 55 So. 490; Lemon v. Lemon, 141 Ga. 448, 81 S. E. 118; Allen v. Allen, 108 Kans. 765, 196 Pac. 1075; Dennis v. Perkins, 88 Kans. 428, 129 Pac. 165, 43 L. R. A. (N. S.) 1219; Johns v. Johns, 204 Mo. App. 412, 222 S. W. 492; Brody v. Brody, 190 App. Div. 806, 180 N. Y. S. 364.

[45]Buttlar v. Buttlar, 57 N. J. Eq. 645, 42 Atl. 755, 73 Am. St. 648. See note, 90 Am. Dec. 369.

[46]See note, 90 Am. Dec. 370.

[47]Galusha v. Galusha, 116 N. Y. 635, 22 N. E. 1114, 6 L. R. A. 487, 15 Am. St. 453; Kehr v. Smith, 20 Wall. (U. S.) 31, 22 L. ed. 313. See notes, 6 Eng. Rul. Cas. 375; 90 Am. Dec. 369.

[48]Copeland v. Boaz, 9 Baxt. (Tenn.) 223, 40 Am. Rep. 89; Miller v. Miller, 78 Iowa 177, 35 N. W. 464, 42 N. W. 641, 16 Am. St. 431.

[49]Johnson v. Johnson, 150 App Div. 306, 134 N. Y. S. 1081; Montgomery v. Montgomery, 41 Okla. 581, 139 Pac. 288.

acquiescence or the receipt of benefits from moving to have the separation agreement set aside.[50]

The right to rescind may be also lost by delay in instituting proceedings therefor but this is to be understood as requiring prompt action after knowledge of the grounds for rescission.[51]

The burden of proof of the fraud is on the party asserting it as a ground for rescission.[52] Where the action is by the wife for rescission of the agreement, it is not required of her that she return the money expended for her support,[53] but she should return the property received so far as she is able to do so, and any unexpended balances of funds derived from the agreement remaining in her hands.[54]

A provision for modification of the agreement by a court on a change of circumstances does not give the court the right to substitute a new separation allowance for that adopted by the parties.[55]

§ 219. **Actions on agreements.**—The term of the agreement may be enforced by the courts.[56]

Where the agreement is operative through a trustee, the suit should be brought by the trustee.[57] Where the wife is insane the action should be brought at the instance of next friend of wife.[58]

The action for failure to pay instalments should be brought for the defaulted instalments only.[59]

Interest may be recovered on amounts expended by the wife for maintenance and clothing purchased for the children.[60] The cause of action on default may be assigned, and the assignee need not join the wife as a party to the action thereon.[61]

[50]In re Yoell's Estate, 164 Cal. 540, 129 Pac. 999; King v. Mollohan (Kans.), 198 Pac. 969.

[51]Hilton v. Hilton (Cal. App.), 201 Pac. 337.

[52]Hensley v. Hensley, 179 Cal. 284, 183 Pac. 445.

[53]Montgomery v. Montgomery, 170 N. Y. S. 867. See also Gilsey v. Gilsey, 198 Mo. App. 505, 201 S. W. 588. But see Johns v. Johns, 204 Mo. App. 412, 222 S. W. 492.

[54]Mitchell v. Mitchell, 263 Ill. 165, 104 N. E. 1037; Hogg v. Lindridge, 151 App. Div. 513, 135 N. Y. S. 928.

[55]Stoddard v. Stoddard, 227 N. Y. 13, 124 N. E. 91.

[56]In re Yoell's Estate, 164 Cal. 540, 129 Pac. 999; Snyder v. Snyder, 57 Pa. Super. Ct. 575.

[57]Proctor v. Lombard, 233 Mass. 213, 123 N. E. 507; Whittle v. Schlemm, 93 N. J. L. 78, 106 Atl. 819.

[58]Skeen v. Skeen (Tex. Civ. App.) 190 S. W. 1118.

[59]Stoddard v. Stoddard, 187 App. Div. 279, 175 N. Y. S. 650; Thompson v. Thompson, 173 N. Y. S. 561; Bauchle v. Bauchle, 185 App. Div. 590, 173 N. Y. S. 292.

[60]Van Horn v. Van Horn, 188 N. Y. S. 98.

[61]Phinney v. Andrus, 108 Misc. 717, 178 N. Y. S. 760.

CHAPTER 16

ADULTERY

Section

225. Adultery as a ground for divorce in general.
226. The act must be voluntary.
227. Appearance of particeps criminis.
228. Effect of separation.
229. Connivance.
230. Keeping concubine.
231. Mistake of law as defense.
232. Mistake of fact as defense.
233. Knowledge of adultery.
234. Effect of divorce for adultery on legitimacy of children
235. Non-access.
236. Joinder of other causes of action.
237. Specifications in complaint in general.
238. Particeps criminis must be named if known.
239. Connivance should be pleaded.
240. Amendment to libel or petition.
241. Burden of proof.
242. Circumstantial evidence.
243. Evidence of adulterous disposition.
244. Evidence of opportunity.
245. Evidence of private detectives.
246. Entering house of ill-fame as evidence.
247. Venereal disease as evidence.
248. Evidence and letters of paramour.
249. Corroboration—Confessions.
250. Evidence of prostitutes and pimps.
251. Evidence—Reputation for chastity.
252. Evidence of familiarities.
253. Record of criminal conviction as evidence.

§ 225. **Adultery as a ground for divorce in general.**—Prior to 1857 adultery was only ground for divorce a mensa et thoro in England. Even by the statute of 1857 adultery by the husband was not grounds for divorce except it was accompanied with a

living in adultery or the husband was guilty of such cruel treatment as would be grounds for divorce a mensa et thoro. In a few American jurisdictions there is still a similar distinction between the rights of a husband and wife,[1] but generally the rule is the same for one as the other. Little heed in theory or practice is given to the old arguments about the superior importance of woman's chastity because of the danger to the purity of the offspring. She is generally placed on equal footing with her husband.[2]

Adultery is the voluntary sexual intercourse of a married man or woman with a person other than the offender's wife or husband.[3]

Adultery is a cause for absolute, but not partial, divorce in every state where divorces are granted.[4] The adultery must be pleaded,[5] but the fact that the action is based on adultery does not prevent suit on other grounds.[6] In Kentucky sexual cohabitation by husband and wife before marriage is not a ground for divorce;[7] and in North Carolina, although the law was formerly different, it is now ground for an absolute divorce "if the husband or wife commits adultery."[8]

In some states adultery has been defined as habitual living in illicit relationship. But under such definition it has been held that "open and notorious adultery" may be committed if the parties live together for a single day.[9] A man may be guilty of

[1]Tew v. Tew, 80 N. Car. 316, 30 Am. Rep. 84; Setzer v. Setzer, 128 N. Car. 170, 38 S. E. 731, 83 Am. St. 666.

[2]Cumming v. Cumming, 135 Mass. 386, 46 Am. Rep. 476.

[3]Miner v. People, 58 Ill. 59; Hood v. State, 56 Ind. 263, 274, 26 Am. Rep. 21; Moore v. Moore (Mo. App.), 186 S. W. 541; Johnson v. Johnson, 78 N. J. Eq. 507, 80 Atl. 119; Nichols v. Nichols, 31 Vt. 328, 73 Am. Dec. 352.

[4]Brett v. Brett, 191 Iowa 262, 182 N. W. 241; Hubbard v. Hubbard, 127 Md. 617, 96 Atl. 860; Stewart v. Stewart, 105 Md. 297, 66 Atl. 16; Reinhard v. Reinhard (N. J.), 114 Atl. 404; Allen v. Allen, 125 App. Div. 838, 110 N. Y. S. 303.

[5]Eward v. Eward, 72 Ind. App. 638, 125 N. E. 468.

[6]Holloway v. Holloway, 51 Cal. App. 445, 196 Pac. 926.

[7]Rosenberger v. Rosenberger, 150 Ky. 803, 150 S. W. 1023.

[8]Con. Stats. of N. Car. (1920), 1659, (1). One act not sufficient. Prendergast v. Prendergast, 146 N. Car. 225, 59 S. E. 692.

[9]Morris v. Morris, 20 Ala. 168; Baker v. Baker, 136 Ky. 617, 124 S. W. 866; Kerby v. Kerby (Ky.), 112 S. W. 927; Prendergast v. Prendergast, 146 N. Car. 225, 59 S. E. 692; Hansley v. Hansley, 32 N. Car. 506. In Louisiana the offense is that of keeping his concubine in the common dwelling, or openly and publicly elsewhere.

adultery with a woman he has married after having obtained a void decree of divorce.[10] The husband is entitled to the divorce though he may be guilty of cruelty in threatening the wife with violence for her unchastity.[11]

A man is guilty of adultery, even though the offense was committed with a woman who was stupefied with liquor at the time.[12] Where the offense was committed without the consent of the woman, the man may be convicted of adultery;[13] and where the husband commits rape, his wife may have a divorce on the grounds of adultery. In such a case the adultery is on the part of the husband alone.[14] Emission is not necessary to make the act of adultery complete; penetration is sufficient.[15]

What constitutes carnal knowledge of a woman must be the same in prosecutions for adultery as in prosecutions for rape. Penetration is all that is required to complete the crime.[16] In cases for divorce on this ground the defendant is entitled to the same presumption of innocence as in criminal cases and this must be overcome by evidence.[17]

§ 226. **The act must be voluntary.**—The act must be voluntary and criminal, for, if the woman is insane at the time or is ravished,[18] she does not commit adultery, or if the act is committed under a mistaken belief that the husband or wife is dead, it is no ground for divorce.[19] But insanity in the form of a morbid, uncontrollable sexual desire is no defense, nor is insanity

[10]Ackerman v. Ackerman, 200 N. Y. 72, 93 N. E. 192. See also Hoffman v. Hoffman, 187 N. Y. S. 141.

[11]Arix v. Arix, 212 Mich. 438, 180 N. W. 463.

[12]Commonwealth v. Bakeman, 131 Mass. 577, 41 Am. Rep. 248.

[13]State v. Sanders, 30 Iowa 582; State v. Henderson, 84 Iowa 161, 50 N. W. 758.

[14]Johnson v. Johnson, 78 N. J. Eq. 507, 80 Atl. 119.

[15]Commonwealth v. Hussey, 157 Mass. 415, 32 N. E. 362.

[16]Waller v. State, 40 Ala. 325; State v. Shields, 45 Conn. 256; Commonwealth v. Roosnell, 143 Mass. 32, 8 N. E. 747; Commonwealth v. Squires, 97 Mass. 59; Comstock v. Commonwealth, 50 Mass. 205; People v. Crowley, 102 N. Y. 234, 6 N. E. 384; Osgood v. State, 64 Wis. 472, 25 N. W. 529.

[17]German v. German, 137 Md. 424, 112 Atl. 789; McCrary v. McCrary (Tex. Civ. App.), 230 S. W. 187.

[18]Johnson v. Johnson, 78 N. J. Eq. 507, 80 Atl. 119; Laudo v. Laudo, 177 N. Y. S. 396; Nichols v. Nichols, 31 Vt. 328, 73 Am. Dec. 352. See notes, 47 Am. Dec. 469; 34 L. R. A. 162.

[19]Mims v. Mims, 33 Ala. 98; Wray v. Wray, 19 Ala. 522; Broadstreet v. Broadstreet, 7 Mass. 474; People v. Chapman, 62 Mich. 280, 28 N. W. 896, 4 Am. St. 857; Kretz v. Kretz, 73 N. J. Eq. 246, 67 Atl. 378; Valleau v. Valleau, 6 Paige (N. Y.) 207; Nichols v. Nichols, 31 Vt. 328, 73 Am. Dec. 352.

subsequent to the act.[20] Religious belief in polygamy or concubinage is no defense.[21] The fact that the spouse committing adultery while sane, afterwards becomes insane does not prevent a divorce on the ground of such adultery.[22]

§ 227. **Appearance of particeps criminis.**—At common law it is well settled that the alleged paramour or particeps criminis has no legal right to appear or intervene in divorce proceedings, although his or her character or reputation may be directly assailed, but there is a tendency on the part of courts and legislatures to permit an alleged particeps criminis to intervene and defend his or her good name.[23] In Massachusetts, by express statute, the alleged particeps criminis may appear as a matter of right, whether the libel is contested or not.[24] And by rule of court in several states, the co-respondent must be notified that he or she may appear and contest if he or she so desires.[25]

§ 228. **Effect of separation.**—The fact that the parties are living apart through agreement or because of desertion by defendant is no defense to an action for divorce on account of adultery. Such separation cannot license either party to adulterous habits of life.[26] Neither is desertion by the plaintiff a defense unless such desertion is equally a ground for divorce. Where it has not ripened into such cause on account of the lack of lapse of the statutory period of time, it is no defense,[27] nor even where the plaintiff maliciously turned the defendant from his home, where such act gave defendant cause only for separate maintenance.[28] So

[20]See note, 34 L. R. A. 163.

[21]D'Aguilar v. D'Aguilar, 1 Hag. Ecc. 773.

[22]Thomason v. Thomason, 142 Ky. 176, 134 S. W. 161.

[23]Clay v. Clay, 21 Hun (N. Y.) 609.

[24]Mass. Gen. Laws, 1921 Chap. 208, § 9.

[25]See synopsis of divorce laws of the several states, Ch. 50.

[26]Watts v. Watts, 160 Mass. 464, 36 N. E. 479, 23 L. R. A. 187, 39 Am. St. 509; Franklin v. Franklin, 154 Mass. 515, 28 N. E. 681, 13 L. R. A. 843, 26 Am. St. 266; Freeman v. Freeman, 82 N. J. Eq. 360, 88 Atl. 1071, 49 L. R. A. (N. S.) 1042; Galusha v. Galusha, 116 N. Y. 635, 22 N. E. 1114, 6 L. R. A. 487, 15 Am. St. 453; Anderson v. Anderson, 1 Edw. Ch. (N. Y.) 380. See also Clark v. Fosdick, 118 N. Y. 7, 22 N. E. 1111, 6 L. R. A. 132, 16 Am. St. 733; Richardson v. Richardson, 4 Port. (Ala.) 467, 30 Am. Dec. 538; Dupont v. Dupont, 10 Iowa 112, 74 Am. Dec. 378; Ellett v. Ellett, 157 N. Car. 161, 72 S. E. 861, 39 L. R. A. (N. S.) 1135, Ann. Cas. 1913B, 1215; See note, 83 Am. St. 668.

[27]Watts v. Watts, 160 Mass. 464, 36 N. E. 479, 23 L. R. A. 187, 39 Am. St. 509.

[28]Ellett v. Ellett, 157 N. Car. 161, 72 S. E. 861, 39 L. R. A. (N. S.) 1135, Ann. Cas. 1913B, 1215.

a divorce a mensa et thoro was held no defense to an action on ground of adultery.[29] But where the plaintiff's acts are ground for divorce they are a good defense to his actions against defendant for divorce because of her subsequent adultery.[30]

§ 229. **Connivance.**—Connivance is the consent of the complainant to the respondent's commission of the offense complained of. A corrupt intent is essential.[31] The necessary consent may be either express or implied, and it is a bar to divorce, even for adultery committed with the consent or connivance of the other. The law does not permit connivance in the offense and denies relief where it is shown. This defense is in the nature of an estoppel of the plaintiff.[32]

When a husband intentionally lays a lure for his wife, either acting in person or through an agent, his will necessarily concurs in her act. The husband must not lay temptations in the way of the wife.[33] It does not, however, act as an estoppel, where the acts connived at occurred at a different time and after the acts alleged as adulterous, and the fact that the husband laid a trap for his wife and caught her flagrante delicto has been held insufficient, but active or passive consent is enough.[34] Connivance is

[29]Cariens v. Cariens, 50 W. Va. 113, 40 S. E. 335, 55 L. R. A. 930.

[30]Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717.

[31]Herriford v. Herriford, 169 Mo. App. 641, 155 S. W. 855; Sargent v. Sargent (N. J.), 114 Atl. 428. See also Jordan v. Jordan, 149 La. 428, 89 So. 313.

[32]Riesen v. Riesen, 148 Ill. App. 460; Eames v. Eames, 133 Ill. App. 665; Noyes v. Noyes, 194 Mass. 20, 79 N. E. 814, 120 Am. St. 517; Donohue v. Donohue, 150 Mo. App. 610, 141 S. W. 465; White v. White, 84 N. J. Eq. 512, 95 Atl. 197; Rademacher v. Rademacher, 74 N. J. Eq. 570, 70 Atl. 687; Richardson v. Richardson, 114 N. Y. S. 912; Thompson v. Thompson, 50 Pa. Super. Ct. 159; Smith v. Smith (Tex. Civ. App.), 218 S. W. 602. See also Rosenwasser v. Rosenwasser, 110 Misc. 38, 179 N. Y. S. 617. Hedden v. Hedden, 21 N. J. Eq. 61. Connivance is the complainant's consent, express or implied, to the misconduct alleged as a ground for divorce. In 2 Bishop Marriage, Divorce and Separation, § 203, it is defined as, "A married party's corrupt consenting to evil conduct in the other whereof afterward he complains." For collusion, see § 420, post.

[33]Harmon v. Harmon, 111 Kans. 786, 208 Pac. 647; Fisher v. Fisher, 74 Pa. Super. Ct. 538.

[34]Lambert v. Lambert, 165 Iowa 367, 145 N. W. 920; Engle v. Engle 153 Iowa 285, 133 N. W. 654; Leavitt v. Leavitt, 229 Mass. 196, 118 N. E. 262; Morrison v. Morrison, 142 Mass. 361, 8 N. E. 59, 56 Am. Rep. 688; Herriford v. Herriford, 169 Mo. App. 641, 155 S. W. 855; Farwell v. Farwell, 47 Mont. 574, 133 Pac. 958, Ann. Cas. 1915C, 78. On connivance and collusion, see 2 A. L. R. 689 and

generally held no defense to subsequent acts of adultery.[35]

It is very properly held that the adultery may not be proved by a letter written by a third party.[36]

§ 230. **Keeping concubine.**—Living in open adultery or keeping a concubine, within the meaning of a statute granting a divorce for such cause, may consist in being kept by her in her own house.[37]

§ 231. **Mistake of law as defense.**—A mistake of law is no defense to a charge of adultery.[38] And where one has intercourse after a second marriage, when the divorce from the prior marriage was illegal, it is adultery, and a sufficient ground for a divorce from the prior marriage, though there was a bona fide belief that the divorce was valid.[39]

§ 232. **Mistake of fact as defense.**—Where a woman has connection with a man under the honest belief that he is her husband, or where she has married a man with whom she has intercourse under the belief that her husband is dead, she is not guilty of adultery, for there is a mistake of fact as to her standing and rights.[40] But if the intercourse continues under the second marriage after knowledge that the first spouse is living, she is guilty.[41]

§ 233. **Knowledge of adultery.**—Complainant may be allowed to prove the adultery alleged, although he knew it some time, and the defendant may prove such scienter as a defense,[42] for continued cohabitation after knowledge of adultery may amount to condonation.[43]

note on page 699 on collusion as bar to divorce. On page 701 the distinction between collusion and connivance is pointed out, collusion being a corrupt agreement, while connivance is a corrupt consenting.

[35]Viertel v. Viertel, 99 Mo. App. 710, 75 S. W. 187.

[36]Mitchell v. Mitchell, 193 Iowa 153, 185 N. W. 62.

[37]Adams v. Hurst, 9 La. 243.

[38]Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244.

[39]Simonds v. Simonds, 103 Mass. 572, 4 Am. Rep. 576; Leith v. Leith, 39 N. H. 20.

[40]Valleau v. Valleau, 6 Paige (N. Y.) 207.

[41]Mathewson v. Mathewson, 18 R. I. 456, 28 Atl. 801, 49 Am. St. 782.

[42]McCafferty v. McCafferty, 8 Blackf. (Ind.) 218.

[43]Hunter v. Hunter, 121 Ill. App. 380; McDuffee v. McDuffee, 169 Mich. 410, 135 N. W. 242; Speiser v. Speiser, 188 Mo. App. 328, 175 S. W. 122; Clark v. Clark, 78 N. J. Eq. 304, 81 Atl. 1126; Johnston v. Johnston, 116 Va. 678, 82 S. E. 694; Rogers v. Rogers, 81 Wash. 502, 142 Pac. 1150.

A valid separation agreement entered into by the husband without knowledge of the previous adultery of the wife will not bar his action for divorce on the ground of such adultery.[44]

§ 234. **Effect of divorce for adultery on legitimacy of children.**—In order to prove the issue of a married woman illegitimate, there must be proof of non-access of the husband beyond a reasonable doubt.[45]

§ 235. **Non-access.**—The non-access of the husband must be shown to be of such duration that the husband could not have been the father of the child, or, in other words, it must be shown that the husband could not have had sexual intercourse with the wife during the period within which, in the usual course of nature, it must have been begotten.[46] As the law presumes in favor of legitimacy and that the husband had access to the wife, this presumption must be clearly overcome by evidence that he could not have possibly had intercourse with her, and no admissions or statements of either that while living together they did not, in fact, have intercourse will be received to alter the presumption.[47]

§ 236. **Joinder of other causes of action.**—Under the New York code a cause of action for adultery and one for separation for abandonment and cruel treatment may not be united in one action.[48]

§ 237. **Specifications in complaint in general.**—In bringing a libel or petition for divorce on the ground of adultery, the wording of the statute should always be followed and the name of the particeps criminis, if known, alleged;[49] also the time and place of the alleged offense; and if the offense is alleged to have been committed with a party unknown or at a place unknown, the libelant will be obliged to prove such to be the fact. A libel for divorce should be signed by the libellant.[50]

[44]Canning v. Canning, 87 Vt. 492, 89 Atl. 1088.

[45]Sullivan v. Kelley, 85 Mass. 148; Phillips v. Allen, 84 Mass. 453; Hemnenway v. Towner, 83 Mass. 209; Egbert v. Greenwalt, 44 Mich. 245, 6 N. W. 645; Van Aernam v. Van Aernam, 1 Barb. Ch. (N. Y.) 375.

[46]Bancroft v. Bancroft, 4 Boyce (Del.), 85 Atl. 561; Phillips v. Allen, 84 Mass. 453.

[47]Hemmenway v. Towner, 83 Mass. 209; Clapp v. Clapp, 97 Mass. 531. See also Hilton v. Hilton (Cal. App.), 201 Pac. 337.

[48]Conrad v. Conrad, 124 App. Div. 780, 109 N. Y. S. 387.

[49]Church v. Church, 3 Mass. 157.

[50]Gould v. Gould, 42 Mass. 382; Winslow v. Winslow, 7 Mass. 96; Willard v. Willard, 4 Mass. 506.

The proof is limited to the particular acts of adultery charged.[51]

§ 238. **Particeps criminis must be named if known.**—In bringing a libel or petition for divorce on the ground of adultery, the name of the particeps criminis should always be inserted when it is known. If unknown to the petitioner, it should be so stated in the libel; also the time and place where the act was committed, if it is known.[52] But if the libel alleges that the exact time and place of the adultery are unknown, it will be sufficient to allege that the offense was committed in a certain town or city between specified dates.[53] And if the libel states that the particeps criminis is unknown to the libellant, the evidence must show such to be the fact.[54] And where the libel states that the adultery was committed with a certain person, and the evidence shows it to be with another person or an unknown person, it has been held insufficient.[55]

The rule would seem to be different where the complaint or libel alleges adultery with a named person and other persons to the complainant unknown. Here the divorce may be granted for adultery with another than the named co-respondent.[56]

§ 239. **Connivance should be pleaded.**—Connivance is an affirmative defense and plaintiff is not required to negative it.[57] In setting up the defense of connivance it must be pleaded specially. It does not of itself admit adultery, and can be consistently pleaded with a denial of guilt.[58]

A woman who authorizes her attorney to employ detectives to watch her husband, whom she suspects of infidelity, for the purpose of obtaining evidence which will enable her to procure a divorce, and who goes with them at a time appointed to surprise him in a compromising position with a lewd woman, employed by them for that purpose, may be found to have known that the

[51]Buswell v. Buswell, 146 Iowa 52, 124 N. W. 770.

[52]Holston v. Holston, 23 Ala. 777; Choate v. Choate, 3 Mass. 391; Miller v. Miller, 20 N. J. Eq. 216; Wood v. Wood, 2 Paige (N. Y.) 108; Sanders v. Sanders, 25 Vt. 713.

[53]Scheffling v. Scheffling, 44 N. J. Eq. 438, 15 Atl. 577; Mitchell v. Mitchell, 61 N. Y. 398.

[54]Miller v. Miller, 20 N. J. Eq. 216.

[55]Washburn v. Washburn, 5 N. H. 195. See Adams v. Adams, 20 N. H. 299, 51 Am. Dec. 219, holding that a charge of adultery with person unknown to the libellant is sufficient.

[56]Miller v. Miller, 194 App. Div. 183, 185 N. Y. S. 313.

[57]Smith v. Smith (Tex. Civ. App.), 218 S. W. 602.

[58]Moorsom v. Moorsom, 3 Hag. Ecc. 87; Rogers v. Rogers 3 Hag. Ecc. 57.

woman's movements were governed by them, so as to show connivance on her part which will bar her right to divorce. And the right to divorce for adultery will be barred, if plaintiff consents to the employment of a person to allure defendant into the offense for which the action is brought, as where the husband employed a spy to test his wife's virtue.[59] Thus, suppose a husband connives at the commission of adultery by his wife; or unduly and improperly exposes her to temptation; or in some way violates the marriage contract to the extent that the violation would be a good ground for divorce, she will be excused.[60] He can not successfully prosecute an action for divorce against her.[61]

The courts will use their discretion to defeat any and all attempts to use the forms of the law of divorce to minister to the caprices of the fickle-minded or to the revenge of the disappointed or vindictive, or to the passions of the incontinent.

§ 240. **Amendment to libel or petition.**—The bill may be amended in accordance with the facts by setting out the name of the particeps criminis or by stating that the name is unknown.[62] If the name of the particeps criminis is unknown, the offense must be identified by other particulars, such as the description of the unknown person or such designation of time, place, and the circumstances as will enable the defendant and the court to distinguish the particular offense charged in the libel or petition. And where the libel alleges that the act of adultery was with a certain person on a certain day, the court may allow the libel to be amended, changing the allegation so as to charge adultery with another person on another day.[63] In bringing a libel for divorce on the ground of adultery, it is always better, after naming the particeps criminis, to insert "or with some other person or persons to your libellant unknown."[64]

The plaintiff may not set up in an amended complaint acts of

[59]May v. May, 108 Iowa 1, 78 N. W. 703, 75 Am. St. 202.

[60]2 Bishop Marriage and Divorce, chap. 5; Clapp v. Clapp, 97 Mass. 531.

[61]Pierce v. Pierce, 20 Mass. 299, 15 Am. Dec. 210; Karger v. Karger, 19 Misc. 236, 44 N. Y. S. 219, 26 Civ. Proc. 161; Myers v. Myers, 41 Barb. (N. Y.) 114; Briggs v. Briggs, 56 Wash. 580, 106 Pac. 126.

[62]Church v. Church, 3 Mass. 157; Choate v. Choate, 3 Mass. 391, Wood v. Wood, 2 Paige (N. Y.) 108; Germond v. Germond, 6 Johns. Ch. (N. Y.) 347, 10 Am. Dec. 335; Sanders v. Sanders, 25 Vt. 713.

[63]Tourtelot v. Tourtelot, 4 Mass. 506.

[64]See Form, § 931, p. 754.

adultery committed after the commencement of the action.[65] The court may, however, permit the defendant to plead as a counterclaim adulterous acts of the plaintiff since the action was commenced.[66]

§ 241. **Burden of proof.**—The burden of proof is on the plaintiff and the defendant is not required to produce evidence to defeat the suit until a prima facie case is made against her.[67] A divorce was rightly granted in a case where two unimpeached witnesses testified to circumstances leaving no room for doubt that adultery was committed and the contradicting evidence was negative and general in character and the husband did not testify.[68]

§ 242. **Circumstantial evidence.**—Adultery may be proved by circumstantial evidence, but the evidence must be clear and positive,[69] showing an opportunity as to time and place to commit the act, and a willingness on the part of the defendant. In other words the proof must show both an inclination and an opportunity to commit the offense.[70]

[65]Beanley v. Beanley, 191 N. Y. S. 398; Ames v. Ames, 109 Misc. 161, 178 N. Y. S. 177.

[66]Ames v. Ames, 109 Misc. 161, 178 N. Y. S. 177. See also Arix v. Arix, 212 Mich. 438, 180 N. W. 463.

[67]Baker v. Baker, 136 Ky. 617, 124 S. W. 866; Ellebrecht v. Ellebrecht (Mo. App.), 243 S. W. 209; Ellett v. Ellett, 157 N. Car. 161, 72 S. E. 861, 39 L. R. A. (N. S.) 1135, Ann. Cas. 1913B, 1215; Jenkins v. Jenkins, 103 Ore. 208, 204 Pac. 165; Taft v. Taft, 80 Vt. 256, 67 Atl. 703, 130 Am. St. 984.

[68]Colletti v. Tranchina, 151 La. 403, 91 So. 818.

[69]Symons v. Symons, 275 Fed. 1015; McKitrick v. McKitrick, 49 App. D. C. 109, 261 Fed. 451; Krous v. Krous, 41 App. D. C. 200; Le May v. Le May, 205 Ala. 694, 89 So. 49; Leonard v. Leonard (Ark.), 142 S. W. 1133; Aston v. Aston, 14 Cal. App. 323, 111 Pac. 1035; Neff v. Neff, 96 Conn 273, 114 Atl. 126; Brown v. Brown, 27 Idaho 205, 148 Pac. 45; Balswic v. Balswic, 179 Ill. App. 118; Smith v. Smith, 149 Ill. App. 596; Jones v. Jones, 124 Ill. App. 201; Leupold v. Leupold, 164 Iowa 595, 146 N. W. 55; Carter v. Carter, 139 Md. 265, 114 Atl. 902; Freeman v. Freeman, 238 Mass. 150, 130 N. E. 220; Stackhouse v. Stackhouse, 88 Nebr. 184, 129 N. W. 257; Cartan v. Cartan, 93 N. J. Eq. 175, 115 Atl. 353; Messick v. Messick, 93 N. J. Eq. 220, 115 Atl. 379; Sargent v. Sargent, 92 N. J. Eq. 703, 114 Atl. 439. Rector v. Rector, 78 N. J. Eq. 386, 79 Atl. 295; Axtell v. Axtell, 119 N. Y. S. 644; Hagy v. Hagy, 76 Pa. Super. Ct. 288; McCune v. McCune, 31 Pa. Super. Ct. 248; McCrary v. McCrary (Tex. Civ. App.), 230 S. W. 187; Holm v. Holm, 44 Utah 242, 139 Pac. 937; Taft v. Taft, 80 Vt. 256, 67 Atl. 703, 130 Am. St. 984, 12 Ann. Cas. 959; Nicely v. Nicely, 81 W. Va. 269, 94 S. E. 749.

[70]Koenigstein v. Koenigstein, 53 Cal.

Mere suspicion or circumstances of suspicion will not suffice.[71] The circumstances must be such as would lead the guarded discretion of a reasonable and just man to no other conclusion.[72] Where the circumstances singly or together admit of two interpretations, the interpretation in favor of innocence should be adopted.[73]

As the offense is almost invariably clandestine and committed only when every precaution has been taken to preclude the possibility of discovery, and as it is very rarely indeed that the parties are surprised in the direct act of adultery, all the circumstances should be carefully considered,[74] and what would be evidence in one case might not be in another. A preponderance of evidence is all that is required.[75]

The inference of adultery should not be drawn from circumstances which can be reasonably reconciled with the presumption of innocence.[76] Neither should adultery be presumed where the facts and circumstances relied upon may as well be attributed to an innocent as a guilty motive.[77] Direct proof of adultery is not

App. 673, 200 Pac. 730; Bennett v. Bennett, 48 Cal. App. 670, 192 Pac. 180; Torrens v. Torrens (N. J. Ch.), 118 Atl. 332; Smith v. Smith (N. J.), 114 Atl. 412; Story v. Story, 91 N. J. Eq. 515, 110 Atl. 908; Slack v. Slack, 89 N. J. Eq. 589, 105 Atl. 894; Pollock v. Pollock, 71 N. Y. 137; Jenkins v. Jenkins, 103 Ore. 208, 204 Pac. 195; King v. King, 75 Pa. Super. Ct. 19.

[71]Topham v. Topham, 50 App. D. C. 229, 269 Fed. 1013; McKitrick v. McKitrick, 49 App. D. C. 109, 261 Fed. 451; Bennett v. Bennett, 48 Cal. App. 670, 192 Pac. 180; Emory v. Emory (Del. Super.), 111 Atl. 540; Shaffer v. Shaffer (Iowa), 181 N. W. 261; Butts v. Butts, 185 Iowa 954, 171 N. W. 295; Gelbman v. Gelbman, 194 App. Div. 137, 184 N. Y. S. 902; Bowers v. Bowers, 98 Ore. 548, 194 Pac. 697; Schutte v. Schutte, 90 W. Va. 787, 111 S. E. 840.

[72]Mosser v. Mosser, 29 Ala. 313; Freeman v. Freeman, 136 Ark. 288, 206 S. W. 439; Dilatush v. Dilatush, 86 N. J. Eq. 346, 98 Atl. 255; Frost v. Frost, 85 N. J. Eq. 571, 96 Atl. 1010; Berckmans v. Berckmans, 17 N. J. Eq. 453; Gust v. Gust, 70 Wash. 695, 127 Pac. 292.

[73]Sargent v. Sargent, 92 N. J. Eq. 703, 114 Atl. 439; Burgess v. Burgess, 173 N. Y. S. 505.

[74]Daily v. Daily, 64 Ill. 329; Commonwealth v. Gray, 129 Mass. 474, 37 Am. Rep. 378; Commonwealth v. Bowers, 121 Mass. 45.

[75]But see Luderitz v. Luderitz, 88 N. J. Eq. 103, 102 Atl. 661, where the court says, "practically that degree of certainty which is required to justify conviction in a criminal case."

[76]Mosser v. Mosser, 29 Ala. 313; Jeter v. Jeter, 36 Ala. 391; Doolittle v. Doolittle, 166 Iowa 625, 147 N. W. 893; Ellebrecht v. Ellebrecht (Mo. App.), 243 S. W. 209.

[77]Allen v. Allen, 101 N. Y. 658, 5 N. E. 341; Anderson v. Anderson, 78 W. Va. 118, 88 S. E. 653, 2 A. L. R. 1617.

required. It may be shown by any circumstances that naturally lead the mind by a fair inference to the natural conclusion that it has taken place.[78] If the evidence is reasonably consistent with the innocence of the defendant, it should always be interpreted in his or her favor.[79]

§ 243. **Evidence of adulterous disposition.**—Evidence of adulterous acts committed with a certain person after the filing of the libel is admissible to show the disposition and the relations between the parties at the time the adultery complained of was committed.[80] Where it is alleged that the libellee has committed adultery with several persons, evidence of sexual intercourse between the libellee and one of the persons before the marriage is held admissible, as determining the character of the alleged adulterous acts occurring after the marriage.[81] And upon the trial of an indictment for adultery, evidence of other acts of adultery committed by the same parties, near the time charged, though in another county, is admissible to support the indictment.[82]

Evidence of antenuptial incontinence, however, is inadmissible.[83] The fact that the wife was a prostitute at the time of her marriage will not bar suit for adultery while the marriage existed.[84]

In a criminal prosecution proof of an adulterous mind on the part of both parties may be established by circumstantial evi-

[78]Bast v. Bast, 82 Ill. 584; German v. German, 137 Md. 424, 112 Atl. 789; McKenna v. McKenna, 84 N. J. Eq. 190, 96 Atl. 890. It must be so clear and strong as to carry conviction of the truth of the charge. Huff v. Huff, 73 W. Va. 330, 80 S. E. 846, 51 L. R. A. (N. S.) 282.

[79]Powell v. Powell, 80 Ala. 595, 1 So. 549; Jeter v. Jeter, 36 Ala. 391; Mosser v. Mosser, 29 Ala. 313; State v. Stiles, 62 Ill. App. 408; Aitchison v. Aitchison, 99 Iowa 93, 68 N. W. 573; Burke v. Burke, 44 Kans. 307, 24 Pac. 466, 21 Am. St. 283; Knittel v. Knittel, 87 N. J. Eq. 701, 102 Atl. 809; Cooper v. Cooper, 82 N. J. Eq. 581, 91 Atl. 731; Hurtzig v. Hurtzig, 44 N. J. Eq. 320, 15 Atl. 537; Steffens v. Steffens, 16 Daly (N. Y.) 363, 11 N. Y. S. 424, 19 Civ. Proc. 267, 33 N. Y. St. 643.

[80]Spurlock v. Spurlock, 80 Ark. 37 96 S. W. 753; Thayer v. Thayer, 101 Mass. 111, 100 Am. Dec. 110; Commonwealth v. Merriam, 31 Mass. 518, 25 Am. Dec. 420; Taft v. Taft, 80 Vt. 256, 67 Atl. 703, 130 Am. St. 984, 12 Ann. Cas. 959. See note, 16 Ann. Cas. 1118.

[81]Houlton v. McGuirk, 122 La. 359, 47 So. 681, 16 Ann. Cas. 1117; Brooks v. Brooks, 145 Mass. 574, 14 N. E. 777, 1 Am. St. 485.

[82]Commonwealth v. Nichols, 114 Mass. 285, 19 Am. Rep. 346.

[83]Earl v. Earl, 83 N. J. Eq. 341, 90 Atl. 1135.

[84]Wade v. Wade (Mo. App.), 229 S. W. 432.

dence.[85] Letters and photographs of a salacious character are generally held too remote to show that defendant was of such a depraved character as to be likely to commit adultery.[86] It is not necessary to prove adulterous inclination as a condition to the admission of circumstantial evidence to establish the act of adultery.[87]

§ 244. **Evidence of opportunity.**—To grant a divorce for adultery direct evidence is not required; but there must be shown the opportunity for the act and the will to commit it.[88] Mere imprudence, indiscretion, or folly, is not conclusive evidence. Mere evidence that there was an opportunity for illicit intercourse is held to be insufficient. Two facts must be established, a criminal disposition or desire in the minds of both, and an opportunity to commit the crime.[89] There must be some accompanying circumstances which fairly induce the belief that the residence of the parties under the same roof, if they do so reside, was not for a proper purpose.[90]

§ 245. **Evidence of private detectives.**—One who is hired for the purpose of watching and detecting in wrong a husband or wife, and whose services are to extend to the giving of evidence, based upon his work as such detective, is looked upon with some degree of suspicion as a witness,[91] although his testimony is to have the same consideration as that of any other witness, if nothing appears to impeach his credibility.[92] Some courts require

[85]State v. La More, 53 Ore. 261, 99 Pac. 417.

[86]Yates v. Yates, 211 N. Y. 163, 105 N. E. 195.

[87]State v. Weston, 90 Vt. 125, 96 Atl. 702.

[88]Phelps v. Phelps, 176 Ky. 456, 195 S. W. 779; Waer v. Waer (N. J.), 90 Atl. 1039; Giusto v. Giusto, 80 N. J. Eq. 355, 84 Atl. 617; Berckmans v. Berckmans, 16 N. J. Eq. 122; Hartshorn v. Hartshorn (Okla.), 168 Pac. 822; Thomas v. Thomas, 76 Pa. Super. Ct. 54.

[89]Grundy v. Grundy, 92 N. J. Eq. 687, 114 Atl. 552; Black v. Black, 30 N. J. Eq. 228; Till v. State, 132 Wis. 242, 111 N. W. 1109.

[90]Crane v. Crane, 128 Md. 214, 97 Atl. 535; Wille v. Wille, 88 N. J. Eq. 581, 103 Atl. 74; Pollock v. Pollock, 71 N. Y. 137; Gust v. Gust, 70 Wash. 695, 127 Pac. 292.

[91]German v. German, 137 Md. 424, 112 Atl. 789; Naylor v. Naylor, 59 Pa. Super. Ct. 547; Smith v. Smith (Tex. Civ. App.), 218 S. W. 602; Taft v. Taft, 80 Vt. 256, 67 Atl. 703, 130 Am. St. 984, 12 Ann. Cas. 959. See note, 12 Ann. Cas. 960.

[92]Blake v. Blake, 70 Ill. 622; Commonwealth v. Ingersoll, 145 Mass. 231, 13 N. E. 613; Slack v. Slack, 89 N. J. Eq. 589, 105 Atl. 894; Yates v. Yates, 211 N. Y. 163, 105 N. E. 195; Throckmorton v. Throckmorton, 86 Va. 768, 11 S. E. 289.

corroboration of this class of testimony,[93] for it is very plain that detectives are interested to justify their employment.[94] Such evidence is of especially little probative value when it appears that the purpose of securing the aid of such detectives was to secure evidence by promoting adultery.[95]

§ 246. **Entering house of ill-fame as evidence.**—Where it has been proved that the defendant entered a house of ill-fame, it has been held sufficient for granting a decree.[96] But such evidence is not always conclusive and may be rebutted by a satisfactory explanation.[97] It may not be shown that the defendant entered such a house after the suit for divorce was commenced.[98]

§ 247. **Venereal disease as evidence.**—Where one has contracted a venereal disease after marriage it is only prima facie proof of adultery.[99] But it raises a very strong presumption of guilt and the court will consider any circumstance tending to affirm this presumption.[1] Where the disease has been contracted long after marriage, adultery may be inferred.[2] But where the disease presents itself shortly after marriage, adultery will not be inferred, as it may be due to secondary syphilis, or it may have been contracted before marriage.[3] And where one has gonorrhea, it is not necessarily due to adultery, and it may be due to causes consistent with the innocence of both husband and wife.[4]

The husband's adultery will not be inferred from the presence of syphilis in the wife, because she may have contracted the disease by her own adultery, by contagion, or by accident. Either of these methods is consistent with his innocence.[5] Neither is it

[93]McCleary v. McCleary, 140 Md. 659, 118 Atl. 133; Sargent v. Sargent, 92 N. J. Eq. 703, 114 Atl. 439; Slack v. Slack, 89 N. J. Eq. 589, 105 Atl. 894. See also McCleary v. McCleary, 140 Md. 659, 118 Atl. 133 (testimony of child left to spy on father).

[94]German v. German, 137 Md. 424, 112 Atl. 789.

[95]Dennis v. Dennis, 68 Conn. 186, 36 Atl. 34, 34 L. R. A. 449, 57 Am. St. 95. See note, 12 Ann. Cas. 961.

[96]Daily v. Daily, 64 Ill. 329. See also Nolker v. Nolker (Mo. App.), 208 S. W. 128.

[97]Latham v. Latham, 30 Grat. (Va.) 307.

[98]Johanson v. Johanson, 12 Cal. App. 635, 108 Pac. 55.

[99]Mount v. Mount, 15 N. J. Eq. 162, 82 Am. Dec. 276; Johnson v. Johnson, 14 Wend. (N. Y.) 637.

[1]Cook v. Cook, 32 N. J. Eq. 475; Mount v. Mount, 15 N. J. Eq. 162, 82 Am. Dec. 276; Ferguson v. Ferguson, 1 Barb. Ch. (N. Y.) 604.

[2]North v. North, 5 Mass. 320.

[3]Mount v. Mount, 15 N. J. Eq. 162, 82 Am. Dec. 276.

[4]Holthoefer v. Holthoefer, 47 Mich. 260, 11 N. W. 150. But see Cook v. Cook, 32 N. J. Eq. 475.

[5]Homburger v. Homburger, 46 How. Pr. (N. Y.) 346.

established that the husband had a venereal disease by testimony that the husband had stains and spots on his linen, when the witness is unable to identify the linen as that worn by the husband.[6] Neither will a venereal disease be inferred, where the only evidence is that the husband had in his possession medicines supposed by physicians to be used in treating such disease. But where the husband was suffering from a venereal disease at the time of the marriage, and the fact was unknown to the wife at the time, but was discovered by her soon after, and she at once left him, having never cohabited with him, the court held that this was good ground for annulling the marriage on the ground of fraud.[7] The unexplained existence of a venereal disease after marriage, is evidence of adultery, but may be condoned.[8]

§ 248. **Evidence and letters of paramour.**—The evidence of a paramour, or particeps criminis, if admissible, should be very carefully scrutinized, as it is of the weakest kind[9] and usually should be corroborated.[10] As a witness, his own testimony may be used to discredit him.[11]

A clandestine correspondence conveying strong terms of attachment may show a criminal desire,[12] and so with documents in which the paramour holds herself out as the wife of the defendant.[13] The evidence of an alleged paramour, being particeps criminis, is weak but is not rejected.[14] A divorce should not be granted upon the uncorroborated testimony of a particeps criminis.[15]

[6]James v. James, 29 Nebr. 533, 45 N. W. 777.

[7]Smith v. Smith, 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 Am. St. 440; Crane v. Crane, 62 N. J. Eq. 21, 49 Atl. 734; Ryder v. Ryder, 66 Vt. 158, 28 Atl. 1029, 44 Am. St. 833.

[8]Jones v. Jones, 18 N. J. Eq. 33, 90 Am. Dec. 607; McCrary v. McCrary (Tex. Civ. App.), 230 S. W. 187.

[9]Anderson v. Anderson, 152 Ky. 773, 154 S. W. 1; Letts v. Letts, 79 N. J. Eq. 630, 82 Atl. 845, Ann. Cas. 1913A, 1236.

[10]Payne v. Payne, 42 Ark. 235; Wahle v. Wahle, 71 Ill. 510; Evans v. Evans, 93 Ky. 510, 14 Ky. L. 628; 20 S. W. 605, Simons v. Simons, 13 Tex. 468.

[11]Lewis v. Lewis, 9 Ind. 105; Herrick v. Herrick, 31 Mich. 298.

[12]Lorenson v. Lorenson, 155 Ill. App. 35; Black v. Black, 30 N. J. Eq. 228. See also Mathews v. Guellant, 130 La. 459, 58 So. 149 (letters written to paramour admissible). In Lockhart v. Lockhart (Ark.), 220 S. W. 44, it was held that adultery could be shown by wife's letter to her alleged paramour.

[13]Aston v. Aston, 14 Cal. App. 323, 111 Pac. 1035.

[14]Berckmans v. Berckmans, 16 N. J. Eq. 122.

[15]Smith v. Smith, 181 Ky. 55, 203

§ 249. **Corroboration—Confessions.**—The confessions of the party charged, uncorroborated by other evidence, are not sufficient.[16] But the libellee's confessions of adultery are sufficient evidence to authorize a decree of divorce, if the circumstances proved by other evidence show that there is no collusion.[17] Admissions of counsel do not make out a case.[18]

In Alabama, no confession will be accepted as evidence. In Arizona, confessions and declarations of parties must be corroborated. In Maine, the confessions of the guilty party, if there is no evidence of collusion, may be received in proof of adultery.[19]

Very generally, when the charge is adultery, the courts are reluctant to grant a divorce upon the uncorroborated testimony of a particeps criminis.[20] But where it is impossible from all the circumstances to construe the evidence with the theory of innocence, a decree will be granted.[21] It has been held that the fact that a wife found an immoral instrument in her husband's pocket on two occasions was not sufficient of itself to establish the charge of adultery.[22]

§ 250. **Evidence of prostitutes and pimps.**—The testimony of prostitutes is looked upon with more suspicion, if anything, than that of any other particeps criminis, and corroboration is necessary.[23] A prostitute or a person filling the role of a "pimp"[24] is not thereby entirely disqualified, but the testimony of such person

S. W. 884; Clare v. Clare, 19 N. J. Eq. 37. See however Ross v. Ross, 89 N. J. Eq. 261, 104 Atl. 199, affirmed 105 Atl. 894.

[16]Kientz v. Kientz, 104 Ark. 381, 149 S. W. 86; Reynolds v. Reynolds, 151 Ga. 208, 106 S. E. 182; Miller v. Miller, 2 N. J. Eq. 139, 32 Am. Dec. 417; Matchin v. Matchin, 6 Pa. St. 332, 47 Am. Dec. 466. See notes, 30 Am. Dec. 546; 34 Am. St. 482.

[17]Billings v. Billings, 11 Pick. (Mass.) 461; Letts v. Letts, 79 N. J. Eq. 630, 82 Atl. 845, Ann. Cas. 1913A, 1236. See also Monypenny v. Monypenny, 171 App. Div. 134, 157 N. Y. S. 11. See note, 30 Am. Dec. 548.

[18]Streicher v. Streicher, 202 Mich. 588, 168 N. W. 409.

[19]Vance v. Vance, 8 Maine 132.

[20]Payne v. Payne, 42 Ark. 235; Herberger v. Herberger, 16 Ore. 327, 14 Pac. 70.

[21]Jeter v. Jeter, 36 Ala. 391; Names v. Names, 67 Iowa 383, 25 N. W. 671; Bowers v. Bowers, 88 N. J. Eq. 608, 104 Atl. 831. See also Holden v. Matteson, 38 App. D. C. 128.

[22]Simpkins v. Simpkins, 136 Ark. 588, 207 S. W. 28.

[23]Turney v. Turney, 4 Edw. Ch. (N. Y.) 566.

[24]Rosenberger v. Rosenberger, 150 Ky. 803, 150 S. W. 1023.

is not entitled to the weight and consideration that is required by the courts[25] unless there are facts in corroboration.[26]

§ 251. **Evidence—Reputation for chastity.**—It is generally permissible for the wife to prove her innocence of a charge of adultery by proof of her good character,[27] but her want of good character can not be proved as a matter of first instance by her husband.[28]

Where it was shown that the defendant frequently left her home in the absence of her husband, and would be absent several days at a time, and that her reputation for chastity was bad, the court held that this was not sufficient to establish the charge of adultery.[29]

Where the wife's reputation is not impeached her testimony should be given the same weight as that of any other witness except as affected by her interest.[30]

§ 252. **Evidence of familiarities.**—Evidence of familiarities on the part of the defendant and the person with whom the adultery is alleged to have been committed is admissible to prove the adultery, but it must be evidence showing more than mere association and friendly intercourse to support the allegation.[31] The entire circumstances surrounding the alleged acts of familiarity must be taken into consideration in determining their character.[32]

§ 253. **Record of criminal conviction as evidence.**—The record of conviction of respondent in a criminal proceeding is com-

[25]Wagoner v. Wagoner (Md.), 10 Atl. 221; Whitenack v. Whitenack, 36 N. J. Eq. 474; Clare v. Clare, 19 N. J. Eq. 37; Winston v. Winston, 165 N. Y. 553, 59 N. E. 273 (aff. 189 U. S. 506, 47 L. ed. 922, 23 Sup. Ct. 852); Anonymous, 17 Abb. Pr. (N. Y.) 48.

[26] McCarthy v. McCarthy, 143 N. Y. 235, 38 N. E. 288.

[27]Broderick v. Broderick, 40 Cal. App. 550, 181 Pac. 402; O'Bryan v. O'Bryan, 13 Mo. 16, 53 Am. Dec. 128; Milster v. Milster, 200 Mo. App. 603, 209 S. W. 620. But see Talley v. Talley, 215 Pa. 281, 64 Atl. 523.

[28]Earl v. Earl, 81 N. J. Eq. 444, 86 Atl. 940. See note, 16 Ann. Cas. 1119.

[29]Thomas v. Thomas, 51 Ill. 162. See also Blake v. Blake, 70 Ill. 618.

[30]Sargent v. Sargent, 92 N. J. Eq. 703, 114 Atl. 439. See also, Poe v. Poe, 93 Ark. 426, 124 S. W. 1029.

[31]Topham v. Topham, 50 App. D. C. 229, 269 Fed. 1013; Powell v. Powell, 80 Ala. 595, 1 So. 549; Grundy v. Grundy, 92 N. J. Eq. 687, 114 Atl. 552.

[32]Peavey v. Peavey, 76 Iowa 443, 41 N. W. 67; Rivers v. Rivers, 60 Iowa 378, 14 N. W. 774; Bishop v. Bishop, 17 Mich. 211; Conger v. Conger, 82 N. Y. 603; Pollock v. Pollock, 71 N. Y. 137.

petent evidence and is sufficient proof of marriage, also of adultery.[33]

[33]Dennis v. Dennis, 68 Conn. 186, 36 Atl. 34, 34 L. R. A. 449, 57 Am. St. 95; Anderson v. Anderson, 4 Maine 100, 16 Am. Dec. 237; Randall v. Randall, 4 Maine 326. Unchastity before marriage has been held not a ground for divorce. Bryant v. Bryant, 171 N. Car. 746, 88 S. E. 147, L. R. A. 1916E, 648.

CHAPTER 17

BIGAMY

Section

260. General rule—Jurisdiction.
261. Prior marriage must have been valid.
262. Unheard of for years.
263. Defense of unheard of absence for statutory period.
264. Meaning of the term "cohabitation."
265. Legitimacy of children.
266. Remarriage before decree is made absolute.
267. Evidence of bigamy.
268. Proof of marriage.

§ 260. **General rule—Jurisdiction.**—One already married is incompetent to enter into a second marriage, and such second marriage was absolutely void at common law and is frequently made so in this country by the precise language of statutes. In England suits for annulment or divorce a vinculo matrimonii for bigamy were frequent in the ecclesiastical courts. Such proceedings were there favored because, the marriages being absolutely void ab initio, it was considered to be to the interest of the possible offspring to have the rights fixed by court decree before lapse of time should destroy evidence.[1]

Apart from statute, in America it seems that in order to receive aid from the equity courts in annulment proceedings the aggrieved party must show good faith in entering into the marriage contract,[2] but where such good faith appears, divorce or annulment will be granted.[3] At present either divorce or annulment

[1]Lea v. Lea, 104 N. Car. 603, 10 S. E. 488, 17 Am. St. 692.

[2]Kelley v. Kelley, 161 Mass. 111, 36 N. E. 837, 25 L. R. A. 806, 42 Am. St. 389. See note, 25 L. R. A. 800. Tefft v. Tefft, 35 Ind. 44. Where a man marries a woman whom he knows to be the wife of another the courts will not relieve him from the consequences of his act by granting him a divorce.

[3]Batty v. Greene, 206 Mass. 561, 92 N. E. 715, 138 Am. St. 407; Buckley v. Buckley, 50 Wash. 213, 96 Pac. 1079, 126 Am. St. 900; Williams v. Williams, 63 Wis. 58, 23 N. W. 110, 53 Am. Rep. 253. See also Barth v. Barth, 102 Ky. 56, 19 Ky. L. 905, 42 S. W. 1116, 80 Am. St. 335. See note, Ann. Cas. 1914C, 1295.

is generally allowed for bigamy by statute, and jurisdiction is either specifically conferred upon the courts or inferred from general language conferring jurisdiction in annulment or divorce proceedings.[4]

Bigamy or polygamy is a statutory and not a common-law crime. It is committed where one, being legally married, marries another person during the life of his or her wife or husband.[5]

Stephen defines the word "marries" as meaning going through a form of marriage which the law of the place where such form is used recognizes as binding, whether the parties are, by that law, competent to contract marriage or not, and although by their fraud the form employed may, apart from the bigamy, have been insufficient to constitute a binding marriage.[6] The law does not require that the second marriage should be valid, since all bigamous marriages are void. It is enough that the accused obtained a license to marry and the service was performed by a minister.[7] Nor is it important on the question of guilt that the second wife knew that the first marriage had not been dissolved.[8]

§ 261. **Prior marriage must have been valid.**—Bigamy or polygamy is not committed when the prior marriage was void[9] but it would seem otherwise where the former marriage was merely voidable.[10]

[4]Eickhoff v. Eickhoff, 29 Colo. 295, 68 Pac. 237, 93 Am. St. 64; Barth v. Barth, 102 Ky. 56, 119 Ky. L. 905, 42 S. W. 1116, 80 Am. St. 335; Ridgely v. Ridgely, 79 Md. 298, 29 Atl. 597, 25 L. R. A. 800; Lea v. Lea, 104 N. Car. 603, 10 S. E. 488, 17 Am. St. 692; Stewart v. Vandervort, 34 W. Va. 524, 12 S. E. 736, 12 L. R. A. 50. See generally on annulment of bigamous marriages ante, § 175 et seq.

[5]Barth v. Barth, 102 Ky. 56, 19 Ky. L. 905, 42 S. W. 1116, 80 Am. St. 335; People v. Manfredonio, 117 Misc. 632, 191 N. Y. S. 748; Lea v. Lea, 104 N. Car. 603, 10 S. E. 488, 17 Am. St. 692. Clark Criminal Law (2d. ed.), § 116; 79 Am. St. 378, note. Of course the parties, strictly speaking, do not marry at all the second time, but simply go through an invalid ceremony. See note, 44 Am. Dec. 54.

[6]Stephen Dig. Crim. Law, § 257.

[7]Bethany v. State (Tex. Cr.), 237 S. W. 262.

[8]Bethany v. State (Tex. Cr.), 237 S. W. 262.

[9]Beggs v. State, 55 Ala. 108; Cooley v. State, 55 Ala. 162; People v. Beevers, 99 Cal. 286, 33 Pac. 844; Davis v. Commonwealth, 13 Bush. (Ky.) 318; McCombs v. State, 50 Tex. Cr. 490, 99 S. W. 1017, 9 L. R. A. (N. S.) 1036, 123 Am. St. 855, Hull v. State, 7 Tex. App. 593.

[10]Garner v. State, 9 Ala. App. 60, 64 So. 183; State v. Yoder, 113 Minn. 503, 130 N. W. 10, L. R. A. 1916C, 686; State v. Smith, 101 S. Car. 293, 85 S. E. 958, Ann. Cas. 1917C, 149.

Bigamy or polygamy is not committed by one of the parties, who marries after a decree of divorce, or when the prior marriage has been judicially declared void,[11] but the burden is on the defendant to show this.[12] And divorce as a defense to a prosecution for bigamy must have been obtained before the second marriage was contracted.[13] If the decree of divorce was granted by a court which had no jurisdiction, or the decree was obtained by fraud, it will be no defense to a criminal prosecution for bigamy or polygamy.[14] On the issue of the validity of the prior marriage it is proper to receive in evidence certified copies of the application of the defendant for a license, the marriage license and certificate of marriage where properly authenticated.[15]

§ 262. **Unheard of for years.**—Most states have passed statutes to the effect that if the husband or wife absent himself or herself for a period of years, and is unheard of during that time, and the other party marry not knowing him or her to be living or dead at the time, such party shall not be criminally liable for bigamy. And in all places over which the United States has exclusive jurisdiction the length of time is five years.[16]

§ 263. **Defense of unheard of absence for statutory period.**—If the defendant sets up the defense of unheard of absence for such length of time as, by statute, would relieve the accused party of a criminal offense, the burden of proof is on the state to show that the former husband or wife was living at the time of the marriage,[17] i. e. the presumption of continuance of life may be overcome by the presumption of innocence of the defendant.[18]

§ 264. **Meaning of the term "cohabitation."**—The word "cohabitation" as it is used in the statute means the dwelling or living

[11]State v. Norman, 13 N. Car. 222; People v. Hovey, 5 Barb. (N. Y.) 117.

[12]State v. Hicks, 143 N. Car. 689, 57 S. E. 441.

[13]Baker v. People, 2 Hill (N. Y.) 325.

[14]Thompson v. State, 28 Ala. 12; People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274; Vanfossen v. State, 37 Ohio St. 317, 41 Am. Rep. 507.

[15]Bohannon v. State (Ala. App.), 92 So 27.

[16]U. S. Rev. Stat. § 5352, U. S. Comp. Stat (1901) 3633. See also codes and statutes of the several states and Turner v. Williams, 202 Mass. 500, 89 N. E. 110, 24 L. R. A. (N. S.) 1199, 132 Am. St. 511.

[17]Hull v. State, 7 Tex. App. 593; Gorman v. State, 23 Tex. 646. In this case it was presumed that the first wife was still alive because the defendant had admitted it.

[18]Squire v. State, 46 Ind. 459.

together as a man and wife. It does not necessarily mean to live in the same house, for this word is not an essential part of the definition. The man and woman may dwell or live together in an open field, or in a railroad train, or in the same house. They are to be conveniently situated as to each other, and to act in regard to each other in such a manner as to lead the world to believe that the bigamous relation exists between them. In these polygamic relations there never is, and can not be, that intimate association and habitual attention given by the man to the various women, as exists between a husband and his wife in the monogamic state. Consequently, in the very nature of things, the proof of cohabitation can not be made as clear as in the case of a monogamic marriage, simply because the facts of which proof is to be made do not as abundantly exist.[19]

§ 265. **Legitimacy of children.**—A decree of divorce does not affect the legitimacy of children.[20]

§ 266. **Remarriage before decree is made absolute.**—Marriage and cohabitation before a decree is granted is adultery, although entered into in good faith and relying on statements of counsel that a decree had been entered granting a divorce.[21]

§ 267. **Evidence of bigamy.**—On the trial of an indictment for polygamy, it appeared that the defendant, a Protestant, had been married in Ireland to a Roman Catholic, by a Roman Catholic priest; that he had cohabited with the woman there as his wife; and that he had afterwards, while his wife was living, been married to another woman in the state where the indictment was brought. It was held that "the law of Ireland, being a foreign law, is a matter of fact of which our courts have no judicial knowledge without proof. A marriage solemnized by a priest, and under which the parties have cohabited as husband and wife, is prima facie a valid marriage everywhere."[22]

§ 268. **Proof of marriage.**—The marriage may be proved by any competent evidence, direct or circumstantial.[23] It may, of

[19]United States v. Snow, 4 Utah 295, 9 Pac. 686.

[20]Glass v. Glass, 114 Mass. 563.

[21]Gordon v. Gordon, 141 Ill. 160, 30 N. E. 446, 21 L. R. A. 387, 33 Am. St. 294.

[22]Commonwealth v. Kenney, 120 Mass. 387.

[23]People v. Le Doux, 155 Cal. 535, 102 Pac. 517; State v. Pendleton, 67 Kans. 180, 72 Pac. 527; Commonwealth v. Hayden, 163 Mass. 453, 40 N. E. 846, 28 L. R. A. 318, 47 Am. St. 468; People v. Crawford, 62 Hun (N. Y.) 160, 16 N. Y. S. 575, 10 N. Y. Cr. 59, 41 N. Y. St. 809.

course, be established by record proof,[24] but this is not indispensable.[25] Among other things the marriage may be proved by witnesses present at the ceremony;[26] by letters written by defendant which recognize the relation;[27] by admissions and declarations of the defendant with evidence of cohabitation;[28] by the license and the return thereon showing solemnization of marriage;[29] or by the fact of divorce proceedings having been instituted to terminate the marriage.[30]

The fact that the defendant when expostulated with for a sec-

[24]Johnson v. State, 60 Ark. 308, 30 S. W. 31; Tucker v. People, 122 Ill. 583, 13 N. E. 809; Tucker v. People, 117 Ill. 88, 7 N. E. 51; State v. Matlock, 70 Iowa 229, 30 N. W. 495; State v. White, 19 Kans. 445, 27 Am. Rep. 137; People v. Crawford, 62 Hun (N. Y.) 160, 16 N. Y. S. 575; State v. Melton, 120 N. Car. 591, 26 S. E. 933.

[25]McNeil v. State, 117 Ark. 8, 173 S. W. 826, 1200.

[26]Halbrook v. State, 34 Ark. 511, 36 Am. Rep. 17; Dale v. State, 88 Ga. 552, 15 S. E. 287; State v. Williams, 20 Iowa 98; State v. Hodgskins, 19 Maine 155, 36 Am. Dec. 742; People v. Perriman, 72 Mich. 184, 40 N. W. 425; State v. Ulrich, 110 Mo. 350, 19 S. W. 656; State v. Clark, 54 N. H. 456; State v. Abbey, 29 Vt. 60, 67 Am. Dec. 754.

[27]Lum Yan v. United States, 193 Fed. 970; Tucker v. People, 122 Ill. 583, 13 N. E. 809; Commonwealth v. Hayden, 163 Mass. 453, 40 N. E. 846, 28 L. R. A. 318, 47 Am. St. 468; Commonwealth v. Caponi, 155 Mass. 534, 30 N. E. 82.

[28]Caldwell v. State, 146 Ala. 141, 41 So. 473; Williams v. State, 54 Ala. 131, 25 Am. Rep. 665; Phillips v. State, 13 Ala. App. 325, 69 So. 356; Oliver v. State, 7 Ga. App. 695, 67 S. E. 886; Lowery v. People, 172 Ill. 466, 50 N. E. 165, 64 Am. St. 50; Squire v. State, 46 Ind. 469; State v. Seals, 16 Ind. 352; State v. Nadal, 69 Iowa 478, 29 N. W. 451; State v. Sanders, 30 Iowa 582; State v. Hughes, 35 Kans. 626, 12 Pac. 28, 57 Am. Rep. 195; State v. Libby, 44 Maine 469, 69 Am. Dec. 115; State v. Armington, 25 Minn. 29; State v. Melton, 120 N. Car. 591, 26 S. E. 933; Wolverton v. State, 16 Ohio 173, 47 Am. Dec. 373; Stanglein v. State, 17 Ohio St. 453; Commonwealth v. Murtagh, 1 Ashm. (Pa.) 272; State v. Gallagher, 20 R. I. 266, 38 Atl. 655; State v. Britton, 4 McCord (S. Car.) 256; Crane v. State, 94 Tenn. 86, 28 S. W. 317; Dumas v. State, 14 Tex. App. 464, 46 Am. Rep. 241; Oneale v. Commonwealth, 17 Grat. (Va.) 582; Warner v. Commonwealth, 2 Va. Cas. 95.

[29]Eldridge v. State, 126 Ala. 63, 28 So. 580; Squire v. State, 46 Ind. 459; People v. Perriman, 72 Mich. 184, 40 N. W. 425; State v. Melton, 120 N. Car. 591, 26 S. E. 933; Edwards v. State, 73 Tex. Cr. 380, 166 S. W. 517; Bryan v. State, 63 Tex. Cr. 200, 139 S. W. 981; Patterson v. State, 17 Tex. App. 102.

[30]State v. Ashley, 37 Ark. 403; Halbrook v. State, 34 Ark. 511, 36 Am. Rep. 17; State v. Gonce, 79 Mo. 600; Adkisson v. State, 34 Tex. Cr. 296, 30 S. W. 357; State v. Goodrich, 14 W. Va. 834.

ond marriage while the first wife was living, was silent, has been held competent as being in the nature of an admission.[31]

Oral proof may be received of the authority of the person solemnizing the marriage,[32] and it is generally enough to establish a legal marriage that the minister who performed the ceremony, professed and was generally understood to have such authority.[33]

[31]State v. Plym, 43 Minn. 385, 45 N. W. 848.

[32]United States v. Lambert, 2 Cranch C. C. 137, Fed. Cas. 15554; In re Damon, 6 Greenl. (Maine) 148; State v. Robbins, 28 N. Car. 23, 44 Am. Dec. 64; Waldrop v. State, 41 Tex. Cr. 194, 53 S. W. 130; Warner v. Commonwealth, 2 Va. Cas. 95.

[33]State v. Abbey, 29 Vt. 60, 67 Am. Dec. 754. See also § 136 et seq. ante, on Proof of Marriage. The presumption is that the parties bore the legal relation of husband and wife rather than an illegal relationship. Killackey v. Killackey, 156 Mich. 127, 120 N. W. 680; and the person who attacks its legality has the burden of proof. Murchison v. Green, 128 Ga. 339, 57 S. E. 709, 11 L. R. A. (N. S.) 702; Lando v. Lando, 112 Minn. 257, 127 N. W. 1125, 30 L. R. A. (N. S.) 940. In Wood v. State, 62 Ga. 406, proof of reputation alone without proof of cohabitation is held insufficient. With reference to prosecutions for bigamy, see Camden v. Belgrade, 75 Maine 126, 46 Am. Rep. 364. See also note in 36 Am. Dec. 745. On proof of marriage by record, see Gaines v. Relf, 12 How. (U. S.) 472, 13 L. ed. 1071; State v. Kean, 10 N. H. 347, 34 Am. Dec. 162.

CHAPTER 18

CRUELTY

Section

275. In general—Physical and mental cruelty.
276. Reasonable apprehension of violence.
277. Physical cruelty—Actual personal violence.
278. Cruel treatment endangering life.
279. Cruel treatment endangering health.
280. Communicating disease.
281. Denial of sexual intercourse.
282. Abuse of sexual intercourse.
283. Mental cruelty—Mental suffering.
284. Mutual cruelty or family jars.
285. False accusations.
286. Attempts to have spouse declared insane.
287. Abuse of child or others to punish spouse.
288. Unconcealed aversion—Discourtesy—Refusal to entertain.
289. Profanity—Vile language.
290. Associating with objectionable characters or compelling such association.
291. Abortion.
292. Indignities by others.
293. Failure or refusal to provide.
294. Masturbation not cruelty.
295. Drunkenness no defense to cruelty.
296. Pleading acts of cruelty.

§ 275. **In general—Physical and mental cruelty.**—On no ground for divorce has modern thought and social philosophy exerted a greater influence than on that of cruelty. While the general language used is still substantially that recognized by the English ecclesiastical court as cause for divorce from bed and board, there is a wide difference, especially in some of our states, in the application of the rule to the facts proved. The statutes vary in language, using, among others, such expressions as the following, "cruel, inhuman and barbarous treatment;" "extreme

cruelty;" "cruel and inhuman treatment;" "intolerable cruelty;" "extreme and repeated cruelty;" "cruelty of treatment;" "excess;" "outrages;" "indignities to the wife's person;" "intolerable indignities." But whatever the language, the cause thus recognized is that known in England as "cruelty" and in the main it is the fundamental cause thus described as "cruelty" which is the gravamen of the complaint rather than that described by the various styles of language used in the statutes. A few courts, however, have differentiated because of particular statutory expressions.[1]

The early doctrine of cruelty as grounds for divorce practically limited the cruelty to acts giving physical, as distinguished from mental pain and suffering. The old view is well stated by Lord Stowell[2] in the following language: "What merely wounds the mental feelings is in few cases to be admitted, where not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offenses in the marriage state, undoubtedly; not innocent surely in any state of life; but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties, for it may exist on one side as well as the other, the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation; and if this cannot be done, both must suffer in silence." *** "Petty vexations applied to such a constitution of mind may certainly in time wear out the animal machine, but still they are not cases of legal relief; people must relieve themselves as well as they can by prudent resistance, by calling in the succors of religion and the consolation of friends; but the aid of courts is not to be resorted to in such cases with any effect."

Another court has expressed the general modern tendency.[3] It agrees with Lord Stowell that mere austerity, rudeness, petulance, what merely wounds the feelings, without being accompanied by bodily injury or actual menace, does not amount to

[1]Mathewson v. Mathewson, 81 Vt. 173, 69 Atl. 646, 18 L. R. A. (N. S.) 300. See note, 73 Am. Dec. 621.

[2]Evans v. Evans, 1 Hag. Con. 35, 4 Eng. Eccl. 310, 311.

[3]Latham v. Latham, 30 Grat. (Va.) 307.

legal cruelty. But it adds that such treatment alone without violence, actual or threatened, may make the marriage state impossible to be endured; that there may be angry words, coarse and abusive language, humiliating insults and annoyances in all the forms that malice can suggest, which may as effectually endanger life and health as personal violence and which, therefore, would afford grounds of relief by the court.

It is difficult, if not impossible to formulate a definition of cruelty as a ground for divorce, from the many and varying decisions, and the courts have generally confined themselves to a decision based on the particular facts.[4] As a general rule, however, legal cruelty is such conduct toward the plaintiff by the defendant as will cause him or her injury by actual personal violence, or the reasonable apprehension of it, or such course of treatment as endangers his or her life or health, and renders cohabitation unsafe.[5] The test is whether under all the facts proved, the plaintiff could, with safety to person and health, continue to live with the defendant.[6]

[4]Fleming v. Fleming, 95 Cal. 430, 30 Pac. 566, 29 Am. St. 124; Maddox v. Maddox, 189 Ill. 152, 59 N. E. 599, 52 L. R. A. 628, 82 Am. St. 431; Wheeler v. Wheeler, 53 Iowa 511, 5 N. W. 689, 36 Am. Rep. 240; Williams v. Williams, 101 Minn. 400, 112 N. W. 528; Kelly v. Kelly, 18 Nev. 49, 1 Pac. 194, 51 Am. Rep. 732; Payne v. Payne, 4 Humph. (Tenn.) 500, 40 Am. Dec. 660; Nogees v. Nogees, 7 Tex. 538, 58 Am. Dec. 78. Whether absence from home without consent of the other spouse constitutes cruelty depends on facts and circumstances of the particular case. Dupes v. Dupes, 43 Cal. App. 67, 184 Pac. 425. See notes, 29 Am. Dec. 674; 73 Am. Dec. 619, 630; 12 Am. St. 877.

[5]Morris v. Morris, 14 Cal. 76, 73 Am. Dec. 615; Crum v. Crum (Cal. App.), 207 Pac. 506; Prall v. Prall, 58 Fla. 496, 50 So. 867, 26 L. R. A. (N. S.) 577; Brown v. Brown, 129 Ga. 246, 58 S. E. 825; Odom v. Odom, 36 Ga. 286; De Cloedt v. De-Cloedt, 24 Idaho 277, 133 Pac. 664; Wheeler v. Wheeler, 53 Iowa 511, 5 N. W. 689, 36 Am. Rep. 240; Cole v. Cole, 23 Iowa 433; Rowe v. Rowe, 84 Kans. 696, 115 Pac. 553; McClintock v. McClintock, 147 Ky. 409, 144 S. W. 68, 39 L. R. A. (N. S.) 1127; Sharp v. Sharp, 105 Md. 581, 66 Atl. 463; Hawkins v. Hawkins, 65 Md. 104, 3 Atl. 749; Cowles v. Cowles, 112 Mass. 298; Ford v. Ford, 104 Mass. 198; Peabody v. Peabody, 104 Mass. 195; Bailey v. Bailey, 97 Mass. 373; Jones v. Jones, 66 Pa. St. 494; Mathewson v. Mathewson, 81 Vt. 173, 69 Atl. 646, 18 L. R. A. (N. S.) 300; Beyer v. Beyer, 50 Wis. 254, 6 N. W. 807, 36 Am. Rep. 848. The "cruel treatment" contemplated by the Georgia code is wilful infliction of pain, bodily or mental, on the complaining party such as reasonably justified the apprehension of danger to life, limb, or health. Skellie v. Skellie, 152 Ga. 707, 111 S. E. 22; Dougherty v. Dougherty, 153 Ga. 487, 112 S. E. 454.

[6]Maxwell v. Maxwell, 69 W. Va. 414, 71 S. E. 571.

To some extent the degree of cruelty to justify a divorce depends upon the wording of the local statute. In some states the cruelty must consist of actual personal violence of such severity as to endanger life. In others, no physical violence is necessary. Accusing the wife of unchastity, or profane, insulting, and abusive language, if habitually used, has been held sufficient.[7]

Acts alone are not sufficient. There must be personal injury done or apprehension thereof. The injury must be personal and not merely to property or personal rights.[8] The acts of cruelty are to be judged by the effect produced without regard to the motives of the guilty party. It is not necessary that the acts of alleged cruelty shall be malicious.[9] Inasmuch as the effect of acts done is an important element in the offense, the character of the parties, their positions in society, their sensibilities and actual physical reactions to external stimuli, mental make up and the like are all a part of the facts and circumstances to be presented to the tribunal passing on the ultimate question of cruelty.[10] Acts inflicted upon or treatment administered to certain individuals might, because of social standing or peculiar mental make up, drive such persons to actual insanity; yet the same acts or treatment might be the cause of only hilarious amusement to others. Obviously there is no legal cruelty in the latter case. As has been said: "It is not all unlawful and barbarous acts that are made grounds of divorce. We do not divorce savages and barbarians because they act as such toward each other."[11] It may also be that no one line of conduct is of itself sufficient as cause for divorce, yet numerous of such lines of conduct all

[7]Sylvis v. Sylvis, 11 Colo. 319, 17 Pac. 912; Carpenter v. Carpenter, 30 Kans. 712, 2 Pac. 122, 46 Am. Rep. 108; Holyoke v. Holyoke, 78 Maine 404, 6 Atl. 827; Walsh v. Walsh, 61 Mich. 554, 28 N. W. 718; Palmer v. Palmer, 45 Mich. 150, 7 N. W. 760, 40 Am. Rep. 461; Kelly v. Kelly, 18 Nev. 49, 1 Pac. 194, 51 Am. Rep. 732; Crow v. Crow, 29 Ore. 392, 45 Pac. 761; Smith v. Smith, 8 Ore. 100.

[8]Saunders v. Saunders, 10 Jur. 143.

[9]Grierson v. Grierson, 156 Cal. 434, 105 Pac. 120, 134 Am. St. 137. McNeill v. McNeill, 125 Miss. 277, 87 So. 645. But see Kientz v. Kientz, 104 Ark. 381, 149 S. W. 86.

[10]Fleming v. Fleming, 95 Cal. 430, 30 Pac. 566, 29 Am. St. 124; Marks v. Marks, 56 Minn. 264, 57 N. W. 651, 45 Am. St. 466; Kelly v. Kelly, 18 Nev. 49, 1 Pac. 194, 51 Am. Rep. 732; Mosher v. Mosher, 16 N. Dak. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820, 125 Am. St. 654; Reinhard v. Reinhard, 96 Wis. 555, 71 N. W. 803, 65 Am. St. 66. See notes, 73 Am. Dec. 623; 65 Am. St. 70; 34 L. R. A. 453.

[11]Nye's Appeal, 126 Pa. St. 341, 17 Atl. 618, 12 Am. St. 873.

taken together, may constitute legal cruelty, and it is the duty of the court to consider all these circumstances.[12]

Generally stated the term "cruel and inhuman treatment" is a relative term and depends upon the circumstance of each particular case,[13] but would not include a case of mere incompatability.[14]

§ 276. **Reasonable apprehension of violence.**—It has been said a good many times that cruelty as grounds for divorce was in the nature of a preventative remedy. That divorce was not granted because of past cruel acts but for future protection. Under this doctrine arose the rule that reasonable apprehension of personal harm is an essential element to be proved in every divorce for cruelty.[15]

Mere displays of temper or passion, harshness of language, or petulance of manners, however irritating, are not grounds for divorce, nor even threats of bodily harm, unless there is an apprehension on the part of the plaintiff of bodily harm.[16] There

[12]Donaldson v. Donaldson, 31 Idaho 180, 170 Pac. 94 (if cause grievous mental suffering); Smith v. Smith, 181 Ky. 55, 203 S. W. 884 (overworking wife, striking her, refusal to buy sufficient clothing and charging her with running a whore house); McCarty v. Stelly, 145 La. 456, 82 So. 411 (requiring wife to sleep on floor, etc.); Tuffelmire v. Tuffelmire, 192 Mich. 147, 158 N. W. 178; Morris v. Morris, 177 N. Y. S. 600 (wife abusing husband and telling him she loved another with whom she frequently went, etc.); Beebe v. Beebe, 174 App. Div. 408, 160 N. Y. S. 967 (husband telling wife in childbirth of his love for another and then basing lunacy proceedings on condition thus excited); Jones v. Jones, 173 N. Car. 279, 91 S. E. 960; Belmont v. Belmont, 82 Ore. 612, 162 Pac. 830; Mamaux v. Mamaux, 64 Pa. Super. Ct. 131 (physical violence and bringing false charges against him); Doe v. Doe, 48 Utah 200, 158 Pac. 781.

[13]Stewart v. Stewart, 175 Ind. 412, 94 N. E. 564; Zweig v. Zweig, 46 Ind. App. 594, 93 N. E. 234.

[14]Meyer v. Meyer, 169 Iowa 204, 151 N. W. 74; Bowen v. Bowen, 179 Mich. 574, 146 N. W. 271, 51 L. R. A. (N. S.) 460; Kinsey v. Kinsey, 124 N. Y. S. 30; Barker v. Barker, 25 Okla. 48, 105 Pac. 347, 26 L. R. A. (N. S.) 909.

[15]Hancock v. Hancock, 55 Fla. 680, 45 So. 1020, 15 L. R. A. (N. S.) 670; Beekman v. Beekman, 53 Fla. 858, 43 So. 923; Thompson v. Emery, 127 La. 718, 53 So. 968; Saunders v. Saunders, 82 N. J. Eq. 491, 89 Atl. 518; Lockwood v. Lockwood, 2 Curt. Ecc. 281; Westmeath v. Westmeath, 4 Eng. Ecc. 238; Evans v. Evans, 1 Hag. Con. 35. See also Ringgold v. Ringgold, 128 Va. 485, 104 S. E. 836.

[16]Fritz v. Fritz, 138 Ill. 436, 28 N. E. 1058, 14 L. R. A. 685, 32 Am. St. 156; Peavey v. Peavey, 76 Iowa 443, 41 N. W. 67; Whaley v. Whaley, 68 Iowa 647, 27 N. W. 809; Ramsey v. Ramsey, 162 Ky. 741, 172 S. W. 1082; Bounds v. Bounds, 135 Md. 220, 198 Atl. 870; Philley v. Philley,

must be a reasonable apprehension and not one caused by extreme sensitiveness or nervousness, although the modern tendency is to take into consideration the training and environment of the complainant in determining what is a reasonable apprehension.[17] And this apprehension may be created by the threatening statements of the defendant.[18] However, the rule of reasonable apprehension does not go to the extent of requiring the plaintiff to wait until the injury is actually done,[19] and some cases have even used language indicating that where there has been legal cruelty committed in the form of actual violence it is not necessary to prove apprehension.[20] But threats of bodily violence, while not acts of violence in themselves, are held to be acts of cruelty,[21] when they cause apprehension of bodily harm taken in connection with other conduct of the defendant.[22] On this question the intention and ability of the accused spouse to inflict the cruelty alleged and the provocative disposition of the complaining spouse and the demeanor of the parties at the trial may all be taken into consideration.[23]

207 Mich. 672, 175 N. W. 158; Tuffelmire v. Tuffelmire, 192 Mich. 147, 158 N. W. 178; Hewitt v. Hewitt (N. J.), 37 Atl. 1011; Reese v. Reese, 194 App. Div. 907, 185 N. Y. S. 110. The behavior need not rise to the point of brutality. Burns v. Burns, 173 Ky. 105, 190 S. W. 683.

[17]Smedley v. Smedley, 30 Ala. 714; Densmore v. Densmore, 6 Mackey (D. C.) 544; Donald v. Donald, 21 Fla. 571; Ford v. Ford, 104 Mass. 198.

[18]Bailey v. Bailey, 97 Mass. 373; Cook v. Cook, 11 N. J. Eq. 195.

[19]Beebe v. Beebe, 10 Iowa 133; Bailey v. Bailey, 97 Mass. 373; Kennedy v. Kennedy, 73 N. Y. 369, and cases cited; Evans v. Evans, 1 Hag. Con. 35.

[20]See Ruckman v. Ruckman, 58 How. Prac. (N. Y.) 278; Close v. Close, 25 N. J. Eq. 526.

[21]Lord v. Lord, 80 W. Va. 547, 92 S. E. 749.

[22]Miller v. Miller, 139 Ga. 282, 77 S. E. 21; Wheeler v. Wheeler, 53 Iowa 511, 5 N. W. 689, 36 Am. Rep. 240; Palmer v. Palmer, 45 Mich. 150, 7 N. W. 760, 40 Am. Rep. 461; Gardner v. Gardner, 23 Nev. 207, 45 Pac. 139. Words sometimes wound more deeply than blows. Barker v. Barker, 25 Okla. 48, 105 Pac. 347, 26 L. R. A. (N. S.) 909; McCue v. McCue, 191 Mich. 1, 157 N. W. 369. For a case of swearing, see Emery v. Emery, 181 Mich. 146, 147 N. W. 452. Abuse by relatives of the other spouse may be cruelty constituting ground for a divorce, (3 A. L. R. 993), and so it has been held that it may be extreme cruelty for a husband to subject his wife to the abuse and vile epithets of her mother-in-law. Thompson v. Thompson, 205 Mich. 124, 171 N. W. 347, 3 A. L. R. 990. See also Friedmeyer v. Friedmeyer (Mo. App.), 194 S. W. 746, note in 34 L. R. A. (N. S.) 360.

[23]Wells v. Wells, 39 Okla. 765, 136 Pac. 738.

§ 277. **Physical cruelty—Actual personal violence.**—The most flagrant cause in these cases is actual personal violence,[24] and in this connection it is held that proof of a single act of violence does not constitute sufficient proof of cruelty, unless there is apprehension by the plaintiff of a repetition of such acts.[25] Evidence of slight acts of violence such as would cause no fear or apprehension is not sufficient.[26] It is not necessary, though, that the acts should be repeated for any number of times or should continue for any length of time, if they cause the plaintiff to have fear for personal safety and to anticipate bodily harm,[27] but a solitary instance of ill treatment during a long cohabitation has been held insufficient.[28] Such was the case where the only instance of personal violence was a slap delivered by the husband during an altercation.[29] Each case must, however, depend upon its own peculiar circumstances.[30]

The use of moderate force to protect his right to correct his children has been held not to be legal cruelty.[31] So also it has been held within the right of the husband to use reasonable force in enforcing his position as head of the family.[32]

The right of one spouse to inflict corporal punishment on the other in self defense must be clearly established.[33]

[24]Palmer v. Palmer, 51 Cal. App. 120, 196 Pac. 89; Brause v. Brause (Iowa), 174 N. W. 641; Germaine v. Germaine, 204 Mich. 640, 171 N. W. 377; Martensen v. Martensen (Mo. App.), 186 S. W. 581; Ford v. Ford, 43 N. Dak. 43, 173 N. W. 454; Roberts v. Roberts (Ore.), 206 Pac. 1060; Hansen v. Hansen, 103 Ore. 17, 203 Pac. 613; Sills v. Sills, 118 Wash. 94, 202 Pac. 969; Briggs v. Briggs, 56 Wash. 580, 106 Pac. 126; Rice v. Rice, 88 W. Va. 54, 106 S. E. 237.

[25]Jones v. Jones, 189 Ala. 286, 66 So. 4; Darrow v. Darrow, 122 Ark. 346, 183 S. W. 746; Hockerston v. Hockerston, 41 Cal. App. 195, 182 Pac. 325; Ford v. Ford, 104 Mass. 198; Reed v. Reed, 4 Nev. 395; Clark v. Clark, 55 Okla. 67, 154 Pac. 1142 (wife beating).

[26]Henderson v. Henderson, 88 Ill. 248; Coursey v. Coursey, 60 Ill. 186; Hitchins v. Hitchins, 41 Ill. App. 82; Lauber v. Mast, 15 La. Ann. 593; Armant v. Her Husband, 4 La. Ann. 137; Jobb v. Jobb, 199 Mich. 555, 165 N. W. 672; Cook v. Cook, 11 N. J. Eq. 195; Otton v. Otton, 196 App. Div. 403, 188 N. Y. S. 255.

[27]Lauber v. Mast, 15 La. Ann. 593.

[28]Primeaux v. Comeaux, 139 La. 549, 71 So. 845.

[29]Johnson v. Johnson (N. H.), 112 Atl. 399. But see Reilly v. Reilly (Tex. Civ. App.), 233 S. W. 379.

[30]Veal v. Veal, 140 La. 879, 74 So. 181.

[31]Loring v. Loring, 17 Tex. Civ. App. 95, 42 S. W. 642.

[32]Jones v. Jones, 66 Pa. St. 494; Darrow v. Darrow, 122 Ark. 346, 183 S. W. 746.

[33]McKee v. McKee, 191 Ky. 669, 231 S. W. 213.

Cruel treatment may be accentuated by the circumstances. Thus personal violence in the presence of others may be degrading to a wife.[34]

§ 278. **Cruel treatment endangering life.**—Such severe and violent treatment as would endanger the life of the complainant is clearly ground for divorce under the statutes, whatever the terms used therein are.[35] Actual attempts to take the life of complainant, or such vicious acts as would maim or cripple the victim are clearly within this class.[36]

Where a single act of physical violence is relied upon it would seem necessary that the act should be one that would endanger life.[37]

Under various statutes and in connection with other acts and conduct, the following have been held to be acts endangering life, or causing apprehension that life was in danger: striking with weapons, choking, kicking, hair-pulling, soaking with croton oil, drenching with water, whipping, spitting in the face, and even harsh language.[38]

§ 279. **Cruel treatment endangering health.**—As to what constitutes treatment endangering health, there is a broader, modern doctrine being established. Aside from the acts of personal vio-

[34]See Lord Penzance in Milner v. Milner, 4 Swab. & T. 240.

[35]Stoner v. Stoner, 134 Ga. 368, 67 S. E. 1030; Dabelstein v. Dabelstein, 191 Iowa 808, 183 N. W. 385; Thompson v. Thompson, 186 Iowa 1066, 173 N. W. 55, 5 A. L. R. 710.

[36]Crabtree v. Crabtree, 154 Ark. 401, 242 S. W. 804; Rie v. Rie, 34 Ark. 37; Wand v. Wand, 14 Cal. 512; Peavey v. Peavey, 76 Iowa 443, 41 N. W. 67; Knight v. Knight, 31 Iowa 451; Dillon v. Dillon, 32 La. Ann. 643; Harvey v. Harvey (N. J.), 7 Atl. 871; Long v. Long, 9 N. Car. 189; Jones v. Jones, 66 Pa. St. 494.

[37]Crabtree v. Crabtree, 154 Ark. 401, 242 S. W. 804.

[38]Moyler v. Moyler, 11 Ala. 620; Sharp v. Sharp, 116 Ill. 509, 6 N. E. 15; Wessels v. Wessels, 28 Ill. App. 253; Mercer v. Mercer, 114 Ind. 558, 17 N. E. 182; Moore v. Moore, 192 Iowa 394, 184 N. W. 732 (husband insulted, struck plaintiff and shot bullet through wall of her bedroom); Platner v. Platner (Iowa), 162 N. W. 613 (compelling wife to submit to an abortion, but not sufficiently proved here); Schichtl v. Schichtl, 88 Iowa 210, 55 N. W. 309; Harvey v. Harvey (N. J.), 7 Atl. 871; White v. White, 100 Ore. 387, 197 Pac. 1080; Cox v. Cox, 98 Ore. 148, 193 Pac. 482 (husband beat and choked wife); Wachholz v. Wachholz, 75 Wis. 377, 44 N. W. 506. It is only when cruelty becomes a danger to life that a cause of action accrues therefor. Hickman v. Hickman (Iowa), 176 N. W. 698. "The test is whether or not it renders their further living together insupportable." Speer on Marital Rights, 674, § 526, quoted in 207 S. W. 131.

lence and bodily injury, there is a tendency to hold that there may be such conduct on the part of the defendant, which, while it does not come under those heads, from its general effect on the mental and nervous temperament of the victim, produces a consequent injury to the health and tends to shorten life, and is therefore considered a species of cruelty.[39] The mental and physical condition of the complainant will be considered, and conduct which might not be cruelty to a well man may readily be cruelty to a sick woman.[40]

Cruelty endangering health was found where the husband compelled the wife to submit to an abortion,[41] and the case was the same when the husband denied the wife a lamp to burn at night while caring for two children and compelled her to sleep on the floor while he monopolized the bed.[42]

In determining these cases there is also a tendency to take into consideration the station in life, habits, training and refinement of the parties, as what might be cruelty to a person of refinement would not be to one of grosser sensibilities.[43]

It was held not extreme cruelty where couple had lived together for seven years, that husband was afflicted with a non contagious skin disease which caused skin to scale off more rapidly than it would under normal conditions and that he did not bathe as frequently as his wife thought necessary.[44]

§ 280. **Communicating disease.**—Under the theory that acts which tend to injure the health of the complainant are expressions

[39]Northrup v. Northrup, 200 Mich. 623, 166 N. W. 919; Hildebrand v. Hildebrand, 41 Okla. 306, 137 Pac. 711; Schutte v. Schutte, 90 W. Va. 787, 111 S. E. 840; Hiecke v. Hiecke, 163 Wis. 171, 157 N. W. 747, Ann. Cas. 1918B, 497; Cevene v. Cevene, 143 Wis. 393, 127 N. W. 942.

[40]Rice v. Rice, 6 Ind. 100; Pooley v. Pooley, 178 Iowa 19, 157 N. W. 129; Wall v. Wall, 196 Mich. 512, 162 N. W. 1001.

[41]White v. White, 100 Ore. 387, 197 Pac. 1080.

[42]McCarty v. Stelly, 145 La. 456, 82 So. 411.

[43]David v. David, 27 Ala. 222; Van Camp v. Van Camp (Cal. App.), 199 Pac. 885; Sylvis v. Sylvis, 11 Colo. 319, 17 Pac. 912; Morehouse v. Morehouse, 70 Conn. 420, 39 Atl. 516; Fizette v. Fizette, 146 Ill. 328, 34 N. E. 799; Wheeler v. Wheeler, 53 Iowa 511, 5 N. W. 689, 36 Am. Rep. 240; Cole v. Cole, 23 Iowa 433; Caruthers v. Caruthers, 13 Iowa 266; Holyoke v. Holyoke, 78 Maine 404, 6 Atl. 827; Bailey v. Bailey, 97 Mass. 373; Utley v. Utley, 155 Mich. 258, 118 N. W. 932; Kline v. Kline, 50 Mich. 438, 15 N. W. 541; McClung v. McClung, 40 Mich. 493; Cheatham v. Cheatham, 10 Mo. 296; Clinton v. Clinton, 60 Mo. App. 296; Lutz v. Lutz, 56 Hun 649, 9 N. Y. S. 858, 31 N. Y. St. 718.

[44]Dahnke v. Dahnke (Cal. App.), 202 Pac. 894.

of cruelty or cruel treatment, the communicating of a disease, whether the same be venereal, infectious, or "any loathesome" disease, is cruelty.[45] It must appear that the wife contracted the disease from her husband, as it is not enough that she cohabited with him and did not commit adultery.[46] Where the defendant had contracted and communicated to his wife a form of venereal itch, the court held that the charge of wilful communication was proved, and was an act of cruelty.[47]

The fact that one of the spouses has pulmonary consumption is held not a case of cruelty where it is not shown that it existed prior to the marriage.[48]

§ 281. **Denial of sexual intercourse.**—It seems that a denial of sexual intercourse, of itself, even when persisted in for a long space of time will not always be considered ground for divorce,[49] unless it clearly appears to result in an injury to the health of the complaining party.[50] But rather by the weight of authority absolute refusal is legal cruelty,[51] and especially is this true where there has been such refusal for a long time.[52]

[45]Morehouse v. Morehouse, 70 Conn. 420, 39 Atl. 516; Holmes v. Holmes (Iowa), 170 N. W. 793; Carbajal v. Fernandez, 130 La. 812, 58 So. 581; Leach v. Leach (Maine), 8 Atl. 349; Holthoefer v. Holthoefer, 47 Mich. 260, 11 N. W. 150; Canfield v. Canfield, 34 Mich. 519; Darling v. Darling, 181 Mo. App. 211, 167 S. W. 1166; Danielly v. Danielly (N. J. Eq.), 118 Atl. 335; Cook v. Cook, 32 N. J. Eq. 475; Wagner v. Wagner, 80 Ore. 256, 156 Pac. 1037; McMahen v. McMahen, 186 Pa. St. 485, 40 Atl. 795, 41 L. R. A. 802. See notes, 73 Am. Dec. 630; 65 Am. St. 82.

[46]Holthoefer v. Holthoefer, 47 Mich. 260, 11 N. W. 150; Cook v. Cook, 32 N. J. Eq. 475. Not ground for divorce that wife had syphilis but as soon as she discovered fact she ceased to cohabit and the husband never was infected. Cantor v. Cantor, 70 Pa. Super. Ct. 108.

[47]Chestnutt v. Chestnutt, 1 Spinks 196.

[48]Abramowitz v. Abramowitz, 140 N. Y. S. 275.

[49]Pinnebad v. Pinnebad, 134 Ga. 496, 68 S. E. 73; Roush v. Roush, 90 W. Va. 491, 111 S. E. 334; Wills v. Wills, 74 W. Va. 709, 82 S. E. 1092, L. R. A. 1915B, 770.

[50]Steele v. Steele, 1 MacArth. (D. C.) 505; Stewart v. Stewart, 78 Maine 548, 7 Atl. 473, 57 Am. Rep. 822; Cowles v. Cowles, 112 Mass. 298; Burton v. Burton, 52 N. J. Eq. 215, 27 Atl. 825; Reid v. Reid, 21 N. J. Eq. 331. See notes, 65 Am. St. 79; 14 L. R. A. 685.

[51]Campbell v. Campbell, 149 Mich. 147, 112 N. W. 481, 119 Am. St. 660, 14 Detroit Leg. N. 284; Sisemore v. Sisemore, 17 Ore. 542, 21 Pac. 820; Nordlund v. Nordlund, 97 Wash. 475, 166 Pac. 795, L. R. A. 1918A, 59; Gibson v. Gibson, 67 Wash. 474, 122 Pac. 15.

[52]Pinnebad v. Pinnebad, 134 Ga. 496, 68 S. E. 73; Severns v. Severns, 107 Ill. App. 141; Cowles v. Cowles, 112 Mass. 298; Case v. Case, 159

In some states a persistent denial of sexual intercourse is deemed desertion, as in California and Washington.[53] In a good many states the wording of the statutes is such that it is held not to amount to desertion.[54] Neither will a denial of sexual intercourse justify the aggrieved party in leaving the other.[55] The following quotation from a comparatively recent Washington case[56] is in point: "The sexual relation between husband and wife is one of the most delicate things courts have to deal with. For this reason the cases differ as to whether or not the marriage should be dissolved because of the refusal of sexual intercourse upon the part of either spouse. Some courts say the refusal of this privilege is only the denial of a single conjugal right, and of itself imports no cessation of cohabitation, which is deemed necessary before it can be said that there has been such misconduct as to entitle the aggrieved party to a divorce. Most of these cases are based upon the wording of divorce statutes, as in Maine,[57] it was said such a denial is not 'utter desertion' within the meaning of the Maine statute, though one of the judges in a concurring opinion says it may be cruelty. In Illinois, Florida, Iowa, and Massachusetts it has been held that such a denial is not wilful desertion.[58] It was held[59] not to be cruelty, under a statute in which cruelty must be such as to cause injury to life or health, or to cause danger of such injury, or cause a reasonable

Mich. 491, 122 N. W. 538, 124 N. W. 565, 16 Detroit Leg. N. 1013; Campbell v. Campbell, 149 Mich. 147, 112 N. W. 481, 119 Am. St. 660, 14 Detroit Leg. N. 284, Disborough v. Disborough (N. J. Eq.), 26 Atl. 852; Cunningham v. Cunningham, 60 Pa. Sup. Ct. 622; Platt v. Platt, 38 Pa. Sup. Ct. 551; Lohmuller v. Lohmuller (Tex. Civ. App.), 135 S. W. 751; Varner v. Varner, 35 Tex. Civ. App. 381, 80 S. W. 386; Nordlund v. Nordlund, 97 Wash. 475, 166 Pac. 795, L. R. A. 1918A, 59; Schoessow v. Schoessow, 83 Wis. 553, 53 N. W. 856. Contra, see D'Aguilar v. D'Aguilar, 1 Hag. Ecc. 773; Mogg v. Mogg, 2 Add. Ecc. 292.

[53]Nordlund v. Nordlund, 97 Wash. 475, 166 Pac. 795, L. R. A. 1918A, 59 (where twelve years denial was held sufficient).

[54]Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95; Watson v. Watson, 52 N. J. Eq. 349, 28 Atl. 467.

[55]Reid v. Reid, 21 N. J. Eq. 331.

[56]Nordlund v. Nordlund, 97 Wash. 475, 166 Pac. 795, L. R. A. 1918A, 59.

[57]Stewart v. Stewart, 78 Maine 548, 7 Atl. 473, 57 Am. Rep. 822.

[58]Prall v. Prall, 58 Fla. 496, 50 So. 867, 26 L. R. A. (N. S.) 577; Fritz v. Fritz, 138 Ill. 436, 28 N. E. 1058, 14 L. R. A. 685, 32 Am. St. 156; Pfannebecker v. Pfannebecker, 133 Iowa 425, 110 N. W. 618, 119 Am. St. 608, 12 Ann. Cas. 543; Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95.

[59]Cowles v. Cowles, 112 Mass. 298.

apprehension of such danger. Such refusal is held to be cruelty in Michigan,[60] and in Oregon.[61] Bishop supports divorce upon this ground.[62] Though all the cases do not sustain the view of the author, the citation is worthy of note as the view of an eminent student of domestic relations. Our statute[63] upon which our conclusion must be reached, differs from those of the states upon which divorces upon this ground have been denied. It recites that divorce may be granted upon the following cause:

"Cruel treatment of either party by the other, or personal indignities rendering life burdensome. *** And a divorce may be granted upon application of either party for any other cause deemed by the court sufficient, and the court shall be satisfied that the parties can no longer live together.

"Under this statute we have no hesitancy in saying that respondent's denial of sexual intercourse for twelve years without sufficient ground or cause is ground for divorce. The denial of sexual intercourse for six months immediately after the marriage was found as one of the facts[64] upon which the court based a finding of cruelty sufficient to entitle the complaining party to divorce. In the language of some of the cases, the frequency of sexual indulgence between husband and wife is more a question of conscience than of law, and for this reason the courts have not attempted to lay down any standard, the violation of which would be ground for the severance of the marriage relation. While this is true, it must likewise be true that the law can say that under a statute like ours the denial of a desire so strongly implanted in human nature and an unquestioned marital privilege is the denial of that harmony and unity which lies at the very root of the marriage relation, and tends to that which renders life burdensome, and under our statute is a cruelty sufficient to satisfy the court that the parties can no longer live together."[65]

§ 282. **Abuse of sexual intercourse.**—It is a fundamental principle governing the marriage relation, that one of the reasons for the existence of marriage is the necessity for the proper regulation of the natural, sexual desires, and any conduct on the part

[60]Campbell v. Campbell, 149 Mich. 147, 112 N. W. 481, 119 Am. St. 660.

[61]Sisemore v. Sisemore, 17 Ore. 542, 21 Pac. 820.

[62]Bishop on Marriage and Divorce, and Separation, § 1581.

[63]Rem. Com. Stat. Wash. 1922 § 982.

[64]Gibson v. Gibson, 67 Wash. 474, 122 Pac. 15.

[65]Nordlund v. Nordlund, 97 Wash. 475, 166 Pac. 795, L. R. A. 1918A, 59.

of a husband or wife, which shall interfere with, or prevent such proper sexual relation is reprehensible, and, generally, a ground for divorce, either alone, or as forming the basis for a charge of cruelty, or cruel treatment such as would endanger health—a cause for divorce which is becoming wider in its application under the construction of law in the more modern decisions. This abuse of the sexual relation may consist in an excessive and abusive indulgence by the husband, where the intercourse is of such a nature or quantity as to injure the health of the wife.[66] But where there is no injury to health or reason for fear of such injury, such excess will not constitute cause for divorce.[67]

§ 283. **Mental cruelty—Mental suffering.**—The tendency of the modern decisions, reflecting the advanced civilization of the present age, is to view marriage from a different standpoint than as a mere physical relation. It is now more wisely regarded as a union affecting the mental and spiritual lives of the parties to it, a relation intended to bring them the comfort and felicities of home life, and between whom, in order to fulfil such design, there should exist mutual sentiments of love and respect. "It was formerly thought that to constitute extreme cruelty, such as would authorize the granting of a divorce, physical violence is necessary; but the modern and better considered cases have repudiated this doctrine as taking too low and sensual a view of the marriage relation, and it is now very generally held that any unjustifiable conduct on the part of either the husband or wife, which so grievously wounds the feelings of the other, or so utterly destroys the peace of mind of the other as to seriously impair the health, or such as utterly destroys the legitimate ends and objects of matrimony constitutes extreme cruelty."[68] The Court of Appeals of New York thus states the principle: "The

[66]Mayhew v. Mayhew, 61 Conn. 233, 23 Atl. 966, 29 Am. St. 195; Hines v. Hines, 192 Iowa 569, 185 N. W. 91; Grant v. Grant, 53 Minn. 181, 54 N. W. 1059; Melvin v. Melvin, 58 N. H. 569, 42 Am. Rep. 605; English v. English, 27 N. J. Eq. 71; Hildebrand v. Hildebrand, 41 Okla. 306, 137 Pac. 711.

[67]Mayhew v. Mayhew, 61 Conn. 233, 23 Atl. 966, 29 Am. St. 195; Shaw v. Shaw, 17 Conn. 189; Hunt v. Hunt, 211 Ill. App. 410; Youngs v. Youngs, 33 Ill. App. 223, (aff. 130 Ill. 230, 22 N. E. 806, 6 L. R. A. 548, 17 Am. St. 313).

[68]Carpenter v. Carpenter, 30 Kans. 712, 2 Pac. 122, 46 Am. Rep. 108. See also, Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660; Perkins v. Perkins, 29 Cal. App. 68, 154 Pac. 483; Mathews v. Mathews (Iowa), 182 N. W. 390; Carson v. Carson (Iowa), 171 N. W. 584; Ra-

term 'extreme cruelty' and 'cruel and inhuman conduct' are equivalent, and are broad enough to include such behavior of one party as may be reasonably said so to affect the other physically or mentally as seriously to impair health. Cruelty is not limited to bodily hazard and hardship. If it were, a husband might constantly and without cause publicly call his wife a shameless bawd so long as he did not strike her or threaten to strike her, and might thus intentionally break down her health and destroy her reason without giving her a claim on him for separate maintenance. *** Words may result in bodily harm without a threat to inflict blows."[69]

The degree of mental suffering required to be shown in these cases produced by cruelty varies with the decisions on the different forms of the statutes. It is generally well settled, though, that such mental suffering as will impair the health as a matter of fact, if shown by the evidence in the particular case as due to the cruelty of the defendant, will be sufficient.[70] Mental suffering may be, and often is, far greater than physical, and the tendency of the courts is to regard uncalled-for torture, nagging, and false accusations, where wantonly inflicted, if sufficient in degree to injure health or endanger reason, as cruelty and a ground for divorce. In California, Utah and North Dakota it is a direct cause for divorce, and in many of the states conduct making life

der v. Rader, 136 Iowa 223, 113 N. W. 817; Hullinger v. Hullinger, 133 Iowa 269, 110 N. W. 470; Outlaw v. Outlaw, 118 Md. 498, 84 Atl. 383; Humber v. Humber, 109 Miss. 216, 68 So. 161; Bristol v. Bristol (Nebr.), 185 N. W. 972; Faris v. Faris (Nebr.), 185 N. W. 347; Preuitt v. Preuitt, 88 Nebr. 124, 129 N. W. 175; Heytrnun v. Heytrnun, 195 N. Y. S. 335; Morris v. Morris, 108 Misc. 228, 177 N. Y. S. 600; Thompson v. Thompson, 32 N. Dak. 530, 156 N. W. 492; Robertson v. Robertson (Okla.), 176 Pac. 387; Erwin v. Erwin (Tex. Civ. App.), 231 S. W. 834; McNabb v. McNabb (Tex. Civ. App.), 207 S. W. 129.

[69]Pearson v. Pearson, 230 N. Y. 141, 129 N. E. 349.

[70]Waldron v. Waldron, 85 Cal. 251, 24 Pac. 649, 858, 9 L. R. A. 487; Doolittle v. Doolittle, 78 Iowa 691, 43 N. W. 616, 6 L. R. A. 187; Carpenter v. Carpenter, 30 Kans. 712, 2 Pac. 122, 46 Am. Rep. 108; Dawson v. Dawson, 63 Tex. Civ. App. 168, 132 S. W. 379; Mathewson v. Mathewson, 81 Vt. 173, 69 Atl. 646, 18 L. R. A. (N. S.) 300. It must amount to a species of mental cruelty. Scholl v. Scholl, 194 Mo. App. 559, 185 S. W. 762; Kelly v. Kelly, 18 Nev. 49, 1 Pac. 194, 51 Am. Rep. 732; Hart v. Hart, 68 N. H. 478, 39 Atl. 430; Lyon v. Lyon, 39 Okla. 111, 134 Pac. 650. Cruelty may consist in constant reviling of the religious faith of the wife. De Cloedt v. De Cloedt, 24 Idaho 277, 133 Pac. 664. See notes, 73 Am. Dec. 626; 40 Am. Rep. 465; 29 Am. St. 127.

unbearable and causing great mental suffering is sufficient in itself.[71] This cruelty may consist in habitual unkindness of the defendant spouse.[72] It is generally not sufficient that there should be mere danger to health. It must appear that the acts done have already injured the health or at least that there is immediate and imminent danger that injury to the health will result,[73] or, according to some authorities, the alleged acts are such as to create in the mind of the complainant a reasonable apprehension of such danger.[74] But some courts have held that it was not necessary to find that the mental suffering had impaired the health.[75] In Connecticut the courts hold that language calculated to wound the feelings is insufficient, and that the degree of cruelty required must be intolerable in fact.[76]

A husband who permits lewd conduct of daughters in the home is guilty of cruelty to the wife.[77] So the husband's attempt to commit rape and the public disgrace therefrom will justify the wife in demanding a divorce, where her health is injured thereby.[78] So also where he cursed and abused his wife,[79] or was intoxicated in public places and consorted with lewd women.[80]

§ 284. **Mutual cruelty or family jars.**—Suits are often brought for divorce on the ground of cruelty, where the evidence shows that the acts of violence, as well as of cruelty, were committed by

[71]Moyler v. Moyler, 11 Ala. 620; Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660; Piatt v. Piatt (Idaho), 184 Pac. 470; Graft v. Graft, 76 Ind. 136; Palmer v. Palmer, 45 Mich. 150, 7 N. W. 760, 40 Am. Rep. 461; Hamilton v. Hamilton, 100 Ore. 404, 196 Pac. 472; See also Bristol v. Bristol (Nebr.), 185 N. W. 972.

[72]Dabelstein v. Dabelstein, 191 Iowa 808, 183 N. W. 385; Thompson v. Thompson, 186 Iowa 1066, 173 N. W. 55, 5 A. L. R. 710.

[73]Prochaska v. Prochaska (Iowa), 183 N. W. 417; Barker v. Barker, 25 Okla. 48, 105 Pac. 347, 26 L. R. A. (N. S.) 909; Bobbitt v. Bobbitt (Tex. Civ. App.), 223 S. W. 478.

[74]McNeill v. McNeill, 125 Miss. 277, 87 So. 645.

[75]Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660. See also MacDonald v. MacDonald, 155 Cal. 665, 102 Pac. 927, 25 L. R. A. (N. S.) 45.

[76]Shaw v. Shaw, 17 Conn. 189. The Massachusetts court has held that a man neglecting his wife and paying attention to another woman is not cruelty where there was no malevolent motive. Armstrong v. Armstrong, 229 Mass. 592, 118 N. E. 916, L. R. A. 1918D, 426.

[77]Davis v. Davis, 36 Ky. 32, 9 Ky. L. 300, 4 S. W. 822.

[78]Fleming v. Fleming, 95 Cal. 430, 30 Pac. 566, 29 Am. St. 124.

[79]Lynch v. Lynch, 138 La. 1094, 71 So. 195.

[80]Bennett v. Bennett (Cal. App.), 203 Pac. 162.

both parties,[81] and it is difficult to formulate any rule from the decisions. Sometimes it seems to be a question of comparative cruelty, or one as to who committed the most violence, or sometimes the suits are dismissed as not proper cases for divorce. Thus, it has been held that where the husband suffered as much as the wife in a violent, mutual quarrel, it would not be considered cruelty such as would support a complaint for divorce.[82]

The courts are averse to granting divorces on the ground of sporadic quarrels or disagreements between the husband and wife in which both are equally guilty.[83] Mere annoyance, or aggravation,[84] and slight disagreements and words inspired by transitory temper[85] are not considered cruel treatment warranting a divorce.

The courts have also decided that a divorce court is not the proper place for the reformation of domestic brawlers and the regulation of family fights.[86] As man at best is but human, a nagging, abusive and exasperating wife may cause him to lose control of his temper, "for husbands are men, not angels."[87]

A repeated urging of the husband by the wife to insure his life for her benefit can not be considered as an act of cruelty, and it is not a ground for divorce.[88] Laziness and wilful neglect of household duties with obstinate silence by the wife does not constitute cruel and barbarous treatment under the Pennsylvania statutes. Mere family difficulties existing between a husband and wife, are not sufficient cause for divorce, where they show

[81]Hengen v. Hengen, 85 Ore. 155, 166 Pac. 525; Hilleware v. Hilleware, 92 Wash. 99, 158 Pac. 999; Jones v. Jones, 48 Cal. App. 771, 192 Pac. 463.

[82]Soper v. Soper, 29 Mich. 305; Johnson v. Johnson (N. H.), 112 Atl. 399.

[83]Jones v. Jones, 189 Ala. 286, 66 So. 4; Sneed v. Sneed, 14 Ariz. 17, 123 Pac. 312, 40 L. R. A. (N. S.) 99; Bell v. Bell, 105 Ark. 194, 150 S. W. 1031.

[84]Huff v. Huff, 73 W. Va. 330, 80 S. E. 846, 51 L. R. A. (N. S.) 282.

[85]Croghan v. Croghan, 78 Fla. 455, 83 So. 460; Dougherty v. Dougherty, 153 Ga. 487, 112 S. E. 454; Stoner v. Stoner, 134 Ga. 368, 67 S. E. 1030; Rowe v. Rowe, 84 Kans. 696, 115 Pac. 553; Morris v. Morris, 108 Misc. 228, 177 N. Y. S. 600; McNabb v. McNabb (Tex. Civ. App.), 207 S. W. 129. See also Prall v. Prall, 58 Fla. 496, 50 So. 867, 26 L. R. A. (N. S.) 577.

[86]Bleything v. Bleything, 87 Ore. 197, 170 Pac. 305 (childish bickerings). Waterman v. Waterman, 80 Ore. 511, 157 Pac. 791; McKee v. McKee, 191 Ky. 669, 231 S. W. 213.

[87]Durand v. Her Husband, 4 Mart. (La.) 174; Barngrover v. Barngrover (Cal. App.), 206 Pac. 461.

[88]Saterlee v. Saterlee, 28 Colo. 290, 64 Pac. 189.

no grave or insuperable cause which renders cohabitation unbearable.[89] Deficiencies of character and incompatibilities of temper, while fruitful sources of discord, are not in themselves recognized grounds for divorce.[90]

In the following cases no ground for divorce for cruelty was shown: Occasional disrespectful treatment of a husband in the presence of third persons and refusing to sleep with him for a few days;[91] refusal to allow the wife to participate in the conduct of his business together with some violent quarrels;[92] differences arising out of refusal by wife to join in a conveyance, or threats to sell property which the wife does not wish sold.[93]

A husband will not be entitled to divorce where his conduct caused the quarrels about which he complained and the wife did not cease cohabitation until husband accused her of infidelity.[94]

§ 285. **False accusations.**—The accusation of a crime or of unchastity, or of any other gross and false charge, made with accompanying threats of violence, is decreed to be such cruelty as to cause an apprehension of fear by the complainant.[95] The

[89]Scott v. Scott, 27 La. Ann. 594; Bowen v. Bowen, 179 Mich. 574, 146 N. W. 271, 51 L. R. A. (N. S.) 460.

[90]Smith v. Smith, 179 Iowa 723, 161 N. W. 698; Layton v. Layton, 166 Iowa 74, 147 N. W. 134. The question is whether if complainant return she will be in danger of violence or cruelty at her husband's hands. Saunders v. Saunders, 82 N. J. Eq. 491, 89 Atl. 518.

[91]Scott v. Scott, 61 Tex. 119.

[92]Root v. Root, 164 Mich. 638, 130 N. W. 194, 32 L. R. A. (N. S.) 837, Ann. Cas. 1912B, 740.

[93]Hofman v. Hofman, 40 Ind. App. 476, 82 N. E. 477; Simon v. Meaux, 143 La. 760, 79 So. 330.

[94]Lee v. Lee (Ark.), 238 S. W. 525.

[95]MacDonald v. MacDonald, 155 Cal. 665, 102 Pac. 927, 25 L. R. A. (N. S.) 45; Stampfli v. Stampfli, 53 Cal. App. 126, 199 Pac. 829; Broderick v. Broderick, 40 Cal. App. 550, 181 Pac. 402; Wetherington v. Wetherington, 57 Fla. 551, 49 So. 549; Eward v. Eward (Ind. App.), 125 N. E. 468; Cooper v. Cooper, 51 Ind. App. 374, 99 N. E. 782; Shaffer v. Shaffer (Iowa), 181 N. W. 261; Anderson v. Anderson, 189 Iowa 95, 174 N. W. 665; Meyer v. Meyer, 187 Iowa 617, 174 N. W. 356; Wheeler v. Wheeler, 53 Iowa 511, 5 N. W. 689, 36 Am. Rep. 240; Avery v. Avery, 33 Kans. 1, 5 Pac. 418, 52 Am. Rep. 523; Carpenter v. Carpenter, 30 Kans. 712, 2 Pac. 122, 46 Am. Rep. 108; Nichols v. Nichols, 189 Ky. 500, 225 S. W. 147; Campbell v. Campbell, 149 Mich. 147, 112 N. W. 481, 119 Am. St. 660; Palmer v. Palmer, 45 Mich. 150, 7 N. W. 760, 40 Am. Rep. 461 (charging wife with incest); Hertz v. Hertz, 126 Minn. 65, 147 N. W. 825; Williams v. Williams, 101 Minn. 400, 112 N. W. 528; Milster v. Milster, 200 Mo. App. 603, 209 S. W. 620; Rose v. Rose, 129 Mo. App. 175, 107 S. W. 1089; Votaw v. Votaw, 90 Nebr. 699, 134 N.

accusation need not be made to, or in the presence of, a third person, but may be part of the acts of cruelty alleged, which may also be the cause of such mental suffering, from their nature and scope, as to be an injury to health.[96] The mere fact that the parties were not living together at the time the charges were made does not generally alter the situation.[97] Where charges not amounting to adultery are still such as impute lewd character and are made in vile and rude manner before others they amount to legal cruelty.[98] It is held cruelty of mental torture for one living in open adultery, falsely to say that he has divorced his wife for misconduct and that the other woman is his lawful wife.[99] It is essential, however, that the charge shall be false. The charge will not amount to cruelty if made in good faith on reasonable ground.[1]

The rule does not seem so strongly applied in cases where the charge of infidelity is made by the wife against the husband.[2]

W. 410; Miller v. Miller, 89 Nebr. 239, 131 N. W. 203, 34 L. R. A. (N. S.) 360; Kelly v. Kelly, 18 Nev. 49, 1 Pac. 194, 51 Am. Rep. 732; Tuttle v. Tuttle, 21 N. Dak. 503, 131 N. W. 460, Ann. Cas. 1913B, 1; De Roche v. De Roche, 12 N. Dak. 17, 94 N. W. 767, 1 Ann. Cas. 221; Robertson v. Robertson, 73 Okla. ——, 176 Pac 387; Hildebrand v. Hildebrand, 41 Okla. 306, 137 Pac. 711; Railsbach v. Railsbach, 92 Ore. 623, 182 Pac. 131; Braun v. Braun, 194 Pa. St. 287, 44 Atl. 1096, 75 Am. St. 699; Bahn v. Bahn, 63 Tex. 518, 50 Am. Rep. 539; Doe v. Doe, 48 Utah 200, 158 Pac. 781. The charge should be made in bad faith in order that it constitute cruelty. Harl v. Harl, 24 Ky. L. 2163, 73 S. W. 756. Not a charge of infidelity that husband objected to wife's act of dancing with other men. Mulkins v. Mulkins, 215 Mich. 491, 184 N. W. 509. See notes, 73 Am. Dec. 629; 40 Am. Rep. 465; 18 L. R. A. (N. S.) 300 et seq.; 34 L. R. A. (N. S.) 360; 50 Am. Rep. 542; 65 Am. St. 80.

[96]Brandt v. Brandt, 178 Cal. 548, 174 Pac. 55; Ward v. Ward, 103 Ill. 477; Jones v. Jones, 62 N. H. 463; Waltermire v. Waltermire, 110 N. Y. 183, 17 N. E. 739; Kennedy v. Kennedy, 73 N. Y. 369. See notes in 18 L. R. A. (N. S.) 303 and 34 L. R. A. (N. S.) 360.

[97]MacDonald v. MacDonald, 155 Cal. 665, 102 Pac. 927, 25 L. R. A. (N. S.) 45; Stewart v. Stewart, 175 Ind. 412, 94 N. E. 564; Miller v. Miller, 89 Nebr. 239, 131 N. W. 203, 34 L. R. A. (N. S.) 360.

[98]Wheeler v. Wheeler, 53 Iowa 511; Pinkard v. Pinkard, 14 Tex. 356, 65 Am. Dec. 129. See also Johnson v. Johnson, 183 Ky. 421, 209 S. W. 385.

[99]Hofmann v. Hofmann, 232 N. Y. 215, 133 N. E. 450.

[1]Veeder v. Veeder, 189 Iowa 912, 179 N. W. 136; Pearson v. Pearson, 104 Misc. 675, 173 N. Y. S. 563; Parman v. Parman, 94 Ore. 307, 180 Pac. 906, 185 Pac. 922.

[2]Roush v. Roush, 90 W. Va. 491, 111 S. E. 334; Mahonna v. Mahonna, 174 Wis. 586, 183 N. W. 675.

Such charges of infidelity may be made in a complaint in a court proceeding,[3] but these are sometimes held to be privileged.[4]

The false charge may take the form of the accusation of a husband that a wife had attempted to poison him.[5]

§ 286. **Attempts to have spouse declared insane.**—The term "cruel and abusive treatment" in the divorce laws of Maine is construed to cover a wide range of conduct and to include the wilful and unjustified attempt of a husband to have his wife committed to an insane asylum, whereby her health is seriously affected.[6]

§ 287. **Abuse of child or others to punish spouse.**—Compelling a woman to get rid of her children by a former marriage as a condition to living in her second husband's home, when he knew of their existence at the time of marriage and agreed that she might bring them with her, is cruel and inhuman treatment, amounting to abandonment of her.[7] So also cruelty to others close to a wife's affections, for the purpose of annoying her, especially where illness results, is actionable.[8] So it has been held ground for divorce in Louisiana that a wife was injured by her husband while she was trying to protect their son who was being struck and choked by his father.[9]

§ 288. **Unconcealed aversion—Discourtesy—Refusal to entertain.**—A constant, malignant aversion to a spouse may amount to legal cruelty,[10] but a mere cold disregard of marital duties and

[3]Wilson v. Wilson, 97 Ark. 643, 134 S. W. 963; Brandt v. Brandt, 178 Cal. 548, 174 Pac. 55 (if charge of adultery inflict grievous mental suffering); Rodgers v. Rodgers, 13 Ky. L. 203.

[4]Mathewson v. Mathewson, 81 Vt. 173, 69 Atl. 646, 18 L. R. A. (N. S.) 300.

[5]Nolan v. Nolan, 214 Mich. 49, 181 N. W. 971.

[6]Michels v. Michels, 120 Maine 395, 115 Atl. 161.

[7]Williamson v. Williamson, 183 Ky. 435, 209 S. W. 503, 3 A. L. R. 799.

[8]Saunders v. Saunders, 10 Jur. 143; Dunlap v. Dunlap, 49 La. Ann. 1696, 22 So. 929.

[9]Millet v. Millet, 144 La. 921, 81 So. 400.

[10]Dickinson v. Dickinson, 54 Ind. App. 53, 102 N. E. 389; Hofman v. Hofman, 40 Ind. App. 476, 82 N. E. 477; Anderson v. Anderson, 191 Iowa 497, 181 N. W. 241; Johnson v. Johnson, 183 Ky. 421, 209 S. W. 385; Simon v. Meaux, 143 La. 760, 79 So. 330; Murray v. Murray, 169 Mich. 388, 135 N. W. 262; Waldhorn v. Waldhorn, 165 Mich. 130, 130 N. W. 199; Begrow v. Begrow, 162 Mich. 349, 127 N. W. 256, 139 Am. St. 562; Morris v. Morris, 108 Misc. 228, 177 N. Y. S. 600; Erwin v. Erwin (Tex. Civ. App.), 231 S. W. 834; Davenport v. Davenport, 106 Va. 736, 56 S. E. 562; Schoen v. Schoen, 175 Wis. 20, 183 N. W. 876.

obligations is not sufficient.[11] And especially is this true in cases where the husband is the subject of the aversion and no injury to life or health is shown.[12] And likewise where the wife has given birth to several children and continues to care for them but is indifferent to her spouse.[13]

Discourtesy or mere uncouth rudeness are held not to amount to cruelty warranting a decree of divorce.[14] Neither is a husband's refusal to accompany his wife to entertainments nor his inability or refusal to be a suitable companion legal cruelty.[15]

§ 289. **Profanity—Vile language.**—Mere use of vile language or profanity is generally held not legal cruelty,[16] except in cases where the use of such language, toward the wife and the application of abusive and indecent epithets are made in presence of the children or strangers and actual injury to health therefrom is shown.[17] So there was a case of actionable cruelty where the

[11]Black v. Black, 149 Ga. 506, 101 S. E. 182; Miller v. Miller, 43 Iowa 325; Nichols v. Nichols, 189 Ky. 500, 225 S. W. 147; Averett v. Averett, 189 App. Div. 250, 178 N. Y. S. 405; Schutte v. Schutte, 90 W. Va. 787, 111 S. E. 840.

[12]Veeder v. Veeder, 189 Iowa 912, 179 N. W. 136.

[13]Wills v. Wills, 74 W. Va. 709, 82 S. E. 1092, L. R. A. 1915B, 770.

[14]Trenchard v. Trenchard, 245 Ill. 313, 92 N. E. 243; Johnsen v. Johnsen, 78 Wash. 423, 139 Pac. 189; Wills v. Wills, 74 W. Va. 709, 82 S. E. 1092, L. R. A. 1915B, 770. Bad temper, rude language, want of civil attentions, or angry and abusive words not sufficient grounds for divorce. Trenchard v. Trenchard, 245 Ill. 313, 92 N. E. 243.

[15]Bowen v. Bowen, 179 Mich. 574, 146 N. W. 271, 51 L. R. A. (N. S.) 460; Johnsen v. Johnsen, 78 Wash. 423, 139 Pac. 189.

[16]Sweet v. Sweet (Conn.), 118 Atl. 36 (no such refinement in husband as to make coarse language of wife unbearable); Moir v. Moir, 182 Iowa 370, 165 N. W. 1001 (by wife); Beall v. Beall, 80 Ky. 675, 4 Ky. L. 652; Hewitt v. Hewitt (N. J.), 37 Atl. 1011; Bingham v. Bingham (Tex. Civ. App.), 149 S. W. 214.

[17]Koehler v. Koehler, 137 Ark. 302, 209 S. W. 283; Andrews v. Andrews, 120 Cal. 184, 52 Pac. 298; Smith v. Smith, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183; Anderson v. Anderson, 189 Iowa 95, 177 N. W. 712; Thompson v. Thompson, 186 Iowa 1066, 173 N. W. 55, 5 A. L. R. 710; Krusinski v. Krusinski, 170 Mich. 561, 136 N. W. 593; McDuffee v. McDuffee, 169 Mich. 410, 135 N. W. 242 (continually calling attention of wife's condoned wrong in presence of children); Delor v. Delor, 159 Mich. 624, 124 N. W. 544; Hoyt v. Hoyt, 56 Mich. 50, 22 N. W. 105 (while wife is critically ill); Strahorn v. Strahorn, 82 Mo. App. 580; Faris v. Faris (Nebr.), 185 N. W. 347; Benfield v. Benfield, 44 Ore. 94, 74 Pac. 495; Ryan v. Ryan, 30 Ore. 226, 47 Pac. 101; Braun v. Braun, 194 Pa. St. 287, 44 Atl. 1096, 75 Am. St. 699; Erwin v. Erwin (Tex. Civ. App), 231 S. W. 834; Myers v. Myers, 83 Va. 806, 6 S. E. 630. See also

husband on various occasions ordered his wife out of the house, spat at her in the presence of servants and charged her with being a worthless woman and of no assistance to him.[18]

§ 290. **Associating with objectionable characters or compelling such association.**—There may be legal cruelty in cases where a wife's associations with other men are improper and degrading to the husband, especially where such acts are flaunting in character.[19] So similar associations of a husband where open, vile and constant may be cruelty to her.[20] Acts of adultery carried on clandestinely are not cruelty.[21]

§ 291. **Abortion.**—The act of the husband in compelling wife to submit to an abortion without good cause is held cruelty whenever the question has arisen.[22]

§ 292. **Indignities by others.**—Although a husband is not chargeable with the misconduct of others,[23] he does owe a duty to her to use reasonable means to protect her from the insults and abuses of others.[24] Especially is it his duty not in any manner to aid or abet such abuse from others or to compel her to live in an environment where she is subjected to such abuse.[25]

Donnelly v. Donnelly, 76 Pa. Super Ct. 92.

[18]Schoras v. Staba, 150 La. 674, 91 So. 148. But see Calichio v. Calichio, 85 N. J. Eq. 213, 96 Atl. 658.

[19]Craig v. Craig, 129 Iowa 192, 105 N. W. 446, 2 L. R. A. (N. S.) 669; Aitchison v. Aitchison, 99 Iowa 93, 68 N. W. 573; Zumbiel v. Zumbiel, 113 Ky. 841, 24 Ky. L. 590, 69 S. W. 708; Holmes v. Holmes (La.), 23 So. 324; Bearinger v. Bearinger, 170 Mich. 661, 136 N. W. 1117; Glenn v. Glenn, 84 Wash. 215, 146 Pac. 619. Husband may not complain of improprieties where he introduced her into the social set of which he complains. Frith v. Frith, 189 Iowa 201, 175 N. W. 761. See note in L. R. A. 1918D, 427.

[20]Hooker v. Hooker, 65 Fla. 53, 61 So. 121, 43 L. R. A. (N. S.) 964; McClung v. McClung, 40 Mich. 493.

[21]Miller v. Miller, 78 N. Car. 102; Hofman v. Hofman, 195 App. Div. 596, 187 N. Y. S. 141.

[22]Platner v. Platner (Iowa), 162 N. W. 613; Dunn v. Dunn, 150 Mich. 476, 114 N. W. 385, 14 Detroit Leg. N. 767; Sheldon v. Sheldon, 146 App. Div. 430, 131 N. Y. S. 291.

[23]Lane v. Bursha, 50 La. Ann. 275, 23 So. 834.

[24]Snyder v. Snyder, 98 Misc. 431, 162 N. Y. S. 607; Sayles v. Sayles, 41 R. I. 170, 103 Atl. 225.

[25]Thompson v. Thompson, 205 Mich. 124, 171 N. W. 347, 3 A. L. R. 990 (abuse by husband's mother with whom husband compels her to live); Dakin v. Dakin, 1 Nebr. (Unof.) 457, 95 N. W. 781; Snyder v. Snyder, 98 Misc. 431, 162 N. Y. S. 607 (mother-in-law); Ringgold v. Ringgold, 128 Va. 485, 104 S. E. 836; Beyer v. Beyer, 50 Wis. 254, 6 N. W 807, 36 Am. Rep. 848.

An assault by the paramour of defendant may be shown only where the defendant made the attack his own by procurement or subsequent approval.[26]

§ 293. **Failure or refusal to provide.**—Generally mere failure to provide for the wife as he should is not cruelty, the wife having other remedies,[27] but in some extreme cases refusal to provide has been held legal cruelty.[28] Neither is the refusal of the wife to care for a sick husband legal cruelty.[29] Where the husband gave all of his property to the wife and she compelled him to leave, without cause, such offense was held to be actionable cruelty.[30]

It is not cruelty that the husband fails to provide the wife a home commensurate with the ideas of comfort and luxury to which she has been accustomed.[31]

§ 294. **Masturbation not cruelty.**—The practice of masturbation by a husband in the presence of his wife, but without compelling her to remain present, which injures her health by its effect upon her feelings, is not "cruel and abusive treatment" under a statute making such treatment a ground for divorce.[32] But the commission of sodomy by a husband has been held to be extreme cruelty toward the wife.[33]

§ 295. **Drunkenness no defense to cruelty.**—It is not a sufficient defense that the acts of cruelty complained of were inflicted by the defendant when he was intoxicated and that he was kind when sober.[34] But violence inflicted by the husband crazed by the use of morphine has been held not to be cruelty.[35]

[26]Holt v. Holt, 204 Mass. 25, 90 N. E. 392.

[27]Thompson v. Thompson, 205 Mich. 124, 171 N. W. 347, 3 A. L. R. 990; Maddox v. Maddox, 189 Ill. 152, 59 N. E. 599, 52 L. R. A. 628, 82 Am. St. 431; Faller v. Faller, 10 Nebr. 144, 4 N. W. 1036. But to deliberately starve a wife or withhold needful medical supplies is different. Butler v. Butler, 1 Pars. 329.

[28]Dean v. Dean, 181 Mich. 498, 148 N. W. 179.

[29]Bonney v. Bonney, 175 Mass. 7, 55 N. E. 461, 78 Am. St. 473.

[30]Benore v. Benore, 198 Mich. 113, 164 N. W. 468.

[31]Collette v. Collette, 211 Mich. 555, 179 N. W. 269. Thompson v. Thompson, 205 Mich. 124, 171 N. W. 347, 3 A. L. R. 990.

[32]Wood v. Wood, 141 Mass. 495, 6 N. E. 541, 55 Am. Rep. 491.

[33]Crutcher v. Crutcher, 86 Miss. 231, 38 So. 337; Anonymous, 3 Ohio S. & C. P. 450, 2 Ohio N. P. 342.

[34]Hughes v. Hughes, 19 Ala. 307; Berryman v. Berryman, 59 Mich. 605, 26 N. W. 789; Yeager v. Yeager (Mo. App.), 185 S. W. 743; Powers v. Powers, 20 Nebr. 529, 31 N. W. 1; Wachholz v. Wachholz, 75 Wis. 377, 44 N. W. 506.

[35]Youngs v. Youngs, 130 Ill. 230, 22 N. E. 806, 6 L. R. A. 548, 17 Am. St. 313.

§ 296. **Pleading acts of cruelty.**—It is necessary that the pleader set out the facts and circumstances constituting the cruel, harsh and inhuman treatment. It is not enough merely to repeat the word of the statute.[36] It is held unnecessary to allege that the acts were committed without plaintiff's fault.[37]

[36]Seddon v. Seddon, 82 Fla. 48, 89 So. 348; Shockey v. Shockey, 191 Ky. 839, 231 S. W. 508; Pollitzer v. Pollitzer, 188 App. Div. 861, 177 N. Y. S. 516; White v. White, 100 Ore. 387, 190 Pac. 969, 197 Pac. 1080; Rowden v. Rowden (Tex. Civ. App.), 212 S. W. 302. In this case it was held unnecessary to allege and prove particular words of obscene, profane, or vulgar language used by defendant. Cain v. Cain, 145 Ark. 224, 224 S. W. 481.

[37]Harvey v. Harvey, 175 N. Y. S. 177.

CHAPTER 19

CONVICTION OF CRIME

Section

300. General rule.
301. Imprisonment in foreign state.
302. Necessity of conviction—Finality of conviction.
303. Compliance with statutes in manner of sentence.
304. Effect of pardon after sentence.
305. Marriage to a criminal pending appeal.
306. Statutory time of sentence.

§ 300. **General rule.**—Conviction and imprisonment for a crime is not ground for divorce at common law.[1] But the conviction of a crime (generally a felony), followed by sentence of imprisonment in the penitentiary for the term of years prescribed by statute, is a sufficient ground for an absolute divorce in most states by special statutory provision.[2]

"Infamous" crime has been held to include conviction of rape,[3] and so also voluntary manslaughter,[4] but the imprisonment for the crime is not generally considered desertion.[5]

In a Kentucky case, however, where the husband was sentenced to life imprisonment, the wife was granted a divorce on the ground of abandonment,[6] and so it would seem to be more reasonable in some cases to hold the husband responsible for desertion though his separation was due to the sentence of imprisonment.[7] Assault with intent to commit rape is held not an infamous crime.[8]

[1]See note, 31 L. R. A. 515.

[2]Holloway v. Holloway, 126 Ga. 459, 55 S. E. 191, 7 L. R. A. (N. S.) 272, 115 Am. St. 102, 7 Ann. Cas. 1164; Franklin v. Franklin, 40 Mont. 348, 106 Pac. 353, 26 L. R. A. (N. S.) 490, 20 Ann. Cas. 339. See note, 31 L. R. A. 515.

[3]See note, 31 L. R. A. 520.

[4]Holloway v. Holloway, 126 Ga. 459, 55 S. E. 191, 7 L. R. A. (N. S.) 272, 115 Am. St. 102, 7 Ann. Cas. 1164; Sutherlin v. Sutherlin, 27 Ind. App. 301, 61 N. E. 206.

[5]Porritt v. Porritt, 18 Mich. 420; Wolf v. Wolf, 38 N. J. Eq. 128.

[6]Davis v. Davis, 102 Ky. 440, 19 Ky. L. 1520, 43 S. W. 168, 39 L. R. A. 403.

[7]See cases cited in notes, 119 Am. St. 638; 138 Am. St. 159; 31 L. R. A. 520 where both positions have been defended.

[8]Wheeler v. Wheeler, 2 Pa. Dist. R. 567.

§ 301. **Imprisonment in foreign state.**—A sentence to imprisonment in a state prison in another state is not a cause for divorce in Massachusetts, within the meaning of the statute[9] permitting a divorce, "when either party has been sentenced to confinement at hard labor for life or for five years or more in the state prison, or in a jail or house of correction."[10]

The Pennsylvania law as to crimes in other states makes it necessary that the crime shall be one punishable by two years imprisonment or more and is held to demand the imposition in the sister state of a sentence of imprisonment for two years or more [11]

§ 302. **Necessity of conviction—Finality of conviction.**—It is not enough that the defendant has committed a crime. Conviction and sentence are necessary,[12] unless the statute ipso facto dissolves the marriage upon conviction.[13] In a New Hampshire case the court granted a divorce after conviction pending an appeal.[14]

It would seem, in all fairness to the defendant, that no decree of divorce should be granted until the conviction and sentence became final either by affirmance on appeal or by want of appeal.[15]

§ 303. **Compliance with statutes in manner of sentence.**—Where the law making imprisonment as ground for divorce requires a sentence to "confinement at hard labor" it is not a ground for divorce that the husband has been sentenced to a correctional institution which carries no hard labor penalty.[16] Sentence to a state reformatory will not suffice where the statute explicitly requires sentence to the state prison.[17]

[9]Gen. Laws 1921, Chap. 208, § 2.

[10]Leonard v. Leonard, 151 Mass. 151, 23 N. E. 732, 6 L. R. A. 632, 21 Am. St. 437. See also Martin v. Martin, 47 N. H. 52; Klutts v. Klutts, 5 Sneed (Tenn.) 423; and note in 31 L. R. A. 515.

[11]Frantz v. Frantz, 11 Pa. Co. Ct. 467.

[12]Thomas v. Thomas, 51 Ill. 162; Rivers v. Rivers, 60 Iowa 378, 14 N. W. 774; Oliver v. Oliver, 169 Mass. 592, 48 N. E. 843. Confession to wife by husband is not sufficient on a charge of cruelty where he has not been convicted of the crimes. Bill v. Bill, 178 Iowa 1025, 157 N. W. 158.

[13]State v. Duket, 90 Wis. 272, 63 N. W. 83, 31 L. R. A. 515, 48 Am. St. 928.

[14]Cone v. Cone, 58 N. H. 152.

[15]Rivers v. Rivers, 60 Iowa 378, 14 N. W. 774; Vinsant v. Vinsant, 49 Iowa 639; Luper v. Luper, 61 Ore. 418, 96 Pac. 1099.

[16]Unsoeld v. Unsoeld, 216 Mass. 594, 104 N. E. 462.

[17]Dion v. Dion, 92 Minn. 278, 100 N. W. 4, 1101.

§ 304. **Effect of pardon after sentence.**—No pardon granted to the defendant after decree of divorce will restore such party to his or her conjugal rights.[18]

§ 305. **Marriage to a criminal pending appeal.**—Under the Vermont statute a divorce may be granted, when either party is sentenced to confinement at hard labor in the state's prison for life, or for three years or more, and is actually confined at the time; but a divorce for conviction of crime under the statute will not be granted a wife who has married a criminal pending an appeal from the conviction.[19]

§ 306. **Statutory time of sentence.**—Where the statute prescribes the length of time for which the spouse must be sentenced no allowance is made for deductions for good conduct,[20] and if there are several sentences for several crimes for all of which the spouse is sentenced to imprisonment the statutory period is not met by adding the time of the various sentences.[21] In some instances statutes making sentence to imprisonment cause for divorce are given a retroactive effect, and made to apply to such sentences given before passage of the statute but after marriage.[22]

[18]See Handy v. Handy, 124 Mass. 394; Young v. Young, 61 Tex. 191; Holloway v. Holloway, 126 Ga. 459, 55 S. E. 191, 7 L. R. A. (N. S.) 272, 115 Am. St. 102, 7 Ann. Cas. 1164.

[19]Caswell v. Caswell, 64 Vt. 557, 24 Atl. 988, 33 Am. St. 943.

[20]Oliver v. Oliver, 169 Mass. 592, 48 N. E. 843; Sargood v. Sargood, 77 Vt. 498, 61 Atl. 472.

[21]Kauffman v. Kauffman, 24 Pa. Sup. Ct. 437.

[22]Long v. Long, 135 Minn. 259, 160 N. W. 687, L. R. A. 1917C, 159.

CHAPTER 20

HABITUAL DRUNKENESS

Section

310. Use of alcoholic liquors.
311. Use of opium or other drugs.
312. Habitual drunkenness defined.
313. Degree of drunkenness.
314. Dipsomaniacs.
315. Court records.
316. Necessity of conviction.
317. Complainant furnishing liquor.
318. Periodical debauches.
319. Occasional intoxication.
320. Knowledge of drunkenness at time of marriage.
321. Habitual intemperance.

§ 310. **Use of alcoholic liquors.**—In the absence of statutes drunkenness is not grounds for divorce,[1] but may be justification for leaving the spouse so addicted,[2] or be considered along with other facts establishing the habits and conduct of the spouse.[3]

By statutes habitual drunkenness or intemperance caused by the voluntary and excessive use of alcoholic liquors is a ground for divorce in nearly all states.[4] A divorce will not be granted, however, on the ground of drunkenness unless it is shown that the drunkenness is habitual;[5] and reformation has been held suffi-

[1]Wheeler v. Wheeler, 101 Md. 427, 61 Atl. 216.

[2]Foote v. Foote (N. J. Eq.), 61 Atl. 90; Wolcott v. Wolcott, 32 Ohio Cir. Ct. 587. See, however, McKay v. McKay, 18 B. Mon. (Ky.) 8.

[3]Shutt v. Shutt, 71 Md. 193, 17 Atl. 1024, 17 Am. St. 519; McVickar v. McVickar, 46 N. J. Eq. 490, 19 Atl. 249, 19 Am. St. 422. See notes, 34 L. R. A. 449; Ann. Cas. 1912C, 655.

[4]See statutes of various states, Chap. 50. See also Brown v. Brown, 38 Ark. 324; Sedgwick v. Sedgwick, 50 Colo. 164, 114 Pac. 488, Ann. Cas. 1912C, 653; Allen v. Allen, 73 Conn. 54, 46 Atl. 242, 49 L. R. A. 142, 84 Am. St. 135; Dennis v. Dennis, 68 Conn. 186, 36 Atl. 34, 34 L. R. A. 449, 57 Am. St. 95; McGill v. McGill, 19 Fla. 341; Evans v. Evans, 43 Minn. 31, 44 N. W. 524, 7 L. R. A. 448; Dawson v. Dawson, 23 Mo. App. 169; Batchelder v. Batchelder, 14 N. H. 380. See note, 6 L. R. A. 548.

[5]Myrick v. Myrick, 67 Ga. 771. In Minnesota drunkenness must exist for

cient to defeat the proceedings.[6] Abstention while incarcerated in a reformatory is not to be considered as reformation.[8] The drunkenness may be habitual though the party may remain sober during business hours.[9]

Evidence of the sobriety of the defendant after the period on which the charge is based is incompetent.[10] Evidence of intoxication since the filing of the suit is competent not to show the substantive cause, but to show a continuing habit.[11]

Habitual drunkenness does not cover the case of one who indulges in the habitual, but moderate use of intoxicating liquors.[12]

§ 311. **Use of opium or other drugs.**—Habitual drunkenness caused by the voluntary and excessive use of opium, chloral, chloroform, cocaine, or similar drug is a ground for divorce in many states. In Illinois, however, it is held that the excessive use of morphine by hypodermic injection is not drunkenness within the meaning of the statute as ground for divorce;[13] and so in Massachuetts where the use of the drug was not excessive at the time the bill was filed.[14] Generally statutes making "habitual drunkenness" grounds for divorce do not include the intemperate use of drugs or narcotics under that classification.[15] The North Dakota statute making the intemperate use of morphine a ground for divorce is held without application to cases where the morphine habit was contracted through the necessary use of the drug to alleviate unendurable pain.[16]

one year prior to bringing suit. Larson v. Larson, 147 Minn. 457, 179 N. W. 723. See note, Ann. Cas. 1912C, 656.

[6]McMahon v. McMahon, 170 Ala. 338, 54 So. 165; Hammond v. Hammond (Mass.), 132 N. E. 724; Smithston v. Smithston, 113 Miss. 644, 74 So. 149, L. R. A. 1917D, 361, (mod. 74 So. 609). Intoxication on a few occasions is not sufficient. Smith v. Smith, 172 Mich. 175, 137 N. W. 644. But see Tarrant v. Tarrant, 156 Mo. App. 725, 137 S. W. 56.

[8]Dorian v. Dorian, 298 Ill. 24, 131 N. E. 129.

[9]Matheny v. Matheny, 191 Iowa 337, 182 N. W. 375.

[10]Loftus v. Loftus, 134 Ill. App. 360.

[11]Smith v. Smith, 149 Ill. App. 596.

[12]Bain v. Bain, 79 Nebr. 711, 113 N. W. 141.

[13]Youngs v. Youngs, 130 Ill. 230, 22 N. E. 806, 6 L. R. A. 548, 17 Am. St. 313.

[14]Burt v. Burt, 168 Mass. 204, 46 N. E. 622.

[15]Smith v. Smith, 7 Boyce (Del.) 283, 105 Atl. 833; Ring v. Ring, 118 Ga. 183, 44 S. E. 861, 62 L. R. A. 878; Youngs v. Youngs, 130 Ill. 230, 22 N. E. 806, 6 L. R. A. 548, 17 Am. St. 313. See notes, 34 L. R. A. 449; 39 L. R. A. 264; Ann. Cas. 1912C, 659.

[16]Rindlaub v. Rindlaub, 19 N. Dak. 352, 125 N. W. 479.

§ 312. **Habitual drunkenness defined.**—Habitual drunkenness, to constitute a ground for divorce, must be gross and confirmed and continue long enough to render living together intolerable. What amounts to habitual drunkenness is a question of law fixed by statute, and in drawing a libel for divorce on this ground particular attention should be paid to the wording of the statute.[17] Another court defines the term to mean an irresistible habit of getting drunk, a fixed habit of drinking to excess, such frequent indulgence to excess as to show a formed habit and inability to control the appetite.[18]

§ 313. **Degree of drunkenness.**—Habitual intemperance is such degree of indulgence in the use of intoxicating liquors as disqualifies a person a greater portion of his time from properly attending to business, or which inflicts great anguish upon an innocent party.[19]

In Kentucky, a confirmed habit of drunkenness on the part of the husband, continued for not less than one year, accompanied with wasting his estate, and no suitable provision being made for wife and children, is a ground for divorce. The courts hold that, in the absence of property, the words "wasting of his estate" apply to and embrace the health, time, and labor of the defendant, as they are essentially his estate for the purpose of supporting himself and family.[20] In Colorado the habit must have existed for a year prior to the commencement of the action.[21]

[17]Wilson v. Wilson, 128 Ark. 110, 193 S. W. 504 (persistent habit of frequently getting drunk); McNabb v. McNabb, 182 Iowa 1143, 166 N. W. 457, L. R. A. 1918C, 865; Bill v. Bill, 178 Iowa 1025, 157 N. W. 158; DeLesdernier v. DeLesdernier, 45 La. Ann. 1364, 14 So. 191; Williams v. Goss, 43 La. Ann. 868, 9 So. 750; Halls v. Cartwright, 18 La. Ann. 414; Blaney v. Blaney, 126 Mass. 205; Lentz v. Lentz, 171 Mich. 509, 137 N. W. 229; McCoin v. McCoin (Mo.), 218 S. W. 949; Page v. Page, 43 Wash. 293, 86 Pac. 582, 6 L. R. A. (N. S.) 914, 117 Am. St. 1054. Not necessary to be staggering drunk or drunk during business hours. But it is sufficient if the habit is so firmly fixed upon him that he becomes drunk frequently and is unable to resist when opportunity or temptation is presented. O'Kane v. O'Kane, 103 Ark. 382, 147 S. W. 73, 40 L. R. A. (N. S.) 655. See note, Ann. Cas. 1912C, 657.

[18]Garrett v. Garrett, 252 Ill. 318, 96 N. E. 882. See also O'Kane v. O'Kane, 103 Ark. 382, 147 S. W. 73, 40 L. R. A. (N. S.) 655.

[19]De Cloedt v. De Cloedt, 24 Idaho 277, 133 Pac. 664; Berryman v. Berryman, 59 Mich. 605, 26 N. W. 789; Glover v. Glover, 193 Mo. App. 648, 187 S. W. 278; Golding v. Golding, 6 Mo. App. 602.

[20]McKay v. McKay, 57 Ky. 8; Shuck v. Shuck, 70 Ky. 306.

[21]Sedgwick v. Sedgwick, 50 Colo. 164, 114 Pac. 488, Ann. Cas. 1912C, 653.

It is not required that the party be continually drunk, or that his drunkenness incapacitates him for work.[22] Ordinary beer drinking short of intoxication does not amount to habitual drunkenness.[23]

§ 314. **Dipsomaniacs.**—A person who has become fixed in the habit of indulging in liquor and gets drunk as often as the temptation is presented, is a dipsomaniac and the husband or wife of such person is entitled to a divorce.[24]

§ 315. **Court records.**—Where the husband has been declared by the trial court to be an habitual drunkard, a divorce will be decreed.[25]

§ 316. **Necessity of conviction.**—In order to decree a divorce on the ground of drunkenness, it is not necessary that the defendant shall have been convicted of the crime of drunkenness.[26]

§ 317. **Complainant furnishing liquor.**—Where it is shown that the complaining party furnished the defendant with liquor, or money with which to buy liquor, that he might keep drunk so that she could have grounds for a divorce, the court held that she was not entitled to a divorce, for she had consented to his unlawful acts.[27]

§ 318. **Periodical debauches.**—Evidence that the libellee for a period of twelve or fifteen years had, as often as three or four times a year, yielded to an impulse to drink to excess; that on such occasions he became grossly intoxicated, continuing in that condition a week or ten days together; that at such times he went or was sent to an asylum for inebriates; that when the desire for drink came upon him he could not resist; that a single glass would bring on excessive drinking, and a renewal of excessive intoxication; that there had been no apparent improvement in his habits in this respect; and that any undue excitement would make him drink, is sufficient to justify a finding that he had contracted gross and confirmed habits of intoxication, and entitled the wife to a divorce.[28]

[22]Tarrant v. Tarrant, 156 Mo. App. 725, 137 S. W. 56.

[23]Schwab v. Schwab, 117 La. 727, 42 So. 249.

[24]Magahay v. Magahay, 35 Mich. 210.

[25]Johnson v. Johnson, 35 Leg. Int. (Pa.) 70.

[26]Brown v. Brown, 38 Ark. 324.

[27]Bean v. Bean, 11 Lanc. Bar (Pa.) 138.

[28]Blaney v. Blaney, 126 Mass. 205.

§ 319. **Occasional intoxication.**—Occasional intoxication is not sufficient ground for a divorce. The habit must be habitual, gross, and confirmed.[29]

Accordingly the occasional intoxication of the wife is not a ground for divorce;[30] nor is it where the husband was in like fault.[31]

§ 320. **Knowledge of drunkenness at time of marriage.**—If the wife knew of the husband's drunkenness at the time she married him, she cannot complain, and if he sets this fact up as a defense it is good.[32] So, too, a divorce will not be granted for drunkenness, where it appears that the habits of the defendant were the same at the time of the marriage and that the complainant was aware of the fact.[33]

§ 321. **Habitual intemperance.**—Habitual intemperance, within the meaning of a statute authorizing a divorce for such cause, is not shown by the fact that the defendant about once in three weeks became intoxicated during the evening to such an extent that the next morning he did not go as usual to his work, and had continued to do so for two years, if it had not caused the loss of his position, nor produced want or suffering in his family.[34]

[29]Prochaska v. Prochaska (Iowa), 183 N. W. 417; Bain v. Bain, 79 Nebr. 711, 113 N. W. 141; McBee v. McBee, 22 Ore. 329, 29 Pac. 887, 29 Am. St. 613; Bevan v. Bevan (R. I.), 114 Atl. 130; Gourlay v. Gourlay, 16 R. I. 705, 19 Atl. 142; Holm v. Holm, 44 Utah 242, 139 Pac. 937.

[30]Bean v. Bean, 11 Lanc. Bar (Pa.) 138; Rapp v. Rapp. 149 Mich. 218, 112 N. W. 709.

[31]Wesley v. Wesley, 181 Ky. 135, 204 S. W. 165; Smith v. Smith, 172 Mich. 175, 137 N. W. 644; Donley v. Donley, 150 Mo. App. 660, 131 S. W. 356.

[32]Porritt v. Porritt, 16 Mich. 140.

[33]McNabb v. McNabb, 182 Iowa 1143, 166 N. W. 457, L. R. A. 1918C. 865; Tilton v. Tilton, 16 Ky. L. 538, 29 S. W. 290; Porritt v. Porritt, 16 Mich. 140.

[34]Dennis v. Dennis, 68 Conn. 186, 36 Atl. 34, 34 L. R. A. 449, 57 Am. St. 95; State v. Baughn, 162 Iowa 308, 143 N. W. 1100, 50 L. R. A. (N. S.) 912; Magahay v. Magahay, 35 Mich. 210.

CHAPTER 21

DESERTION

Section

325. Desertion as ground for divorce in general.
326. Definition of desertion.
327. Intention to desert—Permanency of separation.
328. Intention to desert must be wilful.
329. Desertion must be continuous.
330. Interruption by insanity.
331. Interruption by divorce proceedings.
332. Interruption by involuntary absence.
333. Refusal of sexual intercourse.
334. Constructive desertion.
335. Misconduct of party complaining as a defense to action for desertion—Justification.
336. Separation by mutual consent is not desertion—Offers of reconciliation.
337. Desertion where both parties dwell under same roof.
338. Refusal to follow husband.
339. Refusal to follow wife.
340. Refusal to leave native country.
341. Duty of spouse at fault to seek renewal of cohabitation.
342. Refusal to renew cohabitation.
343. Refusal to cohabit.
344. Husband's liability for support of wife.
345. Posting wife.
346. Desertion is not excused by continuing support.
347. Presumption of death.

§ 325. **Desertion as ground for divorce in general.**—Desertion was not a cause for divorce under the English law. A suit would lie in the ecclesiastical court to compel assumption of conjugal duties, and a judgment against the defendant was enforced by a prison sentence and excommunication.

In this country there never was such a proceeding as a suit to enforce conjugal rights,[1] and desertion for a specific statutory period was generally made a statutory cause for divorce.[2] Such

[1]Hardin v. Hardin, 17 Ala. 250, 52 Am. Dec. 170.

[2]McCraney v. McCraney, 5 Iowa 232, 68 Am. Dec. 702; Hudson v.

statutes use a variety of expressions in designating the causes for which divorce for desertion is granted, such as: "wilful," "obstinate," "determined," "fixed," "persistent," "intentional," and "malicious." In actual interpretation of the statutes by the courts there is no great difference given to the meaning of such statutes. "Wilful" is held to mean "on purpose, intentional" and not to imply malice or wrong.[3] Where the statute uses the term "malicious," malice is implied from a wilful desertion.[4]

§ 326. **Definition of desertion.**—Desertion or abandonment, as it is sometimes called, is the wilful and wrongful leaving of one spouse by the other.[5] It does not mean ceasing to have sexual relations; it means to cease cohabitation as well as sexual intercourse. It means deliberately and unjustly leaving the other, and living separate and apart, and it must continue uninterruptedly for the period of time fixed by the statute.[6]

There must be a voluntary separation of one party from the other without justification with the intention of not renewing cohabitation or returning to the marital domicile.[7]

Hudson, 59 Fla. 529, 51 So. 857, 29 L. R. A. (N. S.) 614, 138 Am. St. 141, 21 Ann. Cas. 278. See note, 138 Am. St. 151.

[3]Lea v. Lea, 99 Mass. 493, 96 Am. Dec. 772.

[4]See note, 138 Am. St. 151.

[5]Peretti v. Peretti, 165 Cal. 717, 134 Pac. 322; Tirrell v. Tirrell, 72 Conn. 567, 45 Atl. 153, 47 L. R. A. 750; Buckner v. Buckner, 118 Md. 101, 84 Atl. 156, Ann. Cas. 1914B, 628; Matthews v. Matthews, 112 Md. 582, 77 Atl. 249, 29 L. R. A. (N. S.) 905; Rogers v. Rogers, 81 N. J. Eq. 479, 86 Atl. 935; Williams v. Williams, 130 N. Y. 193, 29 N. E. 98, 14 L. R. A. 220, 27 Am. St. 517; Luper v. Luper, 61 Ore. 418, 96 Pac. 1099; Ingersoll v. Ingersoll, 49 Pa. St. 249, 88 Am. Dec. 500; Crounse v. Crounse, 108 Va. 108, 60 S. E. 627. See notes, 19 Am. St. 433; 119 Am. St. 618; 138 Am. St. 147; 9 L. R. A. 696.

[6]Brown v. Brown, 178 Ala. 121, 59 So. 48; Walker v. Walker, 64 Fla. 536, 59 So. 898. See also Shockey v. Shockey, 191 Ky. 839, 231 S. W. 508; Hall v. Hall, 69 W. Va. 175, 71 S. E. 103, 34 L. R. A. (N. S.) 758. Three things must occur: Cessation from cohabitation, continuing one year, intention in the mind of the deserter not to resume cohabitation; and the absence of the other's consent to the separation. Plymate v. Plymate (Mo. App.), 180 S. W. 29.

[7]Brown v. Brown, 178 Ala. 121, 59 So. 48; Andrade v. Andrade, 14 Ariz. 379, 128 Pac. 813; Buckner v. Buckner, 118 Md. 101, 84 Atl. 156, Ann. Cas. 1914B, 628; Rector v. Rector, 78 N. J. Eq. 386, 79 Atl. 295; Domb v. Domb, 195 App. Div. 526, 186 N. Y. S. 306; Heyman v. Heyman, 119 App. Div. 182, 104 N. Y. S. 227; Rebstock v. Rebstock, 144 N. Y. S. 289; Maloney v. Maloney, 83 Wash. 656, 145 Pac. 631; Bacon v. Bacon, 68 W. Va. 747, 70 S. E. 762; Bennett v. Bennett, 43 Conn. 313.

In the language of a Maine decision: "To establish desertion three things must concur and must be proved. These are cessation from cohabitation continued for the statutory period, intention in the mind of the deserter not to resume cohabitation, and the absence of the other party's consent to the separation."[8] In Connecticut desertion "consists in the cessation of cohabitation coupled with a determination in the mind of the offender not to renew it."[9] The Maryland courts define desertion as a marital offense consisting in the voluntary separation of one of the parties from the other, or the refusal to renew suspended cohabitation without justification.[10]

§ 327. **Intention to desert—Permanency of separation.**—The complainant must clearly show that the defendant intended to desert and not to return.[11] The intent must be to effect a permanent separation.[12] The abandonment must be the deliberate

Desertion consists in the voluntary separation of one spouse from the other for the prescribed time without the latter's consent, without justification, and with the intention of not returning.

[8]Moody v. Moody, 118 Maine 454, 108 Atl. 849. See also Hunt v. Hunt, 61 Fla. 630, 54 So. 390; Hudson v. Hudson, 59 Fla. 529, 51 So. 857, 29 L. R. A. (N. S.) 614, 138 Am. St. 141, 21 Ann. Cas. 278; Love v. Love, 185 Iowa 930, 171 N. W. 257; Pfannebecker v. Pfannebecker, 133 Iowa 425, 110 N. W. 618, 119 Am. St. 608, 12 Ann. Cas. 543; Collette v. Collette, 211 Mich. 555, 179 N. W. 269. "Four elements are essential to a divorce because of desertion: (1). The cessation of the marriage relation; (2) the intent to desert; (3) the continuance of the desertion during the statutory period; and (4) the absence of consent or misconduct of the deserted party." Kupa v. Kupa, 132 Iowa 191, 109 N. W. 610 (quoting from Nelson on Divorce and Separation). Separation alone is not desertion. Wilhelm v. Wilhelm, 90 Ore. 435, 177 Pac. 57; Tipton v. Tipton, 169 Iowa 182, 151 N. W. 90, Ann. Cas. 1916C, 360.

[9]Todd v. Todd, 84 Conn. 591, 80 Atl. 717; Bennett v. Bennett, 43 Conn. 313.

[10]Buckner v. Buckner, 118 Md. 101, 84 Atl. 156, Ann. Cas. 1914B, 628. See also Taylor v. Taylor, 112 Md. 666, 77 Atl. 133.

[11]Israel v. Israel, 185 Ala. 39, 64 So. 67; Bennett v. Bennett, 43 Conn. 313; McCoy v. McCoy, 3 Ind. 555; Orr v. Orr, 8 Bush (Ky.) 156; Hubbard v. Hubbard, 127 Md. 617, 96 Atl. 860; Pidge v. Pidge, 44 Mass. 257; Rudd v. Rudd, 33 Mich. 101; Cowen v. Cowen (N. J.), 106 Atl. 366; Rogers v. Rogers, 18 N. J. Eq. 445; Jennings v. Jennings, 13 N. J. Eq. 38; In re McClurg, 66 Pa. St. 366; Thorpe v. Thorpe, 9 R. I. 57; Besch v. Besch, 27 Tex. 390; Matthews v. Matthews, 112 Md. 582, 77 Atl. 249, 29 L. R. A. (N. S.) 905.

[12]Chatterton v. Chatterton, 132 Ill. App. 31; Hale v. Hale, 137 Ky. 831, 127 S. W. 475; Stevens v. Stevens, 123 Ky. 545, 96 S. W. 811; Matthews v. Matthews, 112 Md. 582, 77 Atl. 249, 29 L. R. A. (N. S.) 905;

act of the deserting spouse, done with the intent that the marriage relation should no longer exist.[13] This requires that the defendant should have possessed a normal mental capacity to comprehend the purpose and effect of the act.[14] But a separation from necessity,[15] such as inability by the husband to support the wife, does not constitute desertion.[16]

The intention to abandon need not begin at the time of the separation. Even if at the time of separation there was no intention to abandon the spouse but later such intention arises, legal abandonment occurs and the statutory time begins to run.[17] Since the intent of the party at the time of the separation is largely a matter of inference and presumption, subsequent acts of the abandoning party are admissible in evidence to show the intent.[18] The intent to desert to satisfy the statute was found to exist in a peculiar Virginia case where an austere young husband becoming possessed of the information that his wife, when a child, had slept with a young brother, refused to live with his wife, and compelled her to occupy a separate bed room in a house with his mother and sisters who treated her with contempt and in response to her efforts for reconciliation he intimated that after a period of penitence which might last ten years he might take her back as a wife.[19]

§ 328. **Intention to desert must be wilful.**—The plaintiff must show that the desertion was intended by the party leaving,[20] and

Foote v. Foote, 71 N. J. Eq. 273, 65 Atl. 205.

[13]Fleegle v. Fleegle, 136 Md. 630, 110 Atl. 889. See also Lundy v. Lundy, 23 Ariz. 213, 202 Pac. 809; Landry v. Landry (Maine), 115 Atl. 769.

[14]Camire v. Camire, 43 R. I. 489, 113 Atl. 748.

[15]Perkins v. Perkins, 72 Ore. 302, 143 Pac. 995.

[16]Bennett v. Bennett, 43 Conn. 313; Walton v. Walton, 76 Miss. 662, 25 So. 166, 71 Am. St. 540. Separation and intention to abandon must concur. Muller v. Muller, 125 Md. 72, 93 Atl. 404.

[17]Pinkhard v. Pinkhard, 14 Tex. 356, 65 Am. Dec. 129; Wright v. Wright, 81 Fla. 456, 87 So. 156, 18 A. L. R. 627. See notes, 119 Am. St. 621; 138 Am. St. 151.

[18]Johnson v. Johnson, 22 Colo. 20, 43 Pac. 130, 55 Am. St. 112.

[19]Ringgold v. Ringgold, 128 Va. 485, 104 S. E. 836.

[20]Chatterton v. Chatterton, 231 Ill. 449, 83 N. E. 161, 121 Am. St. 339; Fagan v. Fagan, 186 Iowa 1279, 173 N. W. 875; Heinmuller v. Heinmuller, 133 Md. 491, 105 Atl. 745; Hahn v. Hahn, 93 N. J. Eq. 296, 115 Atl. 652; Jones v. Jones, 83 N. J. Eq. 571, 91 Atl. 819; Foster v. Foster (N. J.), 114 Atl. 333; Hartner v. Hartner, 75 Pa. Super. Ct. 342. Caldwell v. Caldwell, 70 Pa. Super. Ct. 332; Hall v. Hall, 69 W. Va. 175, 71 S. E. 103, 34 L. R. A. (N. S.)

that it was wilful and deliberate,[21] not only to leave, but to permanently cease cohabitation.[22]

Some of the statutes require that the desertion shall also be both wilful and obstinate.[23] The word "obstinate" in this connection, means determined, fixed, persistent,[24] and occurs where the party charged therewith resists all attempts at reconciliation.[25] A wife can not be said to be wilfully absent from her husband where a court of competent jurisdiction has awarded a decree of alimony to the wife on the ground of the husband's wilful abandonment and desertion of the wife.[26] So, the Alabama courts hold that there was no wilful abandonment of a husband by a wife where the wife was taken by her parents to their home because of her poor health and the husband's failure to provide for her and their sick child, and the husband rejected her repeated overtures for returning.[27]

§ 329. **Desertion must be continuous.**—In order to justify the granting of a divorce on the ground of desertion or abandonment, the desertion must continue uninterruptedly for the full statutory period.[28] Hence two periods of desertion can not be

758. Desertion must be wilful, continued, and obstinate. Fisler v. Fisler, 85 N. J. Eq. 194, 95 Atl. 970. See note, 138 Am. St. 151.

[21]Fry v. Fry (N. J.), 100 Atl. 839.

[22]Bennett v. Bennett, 43 Conn. 313; Meldowney v. Meldowney, 27 N. J. Eq. 328; Silberstein v. Silberstein, 218 N. Y. 525, 113 N. E. 495; Ruckman v. Ruckman, 58 How. Pr. (N. Y.) 278.

[23]Hill v. Hill, 62 Fla. 493, 56 So. 941, 39 L. R. A. (N. S.) 1117; Hudson v. Hudson, 59 Fla. 529, 51 So. 857, 29 L. R. A. (N. S.) 614, 138 Am. St. 141, 21 Ann. Cas. 278; Porter v. Porter, 82 N. J. Eq. 400, 89 Atl. 251.

[24]Hudson v. Hudson, 59 Fla. 529, 51 So. 857, 29 L. R. A. (N. S.) 614, 138 Am. St. 141, 21 Ann. Cas. 278.

[25]Kipp v. Kipp, 77 N. J. Eq. 585, 78 Atl. 682.

[26]Condon v. Condon, 8 Ohio App. 189. See also Boger v. Boger, 86 W. Va. 590, 104 S. E. 49.

[27]Pentecost v. Pentecost, 204 Ala. 152, 85 So. 374.

[28]Holston v. Holston, 23 Ala. 777; Reed v. Reed, 62 Ark. 611, 37 S. W. 230; Tirrell v. Tirrell, 72 Conn. 567, 45 Atl. 153, 47 L. R. A. 750; Powell v. Powell, 77 Fla. 181, 81 So. 105; Phelan v. Phelan, 135 Ill. 445, 25 N. E. 751; Gates v. Gates, 192 Ky. 253, 232 S. W. 378; Wall v. Wall, 196 Mich. 512, 162 N. W. 1001; Holmes v. Holmes, 44 Mich. 555, 7 N. W. 228; Gaillard v. Gaillard, 23 Miss. 152; Kirkpatrick v. Kirkpatrick, 81 Nebr. 627, 116 N. W. 499, 16 L. R. A. (N. S.) 1071, 129 Am. St. 708; Hyer v. Hyer, 91 N. J. Eq. 147, 108 Atl. 180; Conger v. Conger, 13 N. J. Eq. 286; Newlin v. Newlin, 94 Vt. 26, 108 Atl. 516. Resumption of cohabitation after commencement of suit for divorce on the ground of adultery bars suit for desertion occurring before such resumption of marital relations. Byrne v. Byrne, 93 N. J. Eq. 5, 114 Atl. 754.

added together to make up the statutory period.[29] But where there has been a wilful abandonment, the party at fault can not terminate the abandonment by a mere return to the spouse, without intention to assume full and unconditional conjugal relations.[30] And it has been held, without seeming good reason, that merely occupying the same bed does not terminate the desertion.[31] It would seem that consent to that very important privilege of married life would act as condonation of the abandonment or at least to an interruption under the statute.[32]

Once the statutory period of abandonment has run it is not within the power of the offending party to legally terminate such abandonment against the will of the innocent party.[33] Desertion once shown to exist is presumed to continue.[34] The length of the time of the desertion is not generally considered material when the application is for a divorce from bed and board.[35]

§ 330. **Interruption by insanity.**—If the defendant has been insane during the period of desertion required by the statute to entitle the plaintiff to a divorce, it can not be included in computing the time, since the element of intent would be lacking.[36] So also if the spouse was insane at the time of the separation such insanity is a good defense,[37] especially if she was confined

[29]La Flamme v. La Flamme, 210 Mass. 156, 96 N. E. 62, 39 L. R. A. (N. S.) 1133; Luper v. Luper, 61 Ore. 418, 96 Pac. 1099. See notes, 119 Am. St. 622; 138 Am. St. 148; Ann. Cas. 1912C, 16.

[30]No interruption by reason of the fact that husband visited wife to persuade her to return. Dickerson v. Dickerson (Tex. Civ. App.), 207 S. W. 941. See note, 119 Am. St. 623.

[31]Danforth v. Danforth, 88 Maine 120, 33 Atl. 781, 31 L. R. A. 608, 51 Am. St. 380.

[32]See notes, 51 Am. St. 382; 138 Am. St. 149.

[33]See note, 84 Am. St. 138.

[34]Doran v. Doran (Del. Super.), 117 Atl. 2.

[35]Etheridge v. Etheridge, 120 Md. 11, 87 Atl. 497. See also Tolzman v. Tolzman, 130 Minn. 342, 153 N. W. 745.

[36]Blandy v. Blandy, 20 App. D. C. 535; Zeigler v. Zeigler, 149 Ga. 508, 101 S. E. 183; Kirkpatrick v. Kirkpatrick, 81 Nebr. 627, 116 N. W. 499, 16 L. R. A. (N. S.) 1071, 129 Am. St. 708; Gordon v. Gordon, 88 N. J. Eq. 436, 103 Atl. 31; Porter v. Porter, 82 N. J. Eq. 400, 89 Atl. 251; Lee v. Lee, 182 N. Car. 61, 108 S. E. 352; Wright v. Wright, 125 Va. 526, 99 S. E. 515, 4 L. R. A. 1331; Fisher v. Fisher, 54 W. Va. 146, 46 S. E. 118, 1 Ann. Cas. 251. But see contra cases cited in notes, 138 Am. St. 160; 34 L. R. A. 164.

[37]Kirkpatrick v. Kirkpatrick, 81 Nebr. 627, 116 N. W. 499, 16 L. R. A. (N. S.) 1071, 129 Am. St. 708. See note, 34 L. R. A. 164.

to an asylum for lunatics with the husband's consent.[38] But if the insanity begins after the expiration of the statutory period it is no defense.[39]

§ 331. **Interruption by divorce proceedings.**—It is held that none of the time covered by the pendency of former proceedings for divorce by one party against the other can be computed as part of the time of the desertion in the later case, without regard to the parties commencing such later case provided the first suit was bona fide.[40]

§ 332. **Interruption by involuntary absence.**—It is held that the wilful and obstinate desertion of a wife by a husband was not interrupted by reason of his having been drafted into the army, where his attitude of mind was not changed while he was in the service.[41]

§ 333. **Refusal of sexual intercourse.**—It is the general view in America that mere refusal to have marital intercourse is not desertion under the statute. Such refusal has been generally considered only partial desertion from marital duties to be considered along with other facts as evidence of legal desertion.[42] In order to make refusal of sexual intercourse the equivalent of desertion, husband denied such intercourse must leave the wife or she leave him.[43] In some jurisdictions, however, such refusal,

[38]See notes, 119 Am. St. 638; 138 Am. St. 160; 34 L. R. A. 164; 1 Ann. Cas. 252.

[39]Harrigan v. Harrigan, 135 Cal. 397, 67 Pac. 506, 87 Am. St. 118; Gordon v. Gordon, 88 N. J. Eq. 436, 103 Atl. 31.

[40]McLaughlin v. McLaughlin, 90 N. J. Eq. 322, 107 Atl. 260; Weigel v. Weigel, 63 N. J. Eq. 677, 52 Atl. 1123.

[41]Margulies v. Margulies, 92 N. J. Eq. 332, 112 Atl. 484.

[42]Underwood v. Underwood, 271 Fed. 553. Contra, Prall v. Prall, 58 Fla. 496, 50 So. 867, 26 L. R. A. (N. S.) 577; Fritz v. Fritz, 138 Ill. 436, 28 N. E. 1058, 14 L. R. A. 685, 32 Am. St. 56; Lambert v. Lambert, 165 Iowa 367, 145 N. W. 920; Snouffer v. Snouffer, 150 Iowa 58, 129 N. W. 326; Pfannebecker v. Pfannebecker, 133 Iowa 425, 110 N. W. 618, 119 Am. St. 608, 12 Ann. Cas. 543; Stewart v. Stewart, 78 Maine 548, 7 Atl. 473, 57 Am. Rep. 822; Cowles v. Cowles, 112 Mass. 298; Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95; Williams v. Williams, 121 Mo. App. 349, 99 S. W. 42; Risk v. Risk, 195 N. Y. S. 536; Wacker v. Wacker, 55 Pa. Super. Ct. 380; McKinney v. McKinney, 77 W. Va. 58, 87 S. E. 928; Reynolds v. Reynolds, 68 W. Va. 15, 69 S. E. 381, Ann. Cas. 1912A, 889; Schoessow v. Schoessow, 83 Wis. 553, 53 N. W. 856.

[43]Gruner v. Grüner, 183 Mo. App. 157, 165 S. W. 865.

when without good cause, such as illness, is legal desertion, where persisted in for the statutory time, entitling the other spouse to divorce.[44] Such refusal is defined by statute as desertion in some states.[45] In these states the refusal of a husband to consummate the marriage by sexual intercourse is held to amount to desertion even though he supported her and they lived under the same roof.[46] But the wife's refusal of sexual intercourse in these jurisdictions is held not to amount to desertion where the husband has failed to provide his wife with adequate support according to his station in life.[47]

§ 334. **Constructive desertion.**—Not always is the husband or wife who leaves the other the deserter. The party leaving may have a legal cause which justifies such leaving, and becomes the deserted party entitled to divorce,[48] as where a husband compels his wife to leave home by inhuman treatment or neglects to provide for her.[49] "A constructive desertion," says the Court of

[44]Whitfield v. Whitfield, 89 Ga. 471, 15 S. E. 543; Danforth v. Danforth, 88 Maine 120, 33 Atl. 781, 31 L. R. A. 608, 51 Am. St. 380; Fleegle v. Fleegle, 136 Md. 630, 110 Atl. 889; Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95; Parmly v. Parmly, 90 N. J. Eq. 490, 106 Atl. 456; Yawger v. Yawger (N. J. Eq.), 86 Atl. 419; Rector v. Rector, 78 N. J. Eq. 386, 79 Atl. 295. See also Chandler v. Chandler 132 Va. 418, 112 S. E. 856. See notes, 119 Am. St. 633; 138 Am. St. 162, 165; 12 Ann. Cas. 548.

[45]See notes, 138 Am. St. 163; 12 Ann. Cas. 548.

[46]Raymond v. Raymond (N. J. Eq.), 79 Atl. 430.

[47]Oertel v. Oertel, 83 N. J. Eq. 39, 90 Atl. 1006.

[48]Jones v. Jones, 95 Ala. 443, 11 So. 11, 18 L. R. A. 95; Lundy v. Lundy, 23 Ariz. 213, 202 Pac. 809; Grierson v. Grierson, 156 Cal. 434, 105 Pac. 120, 134 Am. St. 137; Hudson v. Hudson, 59 Fla. 529, 51 So. 857, 29 L. R. A. (N. S.) 614, 138 Am. St. 141, 21 Ann. Cas. 278; Leonard v. Leonard, 174 Iowa 734, 156 N. W. 803; Spausenberg v. Carter, 151 La. 1038, 92 So. 673; Lea v. Lea, 99 Mass. 493, 96 Am. Dec. 772; Sutermeister v. Sutermeister (Mo. App.), 209 S. W. 955; Danielly v. Danielly, 93 N. J. Eq. 556, 118 Atl. 335; Fraser v. Fraser, 87 N. J. Eq. 633, 101 Atl. 58; McVickar v. McVickar, 46 N. J. Eq. 490, 19 Atl. 249, 19 Am. St. 422; Setzer v. Setzer, 128 N. Car. 170, 38 S. E. 731, 83 Am. St. 666; Huff v. Huff, 73 W. Va. 330, 80 S. E. 846, 51 L. R. A. (N. S.) 282. Husband entitled to divorce where wife's desertion not justified by ill treatment. Rogers v. Rogers, 214 Mich. 516, 183 N. W. 30. See notes, 119 Am. St. 626, 627; 138 Am. St. 156; 29 L. R. A. (N. S.) 614; 21 Ann. Cas. 281.

[49]Israel v. Israel, 185 Ala. 39, 64 So. 67; Rigsby v. Rigsby, 82 Ark. 278, 101 S. W. 727 (cruelty to children of wife by former marriage); Walker v. Walker, 64 Fla. 536, 59 So. 898; Bell v. Bell, 15 Idaho 7, 96 Pac. 196 (husband failed to furnish suitable home and support); Johnson v. Johnson, 145 Ky. 488, 140 S.

Chancery of New Jersey, "is one where an existing cohabitation of the parties is put an end to by misconduct of one of them, provided such misconduct is itself a ground of divorce a vinculo or a mensa. It is not a necessary ingredient in constructive desertion that the husband shall entertain in connection with his acts of cruelty, any settled purpose to drive his wife away from him. It is enough if such is the natural consequence of his acts."[50]

If the wife by her misconduct causes the husband to leave her, she will be held to have consented to the separation,[51] and he is entitled to a divorce for her wilful separation.[52] Neither is such a rule giving the offended party ground for divorce objectionable because under some statutes she may obtain absolute divorce as an indirect result of his cruelty, when the remedy for cruelty alone would be separation from bed and board.[53] Intention to drive the spouse away is not a necessary element of proof.[54] But the conduct of one party to justify the other in leaving must be of such a nature as to be inconsistent with the marital relation, or to render cohabitation unsafe.[55]

In some jurisdictions it is required that the reasonable cause which will justify the constructive desertion must be such con-

W. 656; Levering v. Levering, 16 Md. 213; Tarrant v. Tarrant, 156 Mo. App. 725, 137 S. W. 56; McVickar v. McVickar, 46 N. J. Eq. 490, 19 Atl. 249, 19 Am. St. 422; Palmer v. Palmer, 22 N. J. Eq. 88; Marsh v. Marsh, 14 N. J. Eq. 315, 82 Am. Dec. 251; Dowdy v. Dowdy, 154 N. Car. 556, 70 S. E. 917; Davenport v. Davenport, 106 Va. 736, 56 S. E. 562.

[50]Csanyi v. Csanyi (N. J.), 115 Atl. 76; Denny v. Denny, 118 Va. 79, 86 S. E. 835. See also Danielly v. Danielly, 93 N. J. Eq. 556, 118 Atl. 335; Matthews v. Matthews, 91 N. J. Eq. 149, 108 Atl. 926.

[51]Gray v. Gray, 15 Ala. 779; Hudson v. Hudson, 59 Fla. 529, 51 So. 857, 29 L. R. A. (N. S.) 614, 138 Am. St. 141, 21 Ann. Cas. 278; Farwell v. Farwell, 47 Mont. 574, 133 Pac. 958, Ann. Cas. 1915C, 78; Danielly v. Danielly, 93 N. J. Eq. 556, 118 Atl. 335.

[52]Hudson v. Hudson, 59 Fla. 529, 51 So. 857, 29 L. R. A. (N. S.) 614, 138 Am. St. 141, 21 Ann. Cas. 279; Setzer v. Setzer, 128 N. Car. 170, 38 S. E. 731, 83 Am. St. 666. See also Klemmer v. Klemmer (Cal. App.), 187 Pac. 85.

[53]McVickar v. McVickar, 46 N. J. Eq. 490, 19 Atl. 249, 19 Am. St. 422.

[54]Grierson v. Grierson, 156 Cal. 434, 105 Pac. 120, 134 Am. St. 137. See note, 21 Ann. Cas. 281.

[55]Kinsey v. Kinsey, 37 Ala. 393; Harding v. Harding, 22 Md. 337; Levering v. Levering, 16 Md. 213; Fera v. Fera, 98 Mass. 155; Doty v. Doty, 92 N. J. L. 660, 114 Atl. 546; Rogers v. Rogers, 81 N. J. Eq. 479, 86 Atl. 935, 46 L. R. A. (N. S.) 711; Yawger v. Yawger (N. J.), 86 Atl. 419 (where the court held that the husband's persistent refusal to remove a curable impediment to coition was desertion); Cornish v. Cornish, 23 N. J. Eq. 208; Sower's Appeal, 89 Pa. St. 173.

duct as could be made the foundation of a suit for divorce.[56] Constructive desertion may occur where the husband's conduct in compelling the wife to stay with his mother who attacks her, and by the failure of the husband to seek his wife after leaving such a home and offering her another home away from his mother.[57] Departure or absence of one party from the family dwelling place, caused by cruelty or by threats of bodily harm from which danger would be reasonably apprehended from the other, is not desertion by the absent party, but is desertion by the other party.[58]

In constructive desertion it is the duty of the offending party to endeavor to terminate the separation by manifesting reformation and applying for restoration of the marital relationship, and giving reasonable assurance of sincerity and probable safety of the injured party in resuming cohabitation.[59]

§ 335. **Misconduct of party complaining as a defense to action for desertion—Justification.**—The desertion must be without the fault of the complaining party.[60] Where the complaining party in an action for divorce for separation has been guilty of an offense for which the defendant was justified in leaving, such justification is a good defense.[61]

Evidence should be clear that the abandonment was voluntary and without fault on the part of the complaining party.[62] Whether such justification must be cause sufficient for a divorce or of a

[56]Warfield v. Warfield, 97 Ark. 125, 133 S. W. 606; Craig v. Craig, 90 Ark. 40, 117 S. W. 765; Frank v. Frank, 178 Ill. App. 557; Rogers v. Rogers, 81 N. J. Eq. 479, 86 Atl. 935, 46 L. R. A. (N. S.) 711; Suydam v. Suydam, 79 N. J. Eq. 144, 80 Atl. 1057; Englehardt v. Englehardt, 73 N. J. Eq. 744, 70 Atl. 145; Golden v. Golden, 36 Pa. Super. Ct. 648; Crounse v. Crounse, 108 Va. 108, 60 S. E. 627; Reynolds v. Reynolds, 68 W. Va. 15, 69 S. E. 381, Ann. Cas. 1912A, 889.

[57]Kennedy v. Kennedy (N. J.), 112 Atl. 492.

[58]Pollock v. Pollock, 9 S. Dak. 48, 68 N. W. 176.

[59]Danielly v. Danielly, 93 N. J. Eq. 556, 118 Atl. 335. See also Dow v. Dow, 97 Conn. 488, 117 Atl. 507; Strickland v. Strickland (N. J.), 117 Atl. 391.

[60]Bishop v. Bishop, 155 Ky. 679, 160 S. W. 176; Geisinger v. Conners, 130 La. 922, 58 So. 815 (hostility of plaintiff's mother living with couple); Taylor v. Taylor, 112 Md. 666, 77 Atl. 133.

[61]Doolittle v. Doolittle, 78 Iowa 691, 43 N. W. 616, 6 L. R. A. 187; Sanderson v. Sanderson, 178 N. Car. 339, 100 S. E. 590; Hodgins v. Hodgins, 75 Pa. Super. Ct. 187; Lacock v. Lacock, 74 Pa. Super. Ct. 378. See notes, 19 Am. St. 433; 119 Am. St. 627; 9 L. R. A. 698.

[62]Stone v. Stone, 206 Ala. 568, 90 So. 794; German v. German, 137 Md. 424, 112 Atl. 789.

lesser degree is a matter in which the courts of the various states do not agree. Some require the facts set up in justification for the desertion to be sufficient for a divorce,[63] but the prevailing authority does not require that degree of misconduct which would be grounds for divorce.[64] Where such misconduct has been condoned by the deserting party it can not be set up in defense.[65]

Proof of ill temper or differences over trivial matters is not sufficient to justify the husband in leaving his wife.[66] The husband may not claim that the wife's criticism of him justified him in leaving home where the criticism involved his own disregard of his marital obligation.[67]

Where the wife leaves because of the cruel conduct of her husband, it would seem a very proper thing to require him to reform and seek a restoration of the marital relation giving the wife a reasonable assurance of his sincerity and her safety and that when he does not do so that his desertion will be considered as continuing.[68] The offer must be a good faith offer by the spouse in fault.[69]

It is very clear that evidence of alleged misconduct by an abandoned spouse after abandonment is not relevant on the issue of justification for the abandonment.[70]

[63]Underwood v. Underwood, 271 Fed. 553, 50 App. D. C. 323; Taylor v. Taylor, 80 Iowa 29, 45 N. W. 307, 20 Am. St. 394; Wilkins v. Wilkins, 84 Nebr. 206, 120 N. W. 907, 133 Am. St. 618; Rogers v. Rogers, 81 N. J. Eq. 479, 86 Atl. 935, 46 L. R. A. (N. S.) 711; Risk v. Risk, 195 N. Y. S. 536; Towson v. Towson, 126 Va. 640, 102 S. E. 48.

[64]Hardin v. Hardin, 17 Ala. 250, 52 Am. Dec. 170; Watts v. Watts, 160 Mass. 464, 36 N. E. 479, 23 L. R. A. 187, 39 Am. St. 509; Morrison v. Morrison, 142 Mass. 361, 8 N. E. 59, 56 Am. Rep. 688; Wulke v. Wulke, 149 Minn. 289, 183 N. W. 349; Hamilton v. Hamilton, 87 W. Va. 534, 105 S. E. 771; Hall v. Hall, 69 W. Va. 175, 71 S. E. 103, 34 L. R. A. (N. S.) 758. See notes, 119 Am. St. 628; 9 L. R. A. 698.

[65]Davis v. Davis, 134 Ga. 804, 68 S. E. 594, 30 L. R. A. (N. S.) 73, 20 Ann. Cas. 20.

[66]Underwood v. Underwood, 50 App. D. C. 323, 271 Fed. 553; Schmidt v. Schmidt (N. J.), 117 Atl. 400.

[67]Holloway v. Holloway (Cal. App.), 196 Pac. 926; Bennett v. Bennett, 48 Cal. App. 670, 192 Pac. 180.

[68]Csanyi v. Csanyi (N. J.), 115 Atl. 76. See also Hyer v. Hyer, 91 N. J. Eq. 147, 108 Atl. 180; Wilhelm v. Wilhelm, 90 Ore. 435, 177 Pac. 57.

[69]Underwood v. Underwood, 50 App. D. C. 323, 271 Fed. 553; Jackson v. Jackson (N. J.), 115 Atl. 1. See also Allers v. Allers, 194 App. Div. 96, 185 N. Y. S. 440.

[70]Garcia v. Garcia, 60 Misc. (N. Y.) 198, 111 N. Y. S. 1017.

§ 336. **Separation by mutual consent is not desertion—Offers of reconciliation.**—A separation by mutual consent cannot be construed as desertion, unless one of the parties revokes the consent by making a good faith offer to resume cohabitation and such offer is refused.[71] The husband, for example, may not sue on the ground of abandonment until he has revoked his consent by seeking a reconciliation by something more than a mere request for her return unaccompanied by an offer in any sense of protection, maintenance or a home or a manifestation of any sincere desire to reinstate her to the conjugal relation.[72] So, in another case, where the wife asked to return upon proper conditions and the husband told her she could return and live as one of his daughters, but that he would not agree that she return with the

[71]Crow v. Crow, 23 Ala. 583; Gray v. Gray, 15 Ala. 779; Andrade v. Andrade, 14 Ariz. 379, 128 Pac. 813; Johnson v. Johnson, 107 Ark. 262, 154 S. W. 503; Turner v. Turner (Cal.), 203 Pac. 109; Lewis v. Lewis, 167 Cal. 732, 141 Pac. 367, 52 L. R. A. (N. S.) 675; Borden v. Borden, 166 Cal. 469, 137 Pac. 27; Keesey v. Keesey, 160 Cal. 727, 117 Pac. 1054; Wright v. Wright, 52 Cal. App. 548, 199 Pac. 44; Pettis v. Pettis, 91 Conn. 608, 101 Atl. 13; Ward v. Ward, 7 Penn. (Del.) 364, 75 Atl. 611; Loftus v. Loftus, 134 Ill. App. 360; Sanders v. Sanders, 184 Ky. 119, 211 S. W. 425; Walker v. Walker, 125 Md. 649, 94 Atl. 346, Ann. Cas. 1916B, 934; Lynch v. Lynch, 33 Md. 328; Purdy v. Purdy, 238 Mass. 506, 131 N. E. 297; Cooper v. Cooper, 17 Mich. 205, 97 Am. Dec. 182; Vanderburgh v. Vanderburgh (Minn.), 188 N. W. 276; Simpson v. Simpson, 31 Mo. 24; Holschbach v. Holschbach (Mo. App.), 184 S. W. 155; Bordeaux v. Bordeaux, 43 Mont. 102, 115 Pac. 25; Allbee v. Allbee, 38 Nev. 191, 147 Pac. 452; Hahn v. Hahn (N. J.), 115 Atl. 652; Freeman v. Freeman, 82 N. J. Eq. 360, 88 Atl. 1071, 49 L. R. A. (N. S.) 1042; Provost v. Provost, 73 N. J. Eq. 418, 75 Atl. 1101; Currier v. Currier, 68 N. J. Eq. 797, 64 Atl. 1133; Power v. Power, 65 N. J. Eq. 93, 55 Atl. 111; Goldbeck v. Goldbeck, 18 N. J. Eq. 42; Ingersoll v. Ingersoll, 49 Pa. St. 249, 88 Am. Dec. 500; Saville v. Saville, 76 Pa. Super. Ct. 458; McCoy v. McCoy, 74 Pa. Super. Ct. 552; Sternberg v. Sternberg, 73 Pa. Super. Ct. 328; Pomerantz v. Pomerantz, 71 Pa. Super. Ct. 241; Neale v. Neale, 70 Pa. Super. Ct. 219; McGowen v. McGowen, 52 Tex. 657; Bacon v. Bacon, 68 W. Va. 747, 70 S. E. 762. An agreement for separation is not ordinarily a bar to a divorce, either limited or absolute. Archbell v. Archbell, 158 N. Car. 408, 74 S. E. 327, Ann. Cas. 1913D, 261. A man is not compelled to use physical force to prevent his wife leaving him. Nunn v. Nunn, 91 Ore. 384, 178 Pac. 986, 3 A. L. R. 500. The necessity and extent of the remonstrance or resistance which will negative the consent to the separation depend upon the facts and circumstances of each case. See also note in 3 A. L. R. 503.

[72]Stone v. Stone, 206 Ala. 568, 90 So. 794. See also Sanders v. Sanders, 184 Ky. 119, 211 S. W. 425.

rights of a wife as to household duties, the court held that his offer was not made in good faith after sending her off penniless and alone, so as to bar her suit for divorce on the ground of desertion.[73] In another case it was held that a husband could not complain of an abandonment where he aids the wife in going to another place to care for an uncle who is to deed her valuable property for caring for him and he follows the wife to the new abode and cohabits with her for a time.[74]

But the proof of acquiescence in the separation must be clear. The fact that a husband allowed his wife to go without creating a scene did not amount to his consent.[75] The case was the same where the husband paid his wife a certain amount a month on the order of a court,[76] nor was it evidence of consent that a wife requested her husband to put into writing his refusal to live with her.[77] An acquiescence, however, was implied where the husband sued for divorce on the ground of cruelty instead of desertion.[78]

The request for a resumption of marital relations by the wife sincerely made and so understood by the husband will prevent the granting of an absolute divorce, though a divorce from bed and board was in existence and it was not asked that such divorce be set aside.[79]

§ 337. **Desertion where both parties dwell under same roof.**—There are cases where the courts have granted decrees for divorce where both parties continued to dwell under the same roof.[80] The courts as a rule, however, hold that there must be an actual desertion from the home or place of residence.[81]

§ 338. **Refusal to follow husband.**—As a rule the husband has the legal and moral right to fix the place of domicile, as he is considered the head and support of the family, and if for business or any other reason he removes to another state or locality, and his

[73]Fagan v. Fagan, 186 Iowa 1279, 173 N. W. 875.

[74]Tuning v. Tuning, 90 W. Va. 457, 111 S. E. 139.

[75]Nunn v. Nunn, 91 Ore. 384, 178 Pac. 986.

[76]Caldwell v. Caldwell, 70 Pa. Super. Ct. 332.

[77]Lettau v. Lettau, 89 N. J. Eq. 317, 108 Atl. 112.

[78]Moody v. Moody, 118 Maine 454, 108 Atl. 849.

[79]Krause v. Krause, 177 Wis. 165, 187 N. W. 1019.

[80]Axton v. Axton, 182 Ky. 286, 206 S. W. 480; Evans v. Evans, 93 Ky. 510, 14 Ky. L. 628, 20 S. W. 605; Anshutz v. Anshutz, 16 N. J. Eq. 162; Baker v. Baker, 99 Ore. 213, 195 Pac. 347.

[81]Burton v. Burton, 184 Ky. 268, 211 S. W. 869.

wife refuses to follow him, she is guilty of desertion.[82] He must have due consideration for the wife's welfare, however,[83] and the change of domicile must be made in good faith.[84] The husband should manifest a desire for his wife to follow him.[85]

It is the duty of the husband to furnish a home for the wife[86] and this duty is not satisfied by inviting her to come to the home of his parents.[87] He may not require the wife to furnish the funds to erect the home at the place to which he intends to remove.[88] In Massachusetts it has been held that a divorce obtained by the husband in another state, for desertion by the wife, who lived in Massachusetts, where the parties were married and resided until his removal to the other state, which was not for the purpose of obtaining the divorce, will be recognized as valid in Massachusetts, it appearing that the wife was duly served with process in Massachusetts, in accordance with the statutes of the other state, and it not appearing that she separated from her husband for justifiable cause.[89]

§ 339. **Refusal to follow wife.**—A husband was unable to support his wife and children owing to his poverty. The wife removed to another place where she supported herself. After the removal

[82]Winkles v. Powell, 173 Ala. 46, 55 So. 536; Kennedy v. Kennedy, 87 Ill. 250; Babbitt v. Babbitt, 69 Ill. 277; Mitchell v. Mitchell, 193 Iowa 153, 185 N. W. 62; Coleman v. Coleman, 164 Ky. 709, 176 S. W. 186; Walker v. Laighton, 31 N. H. 111; Calichio v. Calichio, 85 N. J. Eq. 213, 96 Atl. 658; Hunt v. Hunt, 29 N. J. Eq. 96; Domb v. Domb, 195 App. Div. 526, 186 N. Y. S. 306; Stieber v. Stieber, 82 Okla. 205, 200 Pac. 141; De Vry v. De Vry, 46 Okla. 254, 148 Pac. 840; Caldwell v. Caldwell, 70 Pa. Super. Ct. 332; Hair v. Hair, 10 Rich. Eq. (S. Car.) 163. But not where her health prevented. Copping v. Termini, 135 La. 224, 65 So. 132, L. R. A. 1915A, 222.

[83]Franklin v. Franklin, 190 Mass. 349, 77 N. E. 48, 4 L. R. A. (N. S.) 145, 5 Ann. Cas. 851; Brewer v. Brewer, 79 Nebr. 726, 113 N. W. 161, 13 L. R. A. (N. S.) 222; Hall v. Hall, 69 W. Va. 175, 71 S. E. 103, 34 L. R. A. (N. S.) 758. See notes, 119 Am. St. 637; 138 Am. St. 162.

[84]Bibb v. Bibb, 39 Cal. App. 406, 179 Pac. 214; Fischer v. Fischer (N. J.), 114 Atl. 409; See note, 5 Ann. Cas. 853.

[85]Collett v. Collett, 170 Mo. App. 590, 157 S. W. 90.

[86]Coleman v. Coleman, 164 Ky. 709, 176 S. W. 186; King v. King, 122 La. 582, 47 So. 909.

[87]Marshak v. Marshak, 115 Ark. 51, 170 S. W. 567, L. R. A. 1915E, 161, Ann. Cas. 1916E, 206; Garrison v. Garrison, 31 Ky. L. 1209, 104 S. W. 980; Geisinger v. Conners, 130 La. 922, 58 So. 815; Isenberg v. Isenberg, 75 Pa. Super. Ct. 551.

[88]Walter v. Walter, 190 Ky. 49, 226 S. W. 374.

[89]Loker v. Gerald, 157 Mass. 42, 31 N. E. 709, 16 L. R. A. 497, 34 Am. St. 252.

the husband visited his family but once, and made no provision whatever for their support. It was held that he was not guilty of desertion. The law must not be so construed as to require him to follow her to such places as for any cause she may see fit to go in order to escape the imputation of voluntary absence.[90]

§ 340. **Refusal to leave native country.**—The refusal of the wife to accompany her husband to a foreign country is not per se a wilful and malicious desertion,[91] but generally the husband has the same right to change citizenship and allegiance as he has to merely change domicile.[92]

§ 341. **Duty of spouse at fault to seek renewal of cohabitation.**—As a general rule a spouse at fault in the original separation who desires to resume marital relations to prevent the desertion from becoming a statutory ground for divorce, must make a good faith unconditional offer to return and resume the marital status.[93] When an offer to return is made in good faith by the original deserter and is refused by the deserted spouse the fault of desertion is thrown on the refusing spouse. The original desertion is terminated.[94] The spouse not at fault is not required to solicit the return of the other.[95] The fact that insincere efforts at reconciliation have been made should not militate against a good faith offer made by the spouse at fault.[96]

[90]Frost v. Frost, 17 N. H. 251.

[91]Bishop v. Bishop, 30 Pa. St. 412.

[92]Franklin v. Franklin, 190 Mass. 349, 77 N. E. 48, 48 L. R. A. (N. S.) 145, 5 Ann. Cas. 851.

[93]Walker v. Walker, 14 Cal. App. 487, 112 Pac. 479; Ward v. Ward, 7 Penn. (Del.) 364, 75 Atl. 611; Hunt v. Hunt, 61 Fla. 630, 54 So. 390; Arment v. Arment, 154 Iowa 573, 134 N. W. 616; Bohanan v. Bohanan, 150 Iowa 182, 129 N. W. 819; Seeds v. Seeds, 139 Iowa 717, 117 N. W. 1069; Creasey v. Creasey, 168 Mo. App. 68, 151 S. W. 219; Rogers v. Rogers, 81 N. J. Eq. 479, 86 Atl. 935, 46 L. R. A. (N. S.) 711; Devers v. Devers, 115 Va. 517, 79 S. E. 1048; Maloney v. Maloney, 83 Wash. 656, 145 Pac. 631; Stay v. Stay, 53 Wash. 534, 102 Pac. 420. See also Purnell v. Purnell (N. J.), 70 Atl. 187.

[94]McConnell v. McConnell, 98 Ark. 193, 136 S. W. 931, 33 L. R. A. (N. S.) 1074; Peretti v. Peretti, 165 Cal. 717, 134 Pac. 322; Silverstein v. Silverstein, 178 Ill. App. 145; Conlin v. Conlin, 163 Iowa 420, 144 N. W. 1005; De Vry v. De Vry, 46 Okla. 254, 148 Pac. 840; Womble v. Womble (Tex. Civ. App.), 152 S. W. 473.

[95]Fielding v. Fielding, 67 Fla. 143, 64 So. 546; Seeds v. Seeds, 139 Iowa 717, 117 N. W. 1069; McKinney v. McKinney, 77 W. Va. 58, 87 S. E. 928. See also Martin v. Martin, 78 N. J. Eq. 423, 79 Atl. 261. But see Patterson v. Patterson, 45 Wash. 296, 88 Pac. 196.

[96]Creasey v. Creasey, 168 Mo. App. 68, 151 S. W. 219.

§ 342. **Refusal to renew cohabitation.**—Where the parties have consented to live apart, either party may revoke such consent at any time, and if one of them honestly seeks in good faith to renew cohabitation, and the other declines, this refusal constitutes desertion.[97]

Where, however, the wilful, obstinate and continued desertion has existed for the statutory time, the deserted spouse need not thereafter resume marital relations and the refusal to do so will not affect the cause of action for divorce.[98]

§ 343. **Refusal to cohabit.**—Where a marriage is performed under an agreement that the parties will not cohabit, and the purpose of the marriage is to prevent a conviction of bastardy and to legitimatize the children of the parties, a divorce may be granted for desertion although the marriage was not consummated by coition.[99] A wife is guilty of desertion where she refuses to occupy the husband's bed and leaves his home on the morning after the marriage without any cause,[1] but not where she has sufficient excuse.[2]

So where a husband marries to avoid a prosecution for bastardy and immediately leaves the wife and never cohabits with her, she may obtain a divorce for desertion although the marriage was not consummated.[3] Again, a wife who refuses to remove to her husband's home or to cohabit with him in her home is guilty of desertion.[4]

§ 344. **Husband's liability for support of wife.**—A husband who without cause, leaves his wife or drives her from his home is obliged to support her, and is liable for necessaries furnished her.[5] The husband has a right, however, to prohibit certain persons from giving his wife credit for necessaries on his ac-

[97]Baker v. Baker, 168 Cal. 346, 143 Pac. 607, Ann. Cas. 1916A, 854; Danforth v. Danforth, 88 Maine 120, 33 Atl. 781, 31 L. R. A. 608, 51 Am. St. 380; Shaw v. Shaw, 89 N. J. Eq. 214, 108 Atl. 6; Pozzi v. Pozzi, 87 N. J. Eq. 676, 102 Atl. 665.

[98]Wright v. Wright, 81 Fla. 456, 87 So. 156, 18 A. L. R. 627.

[99]Franklin v. Franklin, 154 Mass. 515, 28 N. E. 681, 13 L. R. A. 843, 26 Am. St. 266.

[1]Pilgrim v. Pilgrim, 57 Iowa 370, 10 N. W. 750.

[2]Sutton v. Sutton, 82 N. J. Eq. 648, 90 Atl. 280.

[3]McQuaid v. McQuaid, Wright (Ohio) 223.

[4]Sisemore v. Sisemore, 17 Ore. 542, 21 Pac. 820.

[5]Morris v. Morris, 20 Ala. 168; Warner v. Warner, 54 Mich. 492, 20 N. W. 557.

count, provided she can get them elsewhere. As he is obliged to support her he has a right to determine where she shall trade. But where a wife leaves her husband without just cause, he will not be liable even for necessaries furnished her while absent. A husband is entitled to the presence and society of his wife as long as he treats her well, and if she deserts him without cause, or commits adultery, and he turns her away, he will not be liable even for necessaries furnished her by others who have notice that he has turned her away.[6]

The husband is obliged to furnish his wife at his own home with a decent maintenance according to his position and circumstances in life, and if by his cruel treatment or unlawful acts he drives her away from his home, or he leaves her without just cause, he is bound to pay for such necessaries as others shall supply her.[7] Mere failure to support, however, is not desertion,[8] but a continued refusal to contribute to the support of a wife may indicate a settled purpose to disregard the marital obligation and support the charge of desertion.[9]

§ 345. **Posting wife.**—Even though a husband causes a publication to be made that he will not pay for necessaries furnished his wife, and even though such publication is read by the person who afterwards supplies them, such publication will have no legal effect, nor is it necessarily ground for divorce.[10] The law will not permit a husband, who without cause leaves his wife or drives her from his home, to allow the wife to subsist upon the charity of others.[11]

§ 346. **Desertion is not excused by continuing support.**—A man can not make up for failure to give his wife the benefit of his society and cohabitation by paying for her support.[12]

[6]Hunter v. Boucher, 20 Mass. 289.

[7]Eames v. Sweetser, 101 Mass. 78; Cunningham v. Reardon, 98 Mass. 538, 96 Am. Dec. 670; Cartwright v. Bate, 83 Mass. 514; James v. James, 58 N. H. 266.

[8]Rogers v. Rogers, 81 N. J. Eq. 470, 86 Atl. 935, 46 L. R. A. (N. S.) 711.

[9]Barnhart v. Barnhart, 109 Wash. 110, 186 Pac. 267. See also Hahn v. Hahn (N. J.), 115 Atl. 652; Landry v. Landry, 121 Maine, 104, 115 Atl. 769.

[10]Harrison v. Harrison, 115 La. 817, 40 So. 232.

[11]Watkins v. DeArmond, 89 Ind. 553; Dowling v. Dowling, 183 Mo. App. 454, 167 S. W. 1077. See also Young v. Young (Tenn.), 57 S. W. 438.

[12]Magrath v. Magrath, 103 Mass. 577, 4 Am. Rep. 579; Power v. Power, 66 N. J. Eq. 320, 58 Atl. 192, 105 Am. St. 653; Doty v. Rensselaer County Mut. Fire Ins. Co., 194 App. Div. 841, 185 N. Y. S. 466;

Proof that a husband intentionally and against his wife's consent has for five consecutive years abandoned all matrimonial intercourse and companionship with her, and denied her the protection of his home, will sustain her libel for a divorce from the bonds of matrimony on the ground of desertion; and it is immaterial that during the period he has regularly contributed money, and from time to time necessaries, toward supporting the wife and their children.[13]

§ 347. **Presumption of death.**—Where, on a libel for divorce on account of desertion, the evidence relied upon to prove the desertion raises rather a presumption of death, the libel will be dismissed.[14]

Ringgold v. Ringgold, 128 Va. 485, 104 S. E. 836.

[13]Magrath v. Magrath, 103 Mass. 577, 4 Am. Rep. 579. And see Sargent v. Sargent, 36 N. J. Eq. 644; Ralston's Appeal, 93 Pa. St. 133.

[14]Bodwell v. Bodwell, 113 Mass, 314. See note in 19 Harv. Law Rev. 471.

CHAPTER 22

DISCRETIONARY CAUSES

Section

350. In general.
351. Rhode Island.
352. Washington.

§ 350. **In general.**—The grounds for divorce are purely statutory,[1] and the decree for or against is not a matter of grace but of legal right.[2] It follows that the contract of marriage can be dissolved for a statutory reason and can not be dissolved as an ordinary contract at the desire of the parties.[3]

In a few states, however, the courts have been authorized by statute to grant divorces in their discretion upon sufficient proof that they would be conducive to domestic harmony, or that they would be reasonable and proper for the welfare of the parties, and in accordance with the peace and morality of society.

Such discretion means a judicial discretion, and not the discretion of the parties, and it must be conservative and reasonable.

§ 351. **Rhode Island.**—Wilful desertion for five years of either of the parties, or such desertion for a shorter period of time, in the discretion of the court, is a ground for divorce.[4]

The law giving the court the discretion to grant a divorce where the parties have lived separate and apart from each other for at least ten years is held not to depend on whether the plaintiff has been himself free from guilt of statutory offenses for which divorces are decreed, or his general previous conduct.[5] The Rhode Island statute is held to justify the discretion of the court in decreeing divorce from bed and board to a wife, whose hus-

[1]Stewart v. Stewart, 32 Idaho 180, 180 Pac. 165; Dabelstein v. Dabelstein, 191 Iowa 808, 183 N. W. 385; Veeder v. Veeder, 189 Iowa 912, 179 N. W. 136; Reese v. Reese, 194 App. Div. 907, 185 N. Y. S. 110; Westfall v. Westfall, 100 Ore. 224, 197 Pac. 271, 13 A. L. R. 1428; Boger v. Boger, 86 W. Va. 590, 104 S. E. 49.

[2]Cox v. Cox, 98 Ore. 148, 193 Pac. 482.

[3]Bounds v. Bounds, 135 Md. 220, 108 Atl. 870.

[4]R. I. Gen. Laws, 1909, ch. 247, § 2. Walker v. Walker, 38 R. I. 362, 95 Atl. 925.

[5]Guillot v. Guillot, 42 R. I. 230, 106 Atl. 801.

band for a course of years was unduly intimate with another woman, although he did not commit adultery with her.[6]

§ 352. **Washington.**—In Washington a divorce may be granted upon the application of either party on certain statutory grounds or for any cause deemed by the court sufficient, and the court must be satisfied that the parties can no longer live together.[7] The decree may not be granted merely because the court may believe that ends and objects of society may be subserved by divorcing the parties.[8] It must appear that there is some cause why the parties can not live together, and this cause must not be the fault of the plaintiff.[9]

The court may grant the divorce where it is shown that the wife is quarrelsome and impatient with the husband and there is such incompatability of temperament that they can not longer live together.[10] The statute is not retroactive.[11]

[6]Walker v. Walker, 38 R. I. 362, 95 Atl. 925.

Rem. Comp. Stat. 1922, § 982. Where no other ground has been proven by competent evidence the mere conclusion of the court that the parties can not longer live together is insufficient to sustain a decree of divorce. Hilleware v. Hilleware, 92 Wash. 99, 158 Pac. 999.

[8]McMillan v. McMillan, 113 Wash. 250, 193 Pac. 673.

[9]Maloney v. Maloney, 83 Wash. 656, 145 Pac. 631; Spute v. Spute, 74 Wash. 665, 134 Pac. 175; Pierce v. Pierce, 68 Wash. 415, 123 Pac. 598. The court will find the cause why the parties cannot live together. Bickford v. Bickford, 57 Wash. 639, 107 Pac. 837.

[10]Freeburn v. Freeburn, 107 Wash. 646, 182 Pac. 620.

[11]Pierce v. Pierce, 107 Wash. 125, 181 Pac. 24.

CHAPTER 23

FRAUD, DURESS AND MISTAKE

Section

355. Fraud generally.
356. Prenuptial pregnancy and unchastity.
357. Concealment of fact of conviction of crime.
358. Duress.
359. Mistake.

§ 355. **Fraud generally.**—It is a general rule with regard to fraud and deception in a marriage contract that, because of its solemn importance to the family and society, care and diligence must be exercised by the parties to ascertain the facts which are the basis of and which form the incentive for the mutual undertaking.[1]

Fraud or deception by one of the parties, if it consists in gross, outrageous falsehood or misrepresentation may render the marriage voidable.[2] In some cases disabilities combined with fraud may together give cause for annulment although either alone would be insufficient.[3]

[1]Williamson v. Williamson, 34 App. Cas. (D. C.) 536, 30 L. R. A. (N. S.) 301; Lyon v. Lyon, 230 Ill. 366, 82 N. E. 850, 13 L. R. A. (N. S.) 996, 12 Ann. Cas. 25; Smith v. Smith, 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 Am. St. 440; Cummington v. Belchertown, 149 Mass. 223, 21 N. E. 435, 4 L. R. A. 131; Lewis v. Lewis, 44 Minn. 124, 46 N. W. 323, 9 L. R. A. 505, 20 Am. St. 559; Allen's Appeal, 99 Pa. St. 196, 44 Am. Rep. 101; Varney v. Varney, 52 Wis. 120, 8 N. W. 739, 38 Am. Rep. 726. See note, 79 Am. St. 372.

[2]Browning v. Browning, 89 Kans. 98, 130 Pac. 852, Ann. Cas. 1914C, 1288; Leavitt v. Leavitt, 13 Mich. 452; Carris v. Carris, 24 N. J. Eq. 516. The minds of the parties must meet in one intention. Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, 95 Am. St. 609.

[3]Orchardson v. Cofield, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 256, 63 Am. St. 211; Lewis v. Lewis, 44 Minn. 124, 46 N. W. 323, 9 L. R. A. 505, 20 Am. St. 559; Foster v. Means, Speers Eq. (S. Car.), 569, 42 Am. Dec. 332. Fraud to warrant divorce existed against the wife who was thirty at the time of her marriage to a boy of nineteen and represented to him that she had obtained a divorce from her former husband, but the facts were that the former husband had obtained the divorce on the ground of adultery. Browning v. Browning, 89 Kans. 98, 130 Pac. 852, L. R. A. 1916C, 737. See notes, 40 L. R. A. 740; Ann. Cas. 1913B, 1240.

A marriage will not be annulled for the husband's fraud in inducing a marriage by false representations as to his character or property. So where a husband represented that his former wife was dead, when in fact he had been divorced from her, the court held that this was not sufficient fraud to justify a divorce.[4] One may not obtain a divorce on the ground of his fraud or misconduct in contracting the marriage.[5]

§ 356. **Prenuptial pregnancy and unchastity.**—Where the wife is pregnant by another man at the time of marriage, and fraudulently conceals this fact from her husband, it is generally held such a fraud as to render the marriage void, either by statute giving the court jurisdiction or by assumed equity jurisdiction;[6] but unchastity alone before marriage is not necessarily a sufficient ground for divorce, although this, of course, depends largely upon the wording of the statutes in the different states.[7] And as a general rule where the husband has been induced to marry through a representation that the wife was pregnant by him when in fact she was pregnant by another there is no cause for annulment or divorce.[8]

[4]Clarke v. Clarke, 11 Abb. Pr. (N. Y.) 228; See note 79 Am. St. 371. But see generally cases cited to the contrary in notes, 79 Am. St. 373; 30 L. R. A. (N. S.) 301.

[5]Watters v. Watters, 168 N. Car. 411, 84 S. E. 703.

[6]Baker v. Baker, 13 Cal. 87; Gould v. Gould, 78 Conn. 242, 262, 61 Atl. 604, 2 L. R. A. (N. S.) 531; Frith v. Frith, 18 Ga. 273, 63 Am. Dec. 289; Ritter v. Ritter, 5 Blackf. (Ind.) 81; Wallace v. Wallace, 137 Iowa 37, 114 N. W. 527, 14 L. R. A. (N. S.) 544, 126 Am. St. 253, 15 Ann. Cas. 761 (husband also had intercourse with defendant before marriage and marriage was induced by representation that he was cause of pregnancy); Smith v. Smith, 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 Am. St. 440; Reynolds v. Reynolds, 85 Mass. 605; Harrison v. Harrison, 94 Mich. 559, 54 N. W. 275, 34 Am. St. 364; Ritayik v. Ritayik, 202 Mo. App. 74, 213 S. W. 883; Carris v. Carris, 24 N. J. Eq. 516; Scott v. Shufeldt, 5 Paige (N. Y.) 43; Morris v. Morris, Wright (Ohio) 630; Allen's Appeal, 99 Pa. St. 196, 44 Am. Rep. 101; Johnson v. Johnson (Tex.), 152 S. W. 661. An action in tort for damages may lie in such a case. Kujek v. Goldman, 150 N. Y. 176, 44 N. E. 773, 55 Am. St. 670, 34 L. R. A. 156. See notes in Ann. Cas. 1915D, 221; 24 Am. Rep. 453; 79 Am. St. 372; 116 Am. St. 244; 18 L. R. A. 375; 13 L. R. A. (N. S.) 997; Ann. Cas. 1913A, 134; Ann. Cas. 1914C, 1292.

[7]Browning v. Browning, 89 Kans. 98, 130 Pac. 852, Ann. Cas. 1914C, 1288; Bryant v. Bryant, 171 N. Car. 746, 88 S. E. 147, L. R. A. 1916E, 648; Varney v. Varney, 52 Wis. 120, 8 N. W. 739, 38 Am. Rep. 726. Concealment of fact of having venereal disease not ground for divorce in Arkansas. Koehler v. Koehler, 137 Ark. 302, 209 S. W. 283.

[8]Franke v. Franke, 96 Cal. xvii, 31

Where a man has had sexual intercourse with his wife before marriage, and a child is born, and the husband knows that the child can not be his, it is not sufficient ground to avoid the marriage.[9] So where a man married a woman whom he knew to be with child, and with whom he himself had had unlawful intercourse, being induced to marry her by assurances that the child was his, and not taking any further steps to ascertain its paternity, nor suspecting her unchastity with any other man than himself, the Massachusetts court declined to declare the marriage void, although it appeared that he could not have been the father of the child.[10] And the same court has held that if a man marries a woman whom he knows to be unchaste, having had sexual intercourse with her, the court will not declare the marriage void for the reason that she, on the day thereof, being at the time pregnant with a bastard child of which he was not the father, assured him she was not pregnant, and he married her on the faith of that assurance, because he knew she was unchaste and was thereby put on his guard.[11]

The following quotation from a Connecticut case[12] is in point: "An examination of the cases which have been assigned for the conclusion reached that the law forbids an annulment or dissolution of marriages entered into under the conditions under discussion, shows that, although appearing in various forms and guises in the different cases, they resolve themselves into four, which may be summarized as follows: (1) That the plaintiff in such case does not come into court with clean hands.[13] (2) That the husband, knowing of the wife's unchastity and pregnancy, was put upon his inquiry as to her condition and the paternity of any child she may have conceived, and that in the pursuit of his

Pac. 570, 18 L. R. A. 375; Smith v. Smith, 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 Am. St. 440; Crehore v. Crehore, 97 Mass. 330, 93 Am. Dec. 98.

[9]Carris v. Carris, 24 N. J. Eq. 516; Hoffman v. Hoffman, 30 Pa. St. 417.

[10]Foss v. Foss, 94 Mass (12 Allen) 26. See comment on this case in Lyman v. Lyman, 90 Conn. 399, 97 Atl. 312, L. R. A. 1916E, 643.

[11]Crehore v. Crehore, 97 Mass. 330, 93 Am. Dec. 98, citing Foss v. Foss, 94 Mass. 26. But see Lyman v. Lyman, 90 Conn. 399, 97 Atl. 312, L. R. A. 1916E, 643, where the Connecticut court says justification is shown if he acted reasonably in relying on her representations, and this seems to be a fair test. Young v. Young (Tex. Civ. App.), 127 S. W. 898 (not ground that wife to induce marriage represented herself as pregnant).

[12]Lyman v. Lyman, 90 Conn. 399, 97 Atl. 312, L. R. A. 1916E, 643.

[13]States v. States, 37 N. J. Eq. 195.

inquiry he was, in view of what he knew, put upon his guard as to the confidence to be reposed in her word, so that he was not entitled to rely on it, but was bound to pursue searching independent investigations.[14] (3) That, having experienced and participated in the woman's incontinence, he was thereby sufficiently apprised of her want of chastity to deprive him of the right to complain that he was deceived by her false assurance that he was the only participant in her illicit intercourse.[15] (4) That, having taken the woman to wife for better or for worse, he ought not to be permitted to say that she was worse than he expected.[16]

"The familiar maxim that he who comes into equity must come with clean hands is not used to convey the idea that no person is permitted to invoke the aid of a court of equity whose life and conduct have not been above reproach, nor does it mean, as one of the New Jersey cases cited appears to imply, that a litigant to obtain relief in equity, must have been without fault in all his dealings with or conduct towards the party against whom the relief is asked.[17] The maxim 'only applies to the particular transaction under consideration, for the court will not go outside of the case for the purpose of examining the conduct of the complainant in other matters or questioning his general character for fair dealing. The wrong must have been done to the defendant himself and must be in regard to the matter in litigation.'[18] 'When a court of equity is appealed to for relief, it will not go outside the subject-matter of the controversy and make its interference to depend upon the character and conduct of the moving party in no way affecting the equitable right which he asserts against the defendant or relief which he demands.'[19] 'The maxim that 'he comes into equity must come with clean hands' has not such application as the defendant seeks to give it. It refers solely to wilful misconduct in regard to the matter in litigation. Though an obligation be indirectly connected with an illegal transaction, it will not be thereby barred from enforcement, if the

[14]Foss v. Foss, 94 Mass. (12 Allen), 26; Seilheimer v. Seilheimer, 40 N. J. Eq. 412, 2 Atl. 376.

[15]Franke v. Franke, 96 Cal. xvii, 31 Pac. 571, 18 L. R. A. 375.

[16]Scroggins v. Scroggins, 14 N. Car. 535.

[17]Seilheimer v. Seilheimer, 40 N. J. Eq. 412, 2 Atl. 376.

[18]Chicago v. Union Stock Yards Co., 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281; Langdon v. Templeton, 66 Vt. 173, 28 Atl. 866; Bispham's Equity, 72.

[19]Pomeroy's Equity Jurisprudence, § 399.

plaintiff does not require the aid of the illegal transaction to make out his case.'[20]

"The matter in litigation in this case is the marriage contract which the plaintiff is seeking to have terminated. The antecedent illicit relations form no part of the contract. They were only incidental circumstances, which, while doubtless influencing the plaintiff to enter into it, were not influences brought to bear by him to induce the defendant to do so. They formed no part of its consideration. They gave the defendant no rights which the plaintiff is now trying to avoid, and imposed upon him no obligation which he is trying to evade. His conduct in consenting to marry the defendant, and in marrying her, believing as he did that she was pregnant by him, was not only without fault on his part, but most commendable. It was a step without advantage to him, if the children were not his, as they were not, but of infinite importance to her, as a possible means of protecting her reputation and the fair name and good standing of her child or children. His willingness to do all he could to repair the wrong he believed that he had done her in being the cause of her pregnancy, and to accept the burden which his moral duty, under the circumstances as they were presented to him, called upon him to bear, certainly did not make his hands unclean in the matter of the contract from which he seeks relief, nor for that matter as respects herself.

"The reasoning attempted to be summarized under the second head strikes us as leading to a conclusion quite different from that in support of which it has beeen advanced. As used in Foss v. Foss, supra, assuming that its minor propositions and deductions are sound, it leads not illogically, perhaps, to the conclusion at which the case arrives; but when it is appropriated, as it has been, to the support of the proposition that prenuptial incontinence by the parties to a marriage interposes an absolute legal bar to an annulment or dissolution of that marriage, a striking case of non sequitur is presented. Why, for instance, an investigation and extreme care and caution in accepting the woman's representations, if such investigation, care, and caution would be of no avail, and the law would still interpose its forbidding command?

[20]Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 29 Atl. 303, 311, 25 L. R. A. 90, 42 Am. St. 159.

"The third reason is taken verbatim from the opinion in" a California case.[21] "From the citations made in its support it would appear that the court's intention was to express in brief form the reasoning more fully elaborated in the Massachusetts and New Jersey cases, and assert the conclusion which has been deduced the reform. Whether so or not, the incompleteness of the argument is clearly seen when it is remembered that the burden of the plaintiff's complaint is not want of chastity, to which the quotation is confined, but pregnancy by another, of which nothing is said. The wide gap between the two conditions as grounds for divorce remains unbridged. If, perchance, the court intended to bridge this gap by carrying the argument further, so as to include in it as a reason that, on account of his unlawful relations with the defendant, the plaintiff had put himself outside of the protection of the law, so that he must endure in silence the wrong subsequently done him, there would result an infliction of punishment for which we know no authority. In this state a statute prescribes a punishment for the offense the plaintiff committed. Is another to be judicially added in withdrawing from him the protection which the law ordinarily gives to persons defrauded to their harm? 'In doing an unlawful act a person does not necessarily put himself outside the protection of the law. He is not barred of redress for an injury suffered by himself, nor liable for an injury suffered by another, merely because he is a law-breaker.'[22]

"The fourth reason[23] is not one which comports with the policy of our law, as expressed in our statutes regulating divorce and our decisions thereunder.

"The minority of cases expressing or plainly implying views at variance with those just considered are confined, as far as we have observed," to a very few cases.[24] "It is unnecessary to review these cases. It is sufficient for present purposes to say that we fully concur with the majority opinion in the first-named case in saying that it is consonant with equity and justice that the

[21]Franke v. Franke, 96 Cal. xvii, 31 Pac. 571, 18 L. R. A. 375.

[22]Monroe v. Hartford St. R. Co., 76 Conn. 201, 56 Atl. 498, 500.

[23]Scroggins v. Scroggins, 14 N. Car. 535.

[24]Wallace v. Wallace, 137 Iowa 37, 42, 114 N. W. 527, 14 L. R. A. (N. S.) 544, 126 Am. St. 253, 15 Ann. Cas. 76 (based in part upon a statute); Sissung v. Sissung, 65 Mich. 168, 31 N. W. 770 (decided by a divided court); Scott v. Shufeldt, 5 Paige (N. Y.) 43; McCulloch v. McCulloch, 69 Tex. 682, 7 S. W. 593, 5 Am. St. 96.

law should authorize the 'nullifying of a marriage procured by the fraud of the woman in representing to the man that she is pregnant by him, when, at the time of such representation, she knows that she is pregnant by a stranger, and not by him.' "[25]

We can conceive of few graver frauds than this, nor one which, if successful, is attended with more serious results; and we can see no good reason why, if the essentials of fraud, as respects the representations by the one party and the reasonable reliance thereon and action induced thereby by the other, are present, the one thus defrauded should be compelled to endure in silence the situation which has thus been brought upon him, with all the consequences that it entails, and all by reason of his efforts to play the manly part and repair his supposed wrong to the best of his ability. That seems to us to be imposing a grievous punishment for a purely laudable action. The punishment attaches to the marriage, and not to the earlier impropriety, and subjects a man to penalties for an act which had in it no semblance of wrongdoing, either legal or moral.

"In view of the new trial which must be ordered[26] and the prominence which has been given to the opinion in Foss v. Foss, supra, and to the subordinate propositions it advances, we ought to say that we are unable to agree with that case in all of its subordinate propositions, or with its ultimate conclusion as to the duty, in the matter of independent and searching investigation, of a man in the position that Foss and this plaintiff found themselves when the partners in their illicit relations made to them the representations they did as to their pregnancy and the paternity of their children before being justified in accepting those representations as true and acting upon them.

"One who seeks to be relieved from the consequences of an act or undertaking of his on the ground that it was induced by false and fraudulent representations must indeed show that he was justified under all the circumstances in relying upon the representations as true. This justification, however, is established if he shows that he acted reasonably; that is, as a reasonably prudent and intelligent man would act under like circum-

[25]Sissung v. Sissung, 65 Mich. 168, 31 N. W. 770.

[26]The superior court had ruled against the plaintiff upon the sole ground that his case did not come within the ordinary rule (see Conn. Gen. Stat., 1902, § 4551 authorizing divorces for "fraudulent contract") because of the plaintiff's prenuptial intimacy with the defendant.

stances. The law asks no more. It does not ask that the injured party should be unduly incredulous and skeptical, resort to extremes of precaution, or exhaust all possible sources and means of investigation before he believes. Especially is this true in cases where the facts lie within the knowledge of the author of the representations, and within him alone. In such cases it is the general rule that the one to whom the representations are made is justified in relying upon them, in the absence of any knowledge of his own or which should arouse suspicion and cast doubt upon their truth.[27]

"So it is that this plaintiff is only called upon to establish a belief that the circumstances reasonably justified, or, in other words, that he acted in respect to that matter as a reasonable man might be expected to do. He did believe the woman's story, which was in fact true, except as to the responsible author of her condition. The facts within his knowledge pointed very directly to its truth in its entirety. There was no source or means of verification or disproof in the particular concerning which it was false available to him or to anybody, save it be through the medium of a medical examination, or a delay which would have defeated one of the chief objects sought by the marriage. The pertinent question is: Was the belief, which he entertained as the result of the defendant's statements and the facts of which he had personal knowledge, one at which he could reasonably have arrived and acted upon under the circumstances? The question thus presented is one of fact for the trier, and is to be determined upon the facts of the case."[28]

[27]Pomeroy's Equity Jurisprudence, § 891. See also, Wilson v. Nichols, 72 Conn. 173, 43 Atl. 1052; Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, 95 Am. St. 609.

[28]The following is taken from a note in 79 Am. St. 372: "Antenuptial pregnancy by another man is, if concealed from the husband, such a fraud upon him as will justify an annulment of the marriage. Sinclair v. Sinclair, 57 N. J. Eq. 222, 40 Atl. 679; Carris v. Carris, 24 N. J. Eq. 516; Donovan v. Donovan, 9 Allen (Mass.) 140; Reynolds v. Reynolds, 3 Allen (Mass.) 605; Harrison v. Harrison, 94 Mich. 559, 54 N. W. 275, 34 Am. St. 364. Contra, Moss v. Moss, (1897) P. 263, 274, commenting upon the decisions of the American courts; and the husband is entitled to a decree that the supposed marriage has been void ab initio: Sinclair v. Sinclair, 57 N. J. Eq. 222, 40 Atl. 679; but, if he himself has had improper relations with the wife before marriage, he can not have the marriage annulled on account of his wife's false representations that she was pregnant by him: Tait v. Tait, 3 Misc. 218, 23 N.

§ 357. **Concealment of fact of conviction of crime.**—A Missouri statute makes it a ground of divorce that prior to marriage the other party was convicted of a felony or infamous crime without the knowledge of the party seeking the divorce. The term "felony" in this statute means an offense punishable with death or imprisonment in the penitentary. The offense is infamous where the punishment disqualifies the convicted from jury service and holding office or voting at elections. Petit larceny though classed as a misdemeanor carries this penalty and it is ground for divorce in that state that the defendant spouse was convicted of petit larceny without the knowledge of the plaintiff.[29]

§ 358. **Duress.**—In the absence of special statutes fixing jurisdiction, equity courts in this country have generally assumed authority and declared marriages procured under duress null and

Y. 597, 52 N. Y. St. 645, or by reason of the fact that she was pregnant by another man, although her husband was ignorant of her condition at the time of the marriage: Seilheimer v. Seilheimer, 40 N. J. Eq. 412, 2 Atl. 376; States v. States, 37 N. J. Eq. 195; Carris v. Carris, 24 N. J. Eq. 516; Crehore v. Crehore, 97 Mass. 330, 93 Am. Dec. 98; Foss v. Foss, 12 Allen (Mass.) 26; and compare Fairchild v. Fairchild, 43 N. J. Eq. 473, 11 Atl. 426." It will be noted that a number of the above cases are the same as those commented on by the court in the case of Lyman v. Lyman, 90 Conn. 399, 97 Atl. 312, L. R. A. 1916E, 643. In that case it was admitted by the plaintiff's counsel that he was not entitled to an annulment of the marriage, but he did contend, and successfully, that it was a fraudulent contract. This proposition would seem to be incontrovertible, but the difference in the cases depends somewhat on the different statutes in the different jurisdictions. In 19 C. J. p. 39, § 67, Lyman v. Lyman is cited to the contrary, but the general rule is said to be "that a man who has had illicit relations with a woman whom he subsequently marries is not entitled to a divorce upon the ground that he was induced to marry her by false assurances that she was pregnant by him, at least unless he was deceived thereby." Of course the last part of this proposition is in accord with Lyman v. Lyman, where it is pointed out that the law should compel the prospective husband to do only what any other reasonably sensible and prudent man would do under the same circumstances. In the North Carolina case of Bryant v. Bryant, 171 N. Car. 746, 88 S. E. 147, L. R. A. 1916E, 648, the dissenting opinion of Walker, J. should be read, in which he contends that there was no contract because of the fraud, and it should be remembered that the North Carolina statute, unlike that of Connecticut, does not specify a fraudulent contract as one of the grounds for divorce. In fact, this was the basis of the decision of the North Carolina court—that the statute did not authorize a divorce for such ground, which is perfectly true. See Scroggins v. Scroggins, 14 N. Car. 535.

[29]Hartwig v. Hartwig, 160 Mo. App. 284, 142 S. W. 797.

void, both in direct and collateral attacks.[30] Special statutes now generally make duress a cause for divorce.[31]

A marriage ceremony performed through compulsion[32] or through fear of death or bodily harm is invalid, unless afterwards ratified by the party by voluntary sexual intercourse or cohabitation, or by assent.[33] So a husband will be granted a divorce where the marriage has been contracted under duress of imprisonment under a void process or under a false charge.[34]

Generally, marriage to escape certain punishment for seduction is not marriage under duress,[35] even though the threat takes the form of arrest and imprisonment pending trial for seduction or bastardy.[36]

§ 359. **Mistake.**—Mistake or error as a ground for nullity is held to apply to nothing short of a positive mistake as to person. Nothing else is a sufficient ground.[37] "Nothing would be more dangerous than to allow those who have agreed to take each other in terms, 'for better or worse,' to be permitted to say that one of the parties is worse than expected."[38]

[30]Quealy v. Waldron, 126 La. 258, 52 So. 479, 20 Ann. Cas. 1374 and note, 27 L. R. A. (N. S.) 803; Ferlat v. Gojon, 1 Hopk. (N. Y.) 478, 14 Am. Dec. 554; Willard v. Willard, 6 Baxt. (Tenn.) 297, 32 Am. Rep. 529; see notes, 43 L. R. A. 814; 79 Am. St. 370; 20 Ann. Cas. 1375.

[31]Quealy v. Waldron, 126 La. 258, 52 So. 479, 27 L. R. A. (N. S.) 803, 20 Ann. Cas. 1374.

[32]Thorne v. Farrar, 57 Wash. 441, 107 Pac. 347, 135 Am. St. 995, 27 L. R. A. (N. S.) 385.

[33]Shepherd v. Shepherd, 174 Ky. 615, 192 S. W. 658; Bassett v. Bassett, 9 Bush (Ky.) 696; Boutterie v. Demarest, 126 La. 278, 52 So. 492, 27 L. R. A. (N. S.) 805.

[34]Collins v. Collins, 2 Brewst. (Pa.) 515. See also 79 Am. St. 370, note.

[35]Honnett v. Honnett, 33 Ark. 156, 34 Am. Rep. 39; Collins v. Ryan, 49 La. Ann. 1710, 22 So. 920, 43 L. R. A. 814.

[36]Marvin v. Marvin, 52 Ark. 425, 12 S. W. 875, 20 Am. St. 191; Griffin v. Griffin, 130 Ga. 527, 61 S. E. 16, 16 L. R. A. (N. S.) 937, 14 Ann. Cas. 866; Willits v. Willits, 76 Nebr. 228, 107 N. W. 379, 5 L. R. A. (N. S.) 767, 14 Ann. Cas. 883; Jackson v. Winne, 7 Wend. (N. Y.) 47, 22 Am. Dec. 563; Thorne v. Farrar, 57 Wash. 441, 107 Pac. 347, 27 L. R. A. (N. S.) 385, 135 Am. St. 995; see notes, 43 L. R. A. 816; 20 Ann. Cas. 1377.

[37]Rex v. Burton, 3 M. & S. 537.

[38]Long v. Long, 77 N. Car. 304, 24 Am. Rep. 449. See also Scroggins v. Scroggins, 14 N. Car. 535, and Steel v. Steel, 104 N. Car. 631, 635, 10 S. E. 707.

CHAPTER 24

IMPOTENCY[1]

Section

365. In general.
366. Knowledge of defect.
367. Causes of impotency.
368. Advanced age.
369. Existence at time of marriage.
370. Natural impotency.
371. Temporary impotency.
372. Curable impotency.
373. The defect must be one of copulation.
374. Burden of proof.
375. Absence of sexual intercourse.
376. Examination of defendant's person.
377. Refusal to submit to examination.
378. Impotency must be alleged.
379. Time of instituting proceedings.

§ 365. **In general.**—The incapacity of either party to consummate the marriage, by reason of a defect of physical organization or infirmity, is a cause of divorce from the bonds of matrimony. And by the laws of some states, such a cause, existing at the time of the marriage, renders the contract voidable, and it may be declared void ab initio by a sentence of nullity.[2]

§ 366. **Knowledge of defect.**—Where an impotent person, knowing his defect, induces a person not cognizant of it to marry him, he commits thereby a gross fraud and a grievous injury; and even if he is himself ignorant of it, there is equally an injury.

[1]See generally on impotency as ground for annulment of marriage § 171.

[2]Bunger v. Bunger, 85 Kans. 564, 117 Pac. 1017, Ann. Cas. 1913A, 126; Powell v. Powell, 18 Kans. 371, 26 Am. Rep. 774; Mutter v. Mutter, 123 Ky. 754, 97 S. W. 393, 124 Am. St. 381; Payne v. Payne, 46 Minn. 467, 49 N. W. 230, 24 Am. St. 240; Devanbagh v. Devanbagh, 5 Paige (N. Y.) 554, 28 Am. Dec. 443; Ryder v. Ryder, 66 Vt. 158, 28 Atl. 1029, 44 Am. St. 833; Buckley v. Buckley, 50 Wash. 213, 96 Pac. 1079, 126 Am. St. 000. See note, 13 L. R. A. (N. S.) 997. See also divorce laws of the several states, post, chap. 50.

though without intentional wrong. In the former case the marriage would be clearly voidable on the sole ground of fraud, if the principles governing other contracts were applied to it; in the latter case it would seem to be equally voidable on the ground of mistake, and the violation or the implied warranty. But, owing to the peculiar nature of marriage, this infirmity, though sometimes treated as a pure fraud, is according to the better opinion, to be regarded in a somewhat different aspect, yet as presenting some of the elements of fraud.[3]

§ 367. **Causes of impotency.**—*Idiocy.* Impotency may be caused from idiocy in which case it is no ground for divorce.[4]

Loss of testis. Impotency may be caused by the loss of one or both testes. The loss of one testis does not as a rule affect the procreative powers; the loss of both renders a man incurably impotent.[5]

Relaxation. Relaxation of the parts, the result of masturbation, causing the male to become wholly incapable.[6]

Malformation, or disease. Malformation of the organs by disease, large obstructions, rupture and hydroceles, or some deformity rendering copulation impossible or imperfect.[7]

Lack of development. Impotency may be caused in the female by a lack of development or the want of child-bearing organs, or by lack of physical capacity,[8] as narrowness of the vagina, adhesion of the labia, absence of the vagina, imperforated hymen, tumors in the vagina, and sterility.[9]

§ 368. **Advanced age.**—Old age sometimes renders a man incapable, and where, in a suit for divorce because of impotency,

[3]See divorce statutes of the several states, post, chap. 50. Burtis v. Burtis, 1 Hopk. ch. (N. Y.) 557, 14 Am. Dec. 563, holding impotency no ground for divorce unless statute so provides. Divorce granted where wife knew of malformation rendering copulation impossible but concealed it from plaintiff and this though the malformation could have been removed by surgery. Mutter v. Mutter, 123 Ky. 754, 97 S. W. 393, 8 L. R. A. (N. S.) 433, 124 Am. St. 381.

[4]Norton v. Norton, 2 Aik (Vt.) 188. See also Bascomb v. Bascomb, 25 N. H. 267.

[5]Draper's Legal Medicine pp. 99, 107; Witthaus and Becker, Medical Jurisprudence vol. 2 pp. 409, 410.

[6]Petersen, Haines and Webster, Legal Medicine vol. 1, p. 1030.

[7]Peterson, Haines and Webster, Legal Medicine vol. 1, pp. 1024, 1025.

[8]J. G. v. H. G., 33 Md. 401, 3 Am. Rep. 183.

[9]Peterson, Haines and Webster, Legal Medicine, vol. 1, p. 1032; Witthaus and Becker Medical Jurisprudence, vol. 2, p. 406.

the libellant was seventy-three years of age and the respondent sixty, the court held that, though the suit should be dismissed for want of any proof save the statement of the libellant alone, yet it was doubtful whether a divorce should be decreed in any event.[10] A divorce will not be granted because of impotency where the parties are at an advanced age at the time of marriage.[11]

§ 369. **Existence at time of marriage.**—The impotency must have existed at the time of the marriage and be incurable, in order to constitute a ground for divorce or annulment.[12]

§ 370. **Natural impotency.**—When the defect is natural, the legal presumption is that it existed at the time of the marriage, but a contrary presumption arises when it is merely accidental.[13]

§ 371. **Temporary impotency.**—A temporary or occasional incapacity for copulation is not a ground for a decree of nullity. The defect must be permanent and lasting.[14]

§ 372. **Curable impotency.**—A marriage will not be annulled for curable impotency.[15] The infirmity or defect must be incurable.[16]

§ 373. **The defect must be one of copulation.**—The defect must be one of copulation, not of reproduction. Barrenness will not invalidate the marriage, but the copulation should be complete and not imperfect.[17] "The one essential element to constitute impotency is the absence of complete power of copulation. That element being present, the absence of the power of procrea-

[10]Fulmer v. Fulmer, 13 Phila. (Pa.) 166, 36 Leg. Int. 193.

[11]Briggs v. Morgan, 3 Ph. Ecc. 325. See notes, 28 Am. Dec. 450; 116 Am. St. 246.

[12]Ferris v. Ferris, 8 Conn. 166; Kinkaid v. Kinkaid, 256 Ill. 548, 100 N. E. 217; Bunger v. Bunger, 85 Kans. 564, 117 Pac. 1017, Ann. Cas. 1913A, 126; Powell v. Powell, 18 Kans. 371, 26 Am. Rep. 774; J. G. v. H. G., 33 Md. 401, 3 Am. Rep. 183; Bascomb v. Bascomb, 25 N. H. 267; Devanbagh v. Devanbagh, 5 Paige (N. Y.) 554, 28 Am. Dec. 443.

[13]Brown v. Brown, 1 Hag. Ecc. 523.

[14]Kempf v. Kempf, 34 Mo. 211.

[15]Bascomb v. Bascomb, 25 N. H. 267; Davenbagh v. Davenbagh, 6 Paige (N. Y.) 175.

[16]Griffith v. Griffith, 162 Ill. 368, 44 N. E. 820; Bunger v. Bunger, 85 Kans. 564, 117 Pac. 1017, Ann. Cas. 1913A, 126, 128 note. But see Mutter v. Mutter, 123 Ky. 754, 97 S. W. 393, 30 Ky. L. 76, 8 L. R. A. (N. S.) 433, 124 Am. St. 381, contra.

[17]J. G. v. H. G., 33 Md. 401, 3 Am. Rep. 183; Payne v. Payne, 46 Minn. 467, 49 N. W. 230, 24 Am. St. 240.

tion is inevitable, but absence of procreative power is not sufficient to constitute impotency as defined in law."[18]

§ 374. **Burden of proof.**—The burden of proof is upon the complainant to show that the impotency existed at the time of the marriage, that it still exists, and that it is incurable; and the pleadings must so state.[19]

§ 375. **Absence of sexual intercourse.**—The fact that the parties had occupied the same room and bed nightly for a long time, and the alleged incompetent person had refused and had admitted inability to have sexual intercourse, has been held insufficient evidence to prove impotency.[20] At the trial of a divorce case by a husband against his wife, because of the wife's alleged impotency, it appeared that the parties had occupied the same bed for a period of ten years, both being in good health; that the marriage had never been consummated by any act of sexual intercourse; that the husband had often tried to have intercourse with his wife, but she utterly refused to permit it, giving no reason for her refusal; that the husband did not know that the wife was physically incapable of the act of sexual intercourse; and that the wife refused to submit to an examination as to her physical capacity. A female witness testified that the wife had said to her that "she could not have connection with any man," but gave no reason, nor explanation why she could not. It was held, that this statement of the wife, taken along with the other evidence, would justify a finding in favor of the plaintiff; and that a ruling that the evidence would not, in law, justify such a finding was subject to exception.[21]

§ 376. **Examination of defendant's person.**—The court may order the defendant's person to be examined by a surgeon, and, upon the evidence of the surgeon making the examination, the bill may be sustained.[22] An examination is the only means of ascertaining the true condition.[23] When the lack of present capacity is admitted, the court will direct that a surgical examination be made, together with an examination of the party under

[18]Smith v. Smith, 206 Mo. App. 646, 229 S. W. 398.

[19]Lorenz v. Lorenz, 93 Ill. 376; Devanbagh v. Devanbagh, 5 Paige (N. Y.) 554, 28 Am. Dec. 443.

[20]Ferris v. Ferris, 8 Conn. 166.

[21]Merrill v. Merrill, 126 Mass. 228.

[22]Devanbagh v. Devanbagh, 5 Paige (N. Y.) 554, 28 Am. Dec. 443.

[23]Le Barron v. Le Barron, 35 Vt. 365.

oath, to determine if it existed at the time of the marriage.[24] Where it is alleged that the wife's impotency is from malformation, the court will order an examination,[25] but not in case of a woman of advanced age.[26]

In a suit for annulment on the ground of physical incapacity resulting from disease, a compulsory reference can not be made. This can only be done under the statute where the incapacity is congenital.[27]

§ 377. **Refusal to submit to examination.**—A refusal to submit to an examination raises the presumption that the defendant is impotent.[28]

§ 378. **Impotency must be alleged.**—Impotency must be alleged in the petition and proved to be incurable to justify a divorce.[29]

§ 379. **Time of instituting proceedings.**—The validity of a marriage under such circumstances can be assailed only in the lifetime of both parties, and by the injured party. A wife may, if she chooses, live with a husband who is impotent, and he can not then avoid the duties of the marital relation, such as support and maintenance, by having the marriage dissolved. Suits for divorce upon these grounds should be brought within a reasonable time after marriage, for if the parties continue to live together for an unreasonable length of time after ascertaining the true condition, or when they might with reasonable diligence have ascertained the true condition, it indicates insincerity or bad faith on the part of the plaintiff. For this reason many of the states have passed laws regulating the time, after marriage, in which divorce proceedings or annulments shall be begun.

Under no circumstances does the law permit the parties to cohabit while suit is pending.[30]

[24]Newell v. Newell, 9 Paige (N. Y.) 25.

[25]A. C. v. B. C., 11 Wkly. Notes of Cas. (Pa.) 479.

[26]Shafto v. Shafto, 28 N. J. Eq. 34.

[27]Morrell v. Morrell, 17 Hun (N. Y.) 324.

[28]Merrill v. Merrill, 126 Mass. 228.

[29]Roe v. Roe, 29 Pittsb. L. J. (Pa.) 319.

[30]Chapman v. Chapman, 25 N. J. Eq. 394. On impotency as ground for divorce, see S. v. S., 192 Mass. 194, 77 N. E. 1025, 116 Am. St. 241 and note.

CHAPTER 25

INSANITY[1]

Section

385. In general.
386. Degree of insanity.
387. Collateral attack.
388. Insanity after marriage—Statutory provisions.
389. Insane person plaintiff.

§ 385. **In general.**—No insane person or idiot is capable of contracting marriage. A person can not make a valid contract unless he is capable of understanding; he must have mental capacity to give consent.[2] The insanity or idiocy must exist at the time of the marriage contract, or at the time the ceremony is performed, to render the marriage void or voidable.[3] If a person is only temporarily insane, and afterwards recovers or during a lucid interval consents to the marriage, it will be held valid.[4]

Where alleged acts of cruelty are inflicted by an insane person, it is not ground for divorce, unless inflicted in a lucid interval. And where defendant had been recently confined in an asylum, it was held that the plaintiff should prove lucidity.[5]

§ 386. **Degree of insanity.**—To prove a marriage void on the ground of insanity, it is necessary to show that the insanity is

[1]For insanity as cause for annulment see § 167.

[2]Rawdon v. Rawdon, 28 Ala. 565; In re Gregorson, 160 Cal. 21, 116 Pac. 60, Ann. Cas. 1912D, 1124; Orchardson v. Cofield, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 256, 63 Am. St. 211; Powell v. Powell, 18 Kans. 371, 26 Am. Rep. 774; Jenkins v. Jenkins, 2 Dana (Ky.) 102, 26 Am. Dec. 437; Sims v. Sims, 121 N. Car. 297, 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. 665; Crump v. Morgan, 38 N. Car. 91, 40 Am. Dec. 447; Gathings v. Williams, 27 N. Car. 487, 44 Am. Dec. 49; Foster v. Means, Speers Eq. (S. Car.) 569, 42 Am. Dec. 332; see notes, 44 Am. Dec. 55; 79 Am. St. 376.

[3]Wilson v. Wilson, 104 Miss. 347, 61 So. 453; Johnson v. Johnson, 142 N. Car. 462, 55 S. E. 341; see notes, 40 L. R. A. 737; Ann. Cas. 1913B, 1240.

[4]Orchardson v. Cofield, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 256, 63 Am. St. 211. But see contra, Sims v. Sims, 121 N. Car. 297, 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. 665. See note, Ann. Cas. 1912D, 1128.

[5]Tiffany v. Tiffany, 84 Iowa 122, 50 N. W. 554; Broadstreet v. Broadstreet, 7 Mass. 474.

total, and that the form or degree of insanity was such at the time of marriage that the party did not possess sufficient mental capacity to have understood, in a reasonable manner, the nature and effect of the marriage contract.[6] The insanity which renders a marriage void must have existed at the time that the marriage ceremony was performed. Subsequent or prior insanity is no ground for a divorce or an annulment of a marriage. In an Indiana case the court said, "although a court has jurisdiction to grant a divorce for causes which the court shall deem proper, a divorce will not be granted for insanity arising after marriage, as the court can grant a divorce to the injured party only where the other party is a wrongdoer."[7]

In Washington, however, it has been held that an act of the legislature making incurable chronic mania or dementia existing for more than ten years a ground for divorce was valid, as the matter was a rightful subject of legislation.[8]

§ 387. **Collateral attack.**—The legislature has power to pass a statute providing that the validity of existing marriages shall not be questioned in the trial of collateral issues, on account of the insanity or idiocy of either party.[9]

§ 388. **Insanity after marriage—Statutory provisions.**—Very generally insanity accruing after marriage is not ground for divorce in the absence of statutes making this a ground.[10] In Florida, a divorce may be granted in case of the incurable insanity for four years of one of the parties.

In Idaho, insanity after marriage is a cause for divorce. The statute provides that no divorce shall be granted on this ground

[6]Dunphy v. Dunphy, 161 Cal. 380, 119 Pac. 512, 38 L. R. A. (N. S.) 818, Ann. Cas. 1913B, 1230; Orchardson v. Cofield, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 256, 63 Am. St. 211; St. George v. Biddeford, 76 Maine 593; Lewis v. Lewis, 44 Minn. 124, 46 N. W. 323, 9 L. R. A. 263, 20 Am. St. 559; Ward v. Dulaney, 23 Miss. 410; True v. Ranney, 21 N. H. 52, 53 Am. Dec. 164; Crump v. Morgan, 38 N. Car. 91, 40 Am. Dec. 447; Cole v. Cole, 5 Sneed (Tenn.) 57, 70 Am. Dec. 275.

[7]Curry v. Curry, 1 Wilson (Ind.) 236.

[8]Hickman v. Hickman, 1 Wash. 257, 24 Pac. 445, 22 Am. St. 148.

[9]Goshen v. Richmond, 86 Mass. 458. The general rule is that a person procuring a judgment may not attack it collaterally. This rule has been frequently applied in actions for divorce, where the decree was obtained in one state and afterwards attacked in another. See 3 A. L. R. 522, 535, 540.

[10]Lee v. Lee, 182 N. Car. 61, 108 S. E. 352.

unless such insane person has been regularly confined in an insane asylum for at least six years next preceding the commencement of the action for divorce, and that no action shall be maintained upon this ground unless the plaintiff shall have been an actual resident of the state for at least one year next preceding the commencement of the action.

In Indian Territory,[11] where either party subsequent to marriage has become permanently or incurably insane, a divorce may be granted.

In Pennsylvania, where the wife is a lunatic or non compos mentis, a relative or next friend may petition for divorce.

In Washington, in cases of incurable, chronic mania or dementia of either party which have existed for ten years or more, the court may in its discretion grant a divorce.

In Kentucky, a divorce can not be obtained for acts during insanity, but may be for acts occurring prior to the insanity.[12]

§ 389. **Insane person plaintiff.**—A bill of divorce filed by an insane person while in close confinement is invalid.[13]

[11]Now Oklahoma.

[12]See divorce laws of various states, infra, Chap. 50. Huston v. Huston's Committee, 150 Ky. 353, 150 S. W. 386.

[13]Bradford v. Abend, 89 Ill. 78, 31 Am. Rep. 67.

CHAPTER 26

REFUSAL TO SUPPORT

Section

395. Non support as ground for divorce in general.
396. Time of failure to support.
397. Wife able to support herself.
398. Physical weakness.
399. Pecuniary ability.
400. Squandering wife's property.

§ 395. **Non support as ground for divorce in general.**—Where the husband, being of sufficient ability, cruelly or wilfully refuses or neglects to support his wife, it is a ground for divorce in most states.[1] And in those states where the statutes make no provision for divorce on the ground of refusal to support, if the husband refuses or neglects to supply his wife with the common necessaries of life, and she has no other means of obtaining support, it is held sufficient ground to warrant her in leaving him, and the husband will be the deserting party.[2] There is a wanton and cruel failure to support under the Michigan statute where the failure to support is by one in good health and of ability to earn a living.[3]

The support intended is support according to the means and station in life of the husband,[4] and it is not required to be furnished at any place other than their home.[5]

[1]Shelhart v. Shelhart, 195 Mich. 144, 161 N. W. 843; Dean v. Dean, 181 Mich. 498, 148 N. W. 179; Svanda v. Svanda, 93 Nebr. 404, 140 N. W. 777, 47 L. R. A. (N. S.) 666; Wendling v. Wendling, 134 N. Y. S. 55; Uhler v. Uhler, 128 N. Y. S. 963; McGee v. McGee, 43 Okla. 396, 143 Pac. 178. Not a ground for divorce in Arkansas. Arnold v. Arnold, 115 Ark. 32, 170 S. W. 486. Failure to support not ground for divorce in Texas. Barrett v. Barrett (Tex. Civ. App.), 131 S. W. 821. Not a statutory ground in Missouri. Weller v. Weller, 154 Mo. App. 6, 133 S. W. 128.

[2]Morris v. Morris, 20 Ala. 168; Warner v. Warner, 54 Mich. 492, 20 N. W. 557. Failure to support held sufficient in Kaufman v. Kaufman, 146 La. 488, 83 So. 775.

[3]Gellatly v. Gellatly, 185 Mich. 382, 151 N. W. 1037.

[4]Taylor v. Taylor, 20 N. Mex. 13, 145 Pac. 1075.

[5]Fowler v. Fowler, 138 Ky. 326, 127 S. W. 1014. See also Johnston v. Johnston, 17 Cal. App. 241, 119 Pac. 403.

The failure of the husband to give the wife money is not of itself a failure to support.[6]

When husband makes liberal provisions for support it is not ground for divorce that he occasionally gambled and lost considerable money thereby.[7]

§ 396. **Time of failure to support.**—Neglect to support for such time as reasonably shows a settled intention to refuse support permanently under the Washington statute making that a ground for divorce is held satisfied by neglect or refusal to support for practically three months.[8]

§ 397. **Wife able to support herself.**—If the wife has independent means, or, if she has for some time past supported herself by her own earnings, she will not be entitled to a divorce.[9] Where, however, the breach of the duty to support is wilful, wife may be granted a divorce although she has been able to maintain herself.[10]

§ 398. **Physical weakness.**—If the husband's neglect to supply his wife with the common necessaries of life is due to his physical weakness or enforced poverty, the wife will not be entitled to a divorce.[11]

§ 399. **Pecuniary ability.**—The courts hold that the test in cases for divorce on the ground of refusal or neglect to support is the possession by the husband of sufficient means in property to furnish her maintenance, and not his capacity for acquiring such means.[12] The general rule is that it must be more than a neglect to provide. The libellant must show not only that her husband had means to provide for her, but that he wilfully, and, in some states, cruelly neglected to provide, that she was without

[6]Donley v. Donley, 150 Mo. App. 660, 131 S. W. 356.

[7]Cadieux v. Cadieux, 180 Mich. 99, 146 N. W. 161.

[8]Garland v. Garland, 66 Wash. 226, 119 Pac. 380.

[9]Baker v. Baker, 168 Cal. 346, 143 Pac. 607, Ann. Cas. 1916A, 854; Rycraft v. Rycraft, 42 Cal. 444; Washburn v. Washburn, 9 Cal. 475; Hansen v. Hansen, 27 Cal. App. 401, 150 Pac. 70. For a case of insufficient evidence to sustain wife's charge of non-support, see Cadieux v. Cadieux, 180 Mich. 99, 146 N. W. 161.

[10]Merriam v. Merriam, 75 Wash. 389, 134 Pac. 1058. See also Seigmund v. Seigmund, 46 Wash. 572, 90 Pac. 913.

[11]Baker v. Baker, 82 Ind. 146.

[12]Fellows v. Fellows, 8 N. H. 160; Farnsworth v. Farnsworth, 58 Vt. 555, 5 Atl. 401; Goerner v. Goerner, 177 Wis. 603, 187 N. W. 976. See also Gellatly v. Gellatly, 185 Mich. 382, 151 N. W. 1037.

means, and that she actually suffered for the want of the necessaries of life.[13] If the inability arises through imprisonment,[14] insanity,[15] sickness, or inability to procure employment, the wife will not be entitled to a divorce.[16] In one of the cases, a soldier in the World War was held to have performed his duty where he arranged an allotment of thirty dollars a month for his wife and it did not appear that the husband was able to pay more.[17]

§ 400. **Squandering wife's property.**—It has been held that if the husband squanders the wife's property and for several months neglects to provide for her, she will be entitled to a divorce.[18]

[13]Carson v. Carson, 173 Mich. 452, 138 N. W. 1076, 43 L. R. A. (N. S.) 255; Runkle v. Runkle, 96 Mich. 493, 56 N. W. 2; Randall v. Randall, 37 Mich. 563; Faller v. Faller, 10 Nebr. 144, 4 N. W. 1036; Davis v. Davis, 37 N. H. 191; Metzger v. Metzger, 118 Wash. 479, 203 Pac. 936; Johnson v. Johnson, 4 Wis. 135.

[14]Hammond v. Hammond, 15 R. I. 40, 23 Atl. 143, 2 Am. St. 867.

[15]Baker v. Baker, 82 Ind. 146.

[16]Davis v. Davis, 37 N. H. 191.

[17]Porter v. Porter, 52 Cal. App. 452, 198 Pac. 1006.

[18]Hurlburt v. Hurlburt, 14 Vt. 561.

CHAPTER 27

EXCEPTIONAL CAUSES

Section

405. Sodomy.
406. Crime against nature.
407. Immoral or criminal conduct.
408. Fleeing from justices.
409. Gross neglect of duty.
410. Joining Shakers or like societies.
411. Indignities.
412. Defamation of character.
413. Living apart for years.
414. Unsafe or intolerable cohabitation.
415. Violent temper—Incompatability of temper.
416. Causes within court's discretion.

§ 405. **Sodomy.**—Sodomy committed by the husband, though not adultery, is within the statute making extreme cruelty ground for divorce.[1]

§ 406. **Crime against nature.**—In Alabama, the crime against nature with mankind or beast is a ground for absolute divorce.[2]

§ 407. **Immoral or criminal conduct.**—In California, immoral or criminal conduct is a ground for absolute divorce.[3]

§ 408. **Fleeing from justice.**—It was formerly the law in North Carolina that if the husband was indicted for felony and fled the state, and failed to return within one year from the time the indictment was found, it was cause for divorce.[4] There is no such provision in the present statutes, but five year's separation under certain circumstances is a ground for divorce.[5] In Virginia, when either party, charged with an offense punishable with death or confinement in the penitentiary, has been indicted and is a fugitive from justice, and has been absent for two years, the other party is entitled to a divorce.[6]

[1]Crutcher v. Crutcher, 86 Miss. 231, 38 So. 337; Anonymous, 2 Ohio N. P. 342; Poler v. Poler, 32 Wash. 400, 73 Pac. 372.

[2]Alabama Code, 1907, §3793.

[3]Fleming v. Fleming, 95 Cal. 430, 30 Pac. 566, 29 Am. St. 124.

[4]North Carolina Code, § 2743.

[5]Pub. Laws 1921, Chap. 63.

[6]Code 1919, § 5103.

§ 409. **Gross neglect of duty.**—In Kansas, Oklahoma, and Ohio, any gross neglect of duty is made a ground for divorce.[7] "Gross neglect of duty" within the meaning of the Oklahoma statute is such a glaring, flagrant, shameful or monstrous neglect of duty as to be obvious and inexcusable.[8] A substantial failure to provide suitably for the support of a wife when the husband is able to do so is a gross neglect of duty.[9]

§ 410. **Joining Shakers or like societies.**—The joining of a religious society, such as the Shakers, who profess to believe matrimonial intercourse improper and unlawful, and refusing to cohabit for six months, is a cause for divorce in New Hampshire.[10]

§ 411. **Indignities.**—The laws of several of the states make it a ground for divorce that one spouse has subjected the other to habitual indignities, which have caused undeserved suffering, even though they may not be attended with physical violence, or be of such an extreme nature as to render the party incapable of discharging marital duties.[11]

The indignities intended amounts to a species of cruelty to the mind. The course of treatment is such as actually renders the condition of any woman intolerable and her life burdensome. The law contemplates indignities which consist of unmerited contemptuous conduct, acts manifesting contempt, contumely, incivility, or injury accompanied with insult.[12]

[7]Leach v. Leach, 46 Kans. 724, 27 Pac. 131; Thorp v. Thorp, Wright (Ohio), 763; Schwartz v. Schwartz, 6 Ohio Dec. 525; Oklahoma Comp. Stat. 1921, § 501.

[8]No such case where husband unable to furnish support of wife and daughter and wife not in need of support. Beauchamp v. Beauchamp, 44 Okla. 634, 146 Pac. 30.

[9]Lee v. Lee, 38 Okla. 388, 132 Pac. 1070.

[10]Fitts v. Fitts, 46 N. H. 184; Dyer v. Dyer, 5 N. H. 271.

[11]Pryor v. Pryor, 151 Ark. 150, 235 S. W. 419; Poe v. Poe, 149 Ark. 62, 231 S. W. 198; Rose v. Rose, 9 Ark. 507; Briggs v. Briggs, 20 Mich. 34; Sullivan v. Sullivan, 52 Wash. 160, 100 Pac. 321 (personal violence not required)..

[12]Meffert v. Meffert, 118 Ark. 582, 177 S. W. 1; O'Hern v. O'Hern, 206 Mo. App. 651, 228 S. W. 533; Stevens v. Stevens, 170 Mo. App. 322, 156 S. W. 68; Holschbach v. Holschbach, 134 Mo. App. 247, 114 S. W. 1035; Blair v. Blair, 131 Mo. App. 571, 110 S. W. 652; Sanders v. Sanders, 157 N. Car. 229, 72 S. E. 876; Breene v. Breene, 76 Pa. Super. Ct. 568; Lynn v. Lynn, 76 Pa. Super. Ct. 428; Donnelly v. Donnelly, 76 Pa. Super. Ct. 92.

The indignities must be habitual and systematically pursued.[13] So where the husband was in the habit of using vile and abusive language toward his wife, causing her much mental suffering, and fits of illness, threatening permanent injury to her health, the court held that the wife was entitled to a divorce on the ground of cruelty,[14] and so where the wife assaulted her husband, tore his clothes, and spat in his face.[15] A false charge of adultery made without warrant or foundation is sufficient,[16] as is also continual scolding, fault-finding, unkind language, contempt and petty acts of a malicious nature which impair the wife's health.[17] A husband is guilty of indignity where he communicates a loathesome disease to his wife;[18] or where he tells her that if she wanted money she can get it from other men.[19]

A wife has been held guilty of indignity where she refused to perform marital duties except for pay;[20] where a wife so conducts herself as to raise a suspicion in the mind of her husband or the community that she is not faithful;[21] and where she obtained the assistance of police officers to enter their home and help to compel the husband to give the wife nearly all his salary and the allowance made by the husband for household use was ample.[22]

In a New Hampshire case it appeared that the wife had been practising Christian Science and that the husband was opposed to her so doing. This caused the husband to become morose, moody, and inattentive to his business. He was troubled occasionally with insomnia and loss of appetite and became generally despondent and unhappy from his changed domestic relation.

[13]Pryor v. Pryor, 151 Ark. 150, 235 S. W. 419; Simpkins v. Simpkins, 136 Ark. 588, 207 S. W. 28; Rudd v. Rudd (Mo. App.), 238 S. W. 537; Abbott v. Abbott, 75 Pa. Super. Ct. 483.

[14]Powelson v. Powelson, 22 Cal. 358; Gholston v. Gholston, 31 Ga. 625; Briggs v. Briggs, 56 Wash. 580, 106 Pac. 126.

[15]Stevens v. Stevens, 170 Mo. App. 322, 156 S. W. 68.

[16]Wheeler v. Wheeler, 53 Iowa 511, 5 N. W. 689, 36 Am. Rep. 240; Goodman v. Goodman, 26 Mich. 417; Allen v. Allen, 31 Mo. 479; Tuttle v. Tuttle (Mo. App.), 240 S. W. 509; McNamara v. McNamara, 93 Nebr. 190, 139 N. W. 1045; Pinkard v. Pinkard, 14 Tex. 356, 65 Am. Dec. 129.

[17]Marks v. Marks, 56 Minn. 264, 57 N. W. 651, 45 Am. St. 466; Weller v. Weller, 154 Mo. App. 6, 133 S. W. 128; Clark v. Clark, 143 Mo. App. 350, 128 S. W. 218.

[18]Simon v. Simon, 34 Pa. Super. Ct. 182.

[19]Wares v. Wares, 122 Mo. App. 129, 98 S. W. 91.

[20]Casey v. Casey, 180 Mo. App. 605, 163 S. W. 569.

[21]Herriford v. Herriford, 169 Mo. App. 641, 156 S. W. 855.

[22]McGee v. McGee, 161 Mo. App. 40, 143 S. W. 77.

It was admitted that the wife was kind and peaceable and a good mother. The court held that the husband was entitled to a divorce.[23]

But a divorce will not be granted the husband on the ground of extreme and repeated cruelty on the part of the wife, where the evidence simply shows that she was rude, petulant and passionate, and that she threatened violence, but on no occasion actually struck him or inflicted any bodily suffering upon him.[24]

And where it is shown that the husband neglected to provide necessaries, and was frequently intoxicated, and used profane and abusive language, followed by a single act of violence, the court held that it was such an indignity to the person as to justify a separation, and a delay of ten years in making application for divorce was no bar.[25]

An indignity provoked by the plaintiff,[26] or a single act of indignity,[27] be it ever so rude or coarse, is not a ground for divorce.[28] The refusal of conjugal intercourse is not an indignity,[29] and, similarly, mere indiscreet conduct of a wife consisting of flirting with young men is held not to amount to an indignity.[30]

§ 412. **Defamation of character.**—Public defamation of character, if wanton and malicious, is a cause for divorce in Louisiana. But mere abusive language and charges made by the husband while in anger are not sufficient, where no one was present but the husband and wife.[31] To constitute public defamation, the charge must be false and malicious and made in the presence of others, and where the husband charged his wife with the crime of adultery in the presence of their servants and others, the court held the evidence sufficient to grant a decree.[32] But where the wife, in good faith, told a friend that her husband had committed

[23]Robinson v. Robinson, 66 N. H. 600, 23 Atl. 362, 15 L. R. A. 121, 49 Am. St. 632.

[24]Fritts v. Fritts, 36 Ill. App. 31; Ennis v. Ennis, 92 Iowa 107, 60 N. W. 228; Johnson v. Johnson, 49 Mich. 639, 14 N. W. 670; Scott v. Scott, 61 Tex. 119.

[25]Doan v. Doan, 3 Clark (Pa.) 7, 4 Pa. L. J. 332.

[26]Elder v Elder (Mo. App.), 186 S. W. 530.

[27]Dowling v. Dowling, 183 Mo. App. 454, 167 S. W. 1077.

[28]Richards v. Richards, 37 Pa. St. 225.

[29]Johnson v. Johnson, 31 Pa. Super. Ct. 53.

[30]Hancock v. Hancock, 55 Fla. 680, 45 So. 1020, 15 L. R. A. (N. S.) 670.

[31]Primeaux v. Comeaux, 139 La. 549, 71 So. 845; Homes v. Carrier, 16 La. Ann. 94; Bienvenu v. Her Husband, 14 La. Ann. 387.

[32]Cass v. Cass, 34 La. Ann. 614.

adultery, for the purpose of inducing the friend to intercede with the husband and try to induce him to return home, it was held not to be a public defamation, although the charge was false.[33]

§ 413. **Living apart for years.**—In Kentucky, living apart without any cohabitation for five consecutive years next before the application, is sufficient ground for divorce.[34]

In Wisconsin, whenever the husband and wife shall have voluntarily lived entirely apart for the space of five years next preceding the commencement for the action, a decree will be granted.[35]

In North Carolina an absolute divorce may be granted if there has been a separation of husband and wife and they have lived separate and apart for five successive years, and the plaintiff in the suit for divorce has resided in North Carolina for that period.[36]

In Louisiana the period is seven years and the cause of the initial separation is not material.[37]

§ 414. **Unsafe or intolerable cohabitation.**—Some state statutes make conduct rendering cohabitation unsafe or intolerable a cause for divorce. Thus where the wife poisoned her husband's food her conduct was declared unsafe.[38] So also a husband's frequent intoxication and concurrent acts of cruelty were held to render cohabitation unsafe.[39] But cohabitation is not rendered unsafe by mere infrequent impulsive acts,[40] forgery of her husband's name,[41] by being afflicted with consumption,[42] or acts of

[33]Ashton v. Grucker, 48 La. Ann. 1194, 20 So. 738; Gastauer v. Gastauer, 132 La. 941, 61 So. 879.

[34]Kentucky Stat. 1922, § 2117; Parker v. Parker, 31 Ky. L. 1228, 104 S. W. 1028.

[35]Wisconsin Stat. 1915, § 2356; Sanders v. Sanders, 135 Wis. 613, 116 N. W. 179; Thompson v. Thompson, 53 Wis. 153, 10 N. W. 166; Cole v. Cole, 27 Wis. 531; Phillips v. Phillips, 22 Wis. 256.

[36]Pub. Laws 1921, chap. 63; Cooke v. Cooke, 164 N. Car. 272, 80 S. E. 178, 49 L. R. A. (N. S.) 1034.

[37]Vincent v. Le Doux, 146 La. 144, 83 So. 439. See also Dowie v. Becker, 149 La. 160, 88 So. 777 (statute is remedial); Hurry v. Hurry, 144 La. 877, 81 So. 378 (not important that part or all the time had expired before enactment of statute).

[38]Motley v. Motley, 93 Mo. App. 473, 67 S. W. 741.

[39]O'Neill v. O'Neill, 163 N. Y. S. 250.

[40]Kelly v. Kelly, 183 Ky. 172, 209 S. W. 335; Rebstock v. Rebstock, 144 N. Y. S. 289. Cohabitation not rendered unsafe by fact that husband threw pair of shoes at wife but they did not strike her. De Vide v. De Vide, 186 App. Div. 814, 174 N. Y. S. 774.

[41]Weaver v. Weaver, 178 N. Y. 621, 70 N. E. 1111.

[42]Abramowitz v. Abramowitz, 140 N. Y. S. 275.

adultery.[43] The wife should show facts from which it fairly appears that she would have reasonable grounds to apprehend violence by a continuance of cohabitation.[44]

A wife's condition may be rendered intolerable by the wrong of her husband in communicating a loathsome disease.[45]

§ 415. **Violent temper—Incompatability of temper.**—A Florida statute makes habitual indulgence in ungovernable temper a cause for divorce where the effect of such acts is to make the carrying out of the marriage contract impractical and rendering burdensome the life of the person subjected to it.[46]

Incompatability of temper and the fact that the parties find it impossible to live in harmony without more, are not generally held to constitute ground for divorce.[47]

§ 416. **Causes within the court's discretion.**—In some states a divorce may be granted for causes which the court in its discretion may deem sufficient.[48]

[43]Allen v. Allen, 125 App. Div. 838, 110 N. Y. S. 303.

[44]De Vide v. De Vide, 186 App. Div. 814, 174 N. Y. S. 774.

[45]Simon v. Simon, 34 Pa. Super. Ct. 182.

[46]Croghan v. Croghan, 78 Fla. 455, 83 So. 460; Beekman v. Beekman, 53 Fla. 858, 43 So. 923 (petulance not enough).

[47]Otton v. Otton, 196 App. Div. 403, 188 N. Y. S. 255; Averett v. Averett, 189 App. Div. 250, 178 N. Y. S. 405; Morris v. Morris, 108 Misc. 228, 177 N. Y. S. 600; Bowers v. Bowers, 98 Ore. 548, 194 Pac. 697; Crumbley v. Crumbley, 94 Ore. 617, 186 Pac. 423.

[48]Phillips v. Phillips, 173 Ky. 608, 191 S. W. 482; Colvin v. Colvin, 15 Wash. 490, 46 Pac. 1029. See notes, 138 Am. St. 165; 135 Am. St. 967; 18 L. R. A. 376.

CHAPTER 28

DEFENSES

Section

420. Collusion.
421. Connivance in commission of matrimonial offense.
422. Insincerity.
423. Undue influence of third persons in inducing suit.
424. Condonation.
425. Revival of condoned offense.
426. Delay in bringing suit.
427. Recrimination.
428. Mistake.
429. Notice of grounds.
430. Insanity.
431. Drunkenness.
432. Separation agreements.
433. Provocation.
434. Justification or excuse.
435. Invalidity of marriage.
436. Abatement—Death—Other cause pending.
437. Estoppel.

§ 420. **Collusion.**—Collusion means a mutual consent of the parties to defraud or impose upon the court by agreeing to make up a false case, or consenting to one or the other committing some act upon which an action could be founded, and agreeing that one or the other may get a divorce, when no real injury has been done either of them. If the court is satisfied from the conduct of the parties that they are in collusion the case will be dismissed,[1] for divorces are granted only in favor of the injured

[1]Lanktree v. Lanktree, 42 Cal. App. 648, 183 Pac. 954; Vayette v. Myers, 303 Ill. 562, 136 N. E. 467; People ex rel. v. Case, 241 Ill. 279, 89 N. E. 638, 25 L. R. A. (N. S.) 578; State v. Richardson, 122 La. 1064, 48 So. 458; Wolkovisky v. Rapaport, 216 Mass. 48, 102 N. E. 910, Ann. Cas. 1915A, 809; Sheehan v. Sheehan, 77 N. J. Eq. 411, 77 Atl. 1063, 140 Am. St. 566; Morris v. Patterson, 180 N. Car. 484, 105 S. E. 25; Wiemer v. Wiemer, 21 N. Dak. 371, 130 N. W. 1015; Pearce v. Pearce, 53 Pa. Super. Ct. 129. See also Underwood v. Underwood, 50 App D. C. 323, 271 Fed. 553 (no collusion when offer of husband to wife for

and against the guilty party,[2] and the marriage relation can not be dissolved by act of the parties but only by the judgment of the proper legal tribunal.[3] In many cases both parties desire the same thing, namely, a separation, and in such cases the libels or petitions are usually uncontested and the temptation to collusion is great, and the danger that exaggerations or falsehoods will be exposed is small. For this reason the courts are very careful to see that they are not imposed upon and they consider the testimony with the most painstaking and scrupulous care.[4]

Collusion will cover agreements between the parties that no defense shall be made to the dissolution of the marriage tie which would not otherwise be dissolved.[5] Fraud, however, is never

her consent to divorce rejected). Russian Jew who gave wife a bill of divorce and she returned to Russia and remarried, denied divorce as wife's offense was committed by procurement of husband. Shilman v. Shilman, 174 N. Y. S. 385.

[2]Hamilton v. Hamilton, 89 Ill. 349. Collusion has been defined as a "corrupt combining of married parties to procure a sentence or judicial order by some false practice." Sheehan v. Sheehan, 77 N. J. Eq. 411, 413, 77 Atl. 1063, 140 Am. St. 566. See also 19 C. J. 91, 92, for the following definition of collusion and the difference between it and connivance: Collusion is a corrupt agreement between a husband and wife whereby one of them, for the purpose of enabling the other to obtain a divorce, commits a matrimonial offense, or whereby for the same purpose evidence is fabricated of an offense not actually committed or evidence of a valid defense is suppressed. Connivance is distinguished from collusion in two respects: (1) Connivance is the corrupt consent to a matrimonial offense actually committed, and this is its whole extent. Collusion on the other hand may consist in an agreement not only for the commission of a matrimonial offense, but also for the fabrication of evidence of an offense not committed or the suppression of evidence of a defense. (2) Connivance consists in the corrupt consent of the complainant alone, while collusion necessarily involves a corrupt agreement between the spouses to practise fraud on the court. While one spouse may be guilty of conniving at an offense which the other voluntarily commits, yet there can be no collusion in such a case unless the offense is, committed not only voluntarily, but by actual agreement between the spouses. Gray v. Gray, 31 L. J. P. & M. 83; Gethin v. Gethin, 31 L. J. P. & M. 43; Jessop v. Jessop, 30 L. J. P. & M. 193; Lloyd v. Lloyd, 30 L. J. P. & M. 97.

[3]Wolkovisky v. Rapaport, 216 Mass. 48, 102 N. E. 910, 51 Ann. Cas. 1915A, 809.

[4]Edleson v. Edleson, 179 Ky. 300, 200 S. W. 625; Wilde v. Wilde, 37 Nebr. 891, 56 N. W. 724; McCauley v. McCauley, 88 N. J. Eq. 392, 103 Atl. 20 (the fact that husband and wife are both extremely anxious for a divorce does not amount to collusion); Dinsmore v. Dinsmore, 128 Va. 403, 104 S. E. 785.

[5]Stewart v. Stewart (N. J.), 114 Atl. 851. Sheehan v. Sheehan, 77 N.

presumed, but, if it appears at any stage of the proceedings, the libel may be dismissed. To bring before a court of justice an action for divorce for a cause which does not exist, or, which has been brought about for that special purpose, is a gross fraud upon the court, and the parties render themselves liable for contempt of court.[6] And if it appears that there has been any agreement to assist or even to oppose each other, no divorce will be granted.

Collusion is a defense which a court will interpose sua sponte, where it is developed. The law only permits, ex necessitate rei, but does not favor, the granting of divorces; it is the policy of the law to preserve sacred the marriage tie; and it will never knowingly favor the granting of a decree where the parties consent to it without adequate cause, or where they collude together to secure that end. Cases have not been unknown, among unclean persons, of conventional committing of adultery by one of the parties in order to secure the divorce, coveted by both; but every such case, if it could be established, would be denied, or set aside if granted; and a court would be applauded, which would visit with the utmost rigor, as for contempt of court, all persons who should trifle with its dignity and powers. A divorce obtained by collusion is not only contrary to public policy, but it is an evasion of justice, and any agreement, therefore, between husband and wife, in consideration of one or the other of them withdrawing or not making any opposition to a suit brought by the other for divorce is void, and this applies to any agreement intended to facilitate the procuring of a divorce.[7] There may be no enforcement of an antenuptial agreement whereby wife was to obtain a divorce without contest by husband.[8]

And an agreement between a man and his wife made the day after he had been awarded a decree of divorce, whereby he agrees to pay her an annuity if she will not move for a new trial is void as tending to facilitate divorce.[9] So where a wife agreed not to sue for alimony for a year, the court held the contract void.[10] An

J. Eq. 411, 77 Atl. 1063, 140 Am. St. 566.

[6]Smith v. Brown, 3 Tex. 360, 49 Am. Dec. 748.

[7]Hamilton v. Hamilton, 89 Ill. 349; Muckenburg v. Holler, 29 Ind. 139, 92 Am. Dec. 345; Comstock v. Adams, 23 Kans. 513, 33 Am. Rep. 191; Wilde v. Wilde, 37 Nebr. 891, 56 N. W. 724; Stoutenburg v. Lybrand, 13 Ohio St. 228.

[8]Donohue v. Donohue, 159 Mo. App. 610, 141 S. W. 465.

[9]Blank v. Nohl, 112 Mo. 159, 19 S. W. 65, 20 S. W. 477, 18 L. R. A. 350.

[10]Evans v. Evans, 93 Ky. 510, 14 Ky. L. 628, 20 S. W. 605.

agreements to alimony, however,[11] or to merely facilitate the proceedings, is not collusion.[12] Neither is an agreement on division of property in case of divorce an act of collusion.[13]

The mere fact that the defendant desires the divorce to be granted and makes no defense is not collusion.[14]

§ 421. **Connivance in commission of matrimonial offense.**—A husband who actively connives in the adultery of his wife by procuring her to be lured into the commission of the act will very generally be presumed to have consented to the adultery and will be denied a divorce on that ground.[15] This is termed connivance in the law by which is meant the consent, express or implied, of one spouse to the misconduct of the other.[16] A duty rests upon a husband to protect his wife from temptation and not connive in her downfall.[17] There is connivance defeating a recovery when a husband employs a detective to get evidence of the wife's adultery and the adultery is brought about by the detective,[18]

[11]Ham v. Twombly, 181 Mass. 170, 63 N. E. 336; Rapp v. Rapp, 162 Mo. App. 673, 145 S. W. 114; Erwin v. Erwin (Tex. Civ. App.), 40 S. W. 53.

[12]Dodge v. Dodge, 98 App. Div. 85, 90 N. Y. S. 438. Not an agreement not to defend that defendant entered an appearance and stated that if the court should deem the proof sufficient a decree for complainant might be entered. Vayette v. Myers, 303 Ill. 562, 136 N. E. 467. See State v. Richardson, 122 La. 1064, 48 So. 458 (agreement facilitating proof of offense is collusion).

[13]Doose v. Doose, 198 Ill. App. 387. See also Jarrard v. Jarrard, 116 Wash. 70, 198 Pac. 741.

[14]Pohlman v. Pohlman, 60 N. J. Eq. 28, 46 Atl. 658.

[15]Reisen v. Reisen, 148 Ill. App. 460; Eames v. Eames, 133 Ill. App. 665; Noyes v. Noyes, 194 Mass. 20, 74 N. E. 814, 120 Am. St. 517, 10 Ann. Cas. 818 (husband arranged for wife to spend an evening alone in the house of a third person); Morrison v. Morrison, 136 Mass. 310; Pierce v. Pierce, 3 Pick. (Mass.) 299, 15 Am. Dec. 210; Donohue v. Donohue, 159 Mo. App. 610, 141 S. W. 465; Bailey v. Bailey, 67 N. H. 402, 29 Atl. 847; White v. White, 84 N. J. Eq. 512, 95 Atl. 197; Rademacher v. Rademacher, 74 N. J. Eq. 570, 70 Atl. 687; Delaney v. Delaney, 71 N. J. Eq. 246, 65 Atl. 217; Woodward v. Woodward, 41 N. J. Eq. 224, 4 Atl. 424; Hedden v. Hedden, 21 N. J. Eq. 61; McAllister v. McAllister, 137 N. Y. S. 833; Myers v. Myers, 41 Barb. (N. Y.) 114; Moss v. Moss, 24 N. Car. 55; Romich v. Romich, 16 Pa. Co. Ct. 195; Yocum v. Yocum, 3 Pa. Dist. 615.

[16]Herriford v. Herriford, 160 Mo. App. 641, 155 S. W. 855.

[17]White v. White, 84 N. J. Eq. 512, 95 Atl. 197; Kretz v. Kretz, 73 N. J. Eq. 246, 67 Atl. 378.

[18]Rademacher v. Rademacher, 74 N. J. Eq. 570, 70 Atl. 687; McAllister v. McAllister, 137 N. Y. S. 833; Smith v. Smith (Tex. Civ. App.), 218 S. W. 602.

but not so where the adultery was the deliberate act of defendant without connivance of the detective.[19]

In a case where a wife admittedly knew that by leaving her husband he would seek the embraces of other women, and was satisfied that while she lived with him he had kept all his obligations to her and yet she deliberately abandoned him, it was held that her act constituted consent and connivance.[20]

A mere passive permission to misconduct in order to test fidelity is held not to amount to connivance.[21] So, a husband was held not to connive where being suspicious of the virtue of his wife, he pretended to go away for the night, but returned and detected her in adultery.[22] Very generally, where either husband or wife suspects the other of having adulterous intercourse with another, either may take measures to procure evidence without being guilty of connivance.[23] The husband, for example, may employ agents to watch a wife suspected of lewd conduct and he will not be charged with connivance where he permits her to proceed far enough only to discover to a certainty her lewd disposition.[24]

The principle of connivance applies to other matrimonial misconduct—as for example, desertion—and a divorce on that ground will be denied where the desertion was encouraged by the plaintiff.[25] The fact that a husband brought home beer for the family, has been held not to have amounted to connivance by the husband in the habitual drunkenness of the wife so as to defeat his action for divorce on that ground.[26]

§ 422. **Insincerity.**—There are cases which hold that the conduct of one who institutes a suit for divorce, not from a desire

[19]Tuck v. Tuck, 117 App. Div. 421, 102 N. Y. S. 688.

[20]Richardson v. Richardson, 114 N. Y. S. 912. But see Mattison v. Mattison, 60 Misc. 573, 113 N. Y. S. 1024.

[21]Herriford v. Herriford, 169 Mo. App. 641, 155 S. W. 855; Farwell v. Farwell, 47 Mont. 574, 133 Pac. 958, Ann. Cas. 1915C, 78. Not connivance that the husband, after knowledge, allowed his wife's paramour to remain in the family home for a few days. Lambert v. Lambert, 165 Iowa 367, 145 N. W. 920.

[22]Robbins v. Robbins, 140 Mass. 528, 5 N. E. 837, 54 Am. Rep. 488.

[23]Engle v. Engle, 153 Iowa 285, 133 N. W. 654; Farwell v. Farwell, 47 Mont. 574, 133 Pac. 958, Ann. Cas. 1915C, 78; Lehman v. Lehman, 78 N. J. Eq. 316, 79 Atl. 1060.

[24]Bateman v. Bateman, 42 App. D. C. 230; Torlotting v. Torlotting, 82 Mo. App. 192.

[25]Thompson v. Thompson, 50 Pa. Super. Ct. 150.

[26]Dorian v. Dorian, 298 Ill. 24, 131 N. E. 129.

for the redress sought; but to attain some collateral end, will prevent his recovery of a decree under the doctrine of insincerity. This doctrine is apparently an anomaly in the law, at least it is sui generis; for it is a general principle that motives are disregarded when a suitor is entitled to the relief he seeks.[27]

§ 423. **Undue influence of third persons in inducing suit.**—Where the party applying for the divorce is clearly entitled to this relief, it is not a defense that a third person—a parent, for example—induced the plaintiff to sue. This could be a defense only where the undue influence was such as to deprive plaintiff of free will and choice. Mere persuasion or importunity does not amount to undue influence.[28]

§ 424. **Condonation.**—Condonation is forgiveness by a husband or wife of a violation by the other of the marriage vows and obligations, as of acts of adultery or cruelty, with an implied condition that the injury shall not be repeated and when fully established and the offense is not repeated, bars a divorce on the ground of the condoned offense.[29]

It really goes further than mere forgiveness for past wrongs. The forgiveness must be followed by a restoration of the offending party to all marital rights.[30] Condonation is either express or implied,[31] and is favored in the law.[32] It is express when signified

[27]Kirschbaum v. Kirschbaum, 92 N. J. Eq. 7, 111 Atl. 697.

[28]Powell v. Powell (Tex. Civ. App.), 170 S. W. 111.

[29]Davis v. Davis, 134 Ga. 804, 68 S. E. 594, 30 L. R. A. (N. S.) 73, 20 Ann. Cas. 20; Hunt v. Hunt, 211 Ill. App. 410; Hammond v. Hammond (Mass.), 132 N. E. 724; Cumming v. Cumming, 135 Mass. 386, 46 Am. Rep. 476; Herriford v. Herriford, 169 Mo. App. 641, 155 S. W. 855; Bliss v. Bliss, 161 Mo. App. 70, 142 S. W. 1081; Griffith v. Griffith, 77 Nebr. 180, 108 N. W. 981; Redding v. Redding (N. J. Ch.), 85 Atl. 712; Taber v. Taber (N. J. Eq.), 66 Atl. 1082; Kostachek v. Kostachek, 40 Okla. 947, 140 Pac. 1021; Saville v. Saville, 103 Ore. 117, 203 Pac. 584; Jones v. Jones, 59 Ore. 308, 117 Pac. 414 (condonation after commencement of suit); Lacock v. Lacock, 74 Pa. Super. Ct. 378; Egidi v. Egidi, 37 R. I. 481, 93 Atl. 908, Ann. Cas. 1918A, 648. See note, 6 L. R. A. 548.

[30]Lindsay v. Lindsay, 226 Ill. 309, 80 N. E. 876; Mattes v. Mattes, 121 Ill. App. 400; Anderson v. Anderson, 89 Nebr. 570, 131 N. W. 907, Ann. Cas. 1912C, 1; Egbers v. Egbers, 79 Wash. 72, 139 Pac. 767; Maxwell v. Maxwell, 75 W. Va. 521, 84 S. E. 251. No condonation where no cohabitation though parties occupied same room. Brown v. Brown, 164 Ill. App. 589.

[31]Quincy v. Quincy, 10 N. H. 272.

[32]Bishop v. Bishop, 82 Misc. (N. Y.) 676, 144 N. Y. S. 143.

by words or writing, and is implied when it may be inferred as a presumption of law from the acts of the injured party. It is always implied from cohabitation after the commission of the offense, and after the complainant has knowledge of that fact, or believes it on reasonable grounds.[33] In Oregon there is no implied condonation except in cases of adultery. In other cases the offense must have been expressly forgiven.[34] The offense of habitual drunkenness is not impliedly condoned by cohabitation.[35]

Condonation is a privilege of the injured person alone and not of the injuring party.[36]

Condonation is a frequent defense. Its meaning is that the offended forgives the offending party with full knowledge of the delictum,[37] but only upon condition that the offense be not repeated.[38] The most common case of condonation is where one party commits adultery, and the other party, fully aware of it, cohabits,[39] afterwards, with the offender; this is condonation or presumed forgiveness.[40] Condonation is no defense to an action for annulment.[41]

The chief element in condonation is knowledge of the offense,[42] for there can be no condonation without knowledge,[43] so there

[33]Bush v. Bush, 135 Ark. 512, 205 S. W. 895, 6 A. L. R. 1153; Delliber v. Delliber, 9 Conn. 235; Rogers v. Rogers, 122 Mass. 423; Greims v. Greims, 80 N. J. Eq. 233, 83 Atl. 100.

[34]Saville v. Saville, 103 Ore. 117, 203 Pac. 584.

[35]Dorian v. Dorian 298 Ill. 24, 131 N. E. 129.

[36]McLaughlin v. McLaughlin, 90 N. J. Eq. 322, 107 Atl. 260.

[37]Abbott v. Abbott, 203 Mich. 265, 168 N. W. 950; Diggs v. Diggs, 187 App. Div. 859, 175 N. Y. S. 791.

[38]Neeley v. Neeley, 179 Cal. 232, 176 Pac. 163; Wade v. Wade (Mo. App.), 229 S. W. 432; Rogers v. Rogers, 81 Wash. 502, 142 Pac. 1150.

[39]Newton v. Newton, 86 N. J. Eq. 129, 97 Atl. 294; Frost v. Frost, 85 N. J. Eq. 571, 96 Atl. 1010.

[40]Knowles v. Knowles; 6 Boyce (29 Del.) 458, 100 Atl. 569; Shaffer v. Shaffer (Iowa), 181 N. W. 261; Martin v. Martin, 151 La. 530, 92 So. 46; Weber v. Weber, 195 Mo. 126, 189 S. W. 577; Rudd v. Rudd (Mo. App.), 238 S. W. 537; Jones v. Jones, 208 Mo. App. 632, 235 S. W. 481; Beauley v. Beauley, 199 App. Div. 280, 191 N. Y. S. 398; Jenkins v. Jenkins, 103 Ore. 208, 204 Pac. 165. As to cruelty reviving adultery, see Fisher v. Fisher, 93 Md. 298, 48 Atl. 833.

[41]Millar v. Millar, 175 Cal. 797, 167 Pac. 394, Ann. Cas. 1918E, 184.

[42]Day v. Day, 71 Kans. 385, 80 Pac. 974, 6 Ann. Cas. 169; Shackelton v. Shackelton, 48 N. J. Eq. 364, 21 Atl. 935, 27 Am. St. 478; Smith v. Smith, 4 Paige (N. Y.) 432, 27 Am. Dec. 75. See notes, 9 L. R. A. 699; Ann. Cas. 1912C, 6.

[43]Van Wickle v. Van Wickle (N. J.), 108 Atl. 761; Laycock v. Laycock, 52 Ore. 610, 98 Pac. 487; Canning v. Canning, 87 Vt. 492, 89 Atl. 1088, Ann. Cas. 1916C, 344.

was no condonation of adultery where the wife continued to live with her husband in the belief that this conduct had ceased when in fact it had not.[44] Any acts indicating reconciliation can only be such if there was knowledge on the part of the offended party of something to conciliate. So where the offending party has transgressed the right of the offended upon a multiplicity of occasions, before condonation is shown by acts of cohabitation it must be in evidence that the offended had knowledge of the continued repeating of the offense.[45] Mere suspicious circumstances of the offense are not sufficient.[46] So, if the wife voluntarily has sexual intercourse with her husband while entertaining a belief of his guilt, which belief is the product of suspicion only and not of evidence, it is not a condonation of the offense.[47]

Where the injured party has clear and convincing knowledge of the offense and then deliberately and wilfully cohabits with the offender he or she condones the offender's acts and such condonation is a defense to action for divorce.[48]

In certain cases, however, the legal presumption of the remission of the offense, arising from cohabitation, may be rebutted by evidence, especially in favor of the wife, when the offense is less heinous than infidelity, and when circumstances render immediate separation impracticable or unadvisable; for delay may be justified by the necessity which compels it, as where the wife

[44]Howard v. Howard, 188 Mo. App. 564, 176 S. W. 483.

[45]Shackelton v. Shackelton, 48 N. J. Eq. 364, 21 Atl. 935, 27 Am. St. 478. See note, Ann. Cas. 1912C, 7.

[46]Mitchell v. Mitchell, 193 Iowa 153, 185 N. W. 62; Day v. Day, 71 Kans. 385, 80 Pac. 974, 6 Ann. Cas. 169; Shackelton v. Shackelton, 48 N. J. Eq. 364, 21 Atl. 935, 27 Am. St. 478. The defense must be established by clear and credible evidence. Homrich v. Homrich, 75 Pa. Super. Ct. 598. See notes, 13 Ann. Cas. 216; Ann. Cas. 1912C, 7, 17.

[47]Johnson v. Johnson, 78 N. J. Eq. 507, 80 Atl. 119.

[48]Phelps v. Phelps, 28 App. D. C. 577; Phillips v. Phillips, 102 Ark. 679, 144 S. W. 914; Mathy v. Mathy, 88 Ark. 56, 113 S. W. 1012; Eames v. Eames, 133 Ill. App. 665; Hunter v. Hunter, 121 Ill. App. 380; McDuffee v. McDuffee, 169 Mich. 410, 135 N. W. 242; Holschbach v. Holschbach, 134 Mo. App. 247, 114 S. W. 1035; Speiser v. Speiser, 188 Mo. App. 328, 175 S. W. 122; Greims v. Greims, 80 N. J. Eq. 233, 83 Atl. 1001; Johnson v. Johnson, 78 N. J. Eq. 507, 80 Atl. 119; Clark v. Clark, 78 N. J. Eq. 304, 81 Atl. 1126; Jones v. Jones, 18 N. J. Eq. 33, 90 Am. Dec. 607; Marsh v. Marsh, 14 N. J. Eq. 315, 82 Am. Dec. 251; Johnston v. Johnston, 116 Va. 678, 82 S. E. 694; Rogers v. Rogers, 81 Wash. 502, 142 Pac. 1150. See note, Ann Cas. 1912C, 13.

returned for only a few days to protect the children,[49] or by a laudable desire on her part to avoid a rupture of the family ties till forbearance ceases to be a virtue,[50] or her alleged act of condonation was induced by duress, fear or hallucination.[51] So, too, the law is generally more inclined to favor a wife in the matter of condonation because of her position in society and her dependence upon her husband's support.[52] However, there has been some tendency to disregard this distinction.[53]

It has been held that where the wife cohabited with her husband after having discovered in her husband's vest a receipted bill for the board of the husband and another woman at a hotel, and after his admission that he was present at the hotel on that date, such cohabitation did not show condonation of any adultery on his part, the husband having denied that he was guilty of adultery, and the wife having no knowledge as to the location and surroundings of the rooms to which the husband and the woman were assigned.[54] The inference of condonation may be raised by delay,[55] so condonation was presumed where the wife left her husband nearly a year after the offense and for an entirely different reason.[56]

It has sometimes been said that the doctrine of condonation arising from continued cohabitation was inapplicable to cases of a libel by the wife seeking a divorce for extreme cruelty. But the better established rule seems to be that cruelty, as well as adultery, may be the subject of condonation,[57] by continued cohabita-

[49]Sayles v. Sayles, 41 R. I. 170, 103 Atl. 225. See also Norman v. Norman, 88 W. Va. 640, 107 S. E. 407.

[50]Harrison v. Harrison, 20 Ala. 629, 56 Am. Dec. 227; Armstrong v. Armstrong, 27 Ind. 186. In Roote v. Roote, 33 App. D. C. 398, 23 L. R. A. (N. S.) 240, it was held that where a man had illicit sexual relations with his wife before marriage and married her while she was in a house of ill fame, he might still get a divorce if she refused to leave such house.

[51]Leech v. Leech, 82 N. J. Eq. 472, 89 Atl. 51; Saville v. Saville, 103 Ore. 117, 203 Pac. 584; Mahurin v. Mahurin (Tex. Civ. App.), 208 S. W. 558.

[52]Cochran v. Cochran, 35 Iowa 477; Gardner v. Gardner, 2 Gray (Mass.) 434; Wood v. Wood, 2 Paige (N. Y.) 108; Horne v. Horne, 72 N. Car. 534; D'Aguilar v. D'Aguilar, 1 Hag. Ecc. 733.

[53]Rogers v. Rogers, 122 Mass. 423.

[54]Harris v. Harris, 83 App. Div. 123, 82 N. Y. S. 568.

[55]Griffin v. Griffin, 177 Mich. 623, 143 N. W. 603.

[56]Gray v. Gray (Ark.), 98 S. W. 975.

[57]Whinnery v. Whinnery, 21 Cal. App. 59, 130 Pac. 1065 (only where there is an express agreement to

tion,[58] but the principle requires evidence of an unequivocal intent to forgive and to voluntarily resume marital relations.[59] It is held not a condonation of cruelty that wife has made several efforts to get along with husband.[60] In California an express agreement is essential to condone cruelty.[61]

If the wife commits adultery, and the husband afterwards lives with her with knowledge of the offense, a divorce will not be granted,[62] and so also connivance at acts of adultery amounts to condonation.[63] A mere offer of reconciliation by the wronged spouse may constitute condonation.[64] Mere affectionate letters are not enough to show condonation.[65] However, mere sexual intercourse without further acts of forgiveness is sufficient condonation.[66]

§ 425. **Revival of condoned offense.**—Condonation is forgiveness. It is forgiveness based upon the presumption and belief that the guilty party has repented; but, if the subsequent acts of

condone); Klekamp v. Klekamp, 275 Ill. 98, 113 N. E. 852, Ann. Cas. 1918A, 663 (if pleaded); In re Adams, 161 Iowa 88, 140 N. W. 872; Creyts v. Creyts, 133 Mich. 4, 94 N. W. 383; Davis v. Davis (Mo. App.), 206 S. W. 580; Murchison v. Murchison (Tex. Civ. App.), 171 S. W. 790; Bingham v. Bingham (Tex. Civ. App.), 149 S. W. 214. See note, Ann. Cas. 1912C, 10.

[58]Shirey v. Shirey, 87 Ark. 175, 112 S. W. 369; In re Adams, 161 Iowa 88, 140 N. W. 872; Root v. Root, 164 Mich. 638, 130 N. W. 194, 32 L. R. A. (N. S.) 837, Ann. Cas. 1912B, 740; Johnsen v. Johnsen, 78 Wash. 423, 139 Pac. 189, 1200 (cohabitation from one to two years).

[59]Millet v. Millet, 144 La. 921, 81 So. 400; Quient v. Quient, 105 Wash. 315, 177 Pac. 779; Norman v. Norman, 88 W. Va. 640, 107 S. E. 407.

[60]Austin v. Austin, 172 Mich. 620, 138 N. W. 215; Bliss v. Bliss, 161 Mo. App. 70, 142 S. W. 1081.

[61]Whinnery v. Whinnery, 21 Cal. App. 59, 130 Pac. 1065.

[62]Truitt v. Truitt, 154 Ill. App. 242; Newton v. Newton, 86 N. J. Eq. 129, 97 Atl. 294; Dyott v. Henderson, 85 N. J. Eq. 338, 97 Atl. 35; Johnson v. Johnson, 78 N. J. Eq. 507, 80 Atl. 119; Thomas v. Thomas, 2 Coldw. (Tenn.) 123. The reverse of this proposition is also true. Johnston v. Johnston, 116 Va. 678, 82 S. E. 694. In some states the defense of condonation can only be set up where the charge is adultery, and is held not to apply to a charge of cruelty. Steel v. Steel, 11 Week. No. Cas. (Pa.) 21. See the usual rule, however, as stated above. See also on Condonation, 6 Brit. Rul. Cas. 589.

[63]Skinner v. Skinner, 47 Ind. App. 670, 95 N. E. 128.

[64]Shirly v. Shirly, 87 Ark. 175, 112 S. W. 369; Runkle v. Runkle, 96 Mich. 493, 56 N. W. 2; Maxwell v. Maxwell, 75 W. Va. 521, 84 S. E. 251.

[65]Lundy v. Lundy, 23 Ariz. 213, 202 Pac. 809; Miles v. Miles, 101 Ill. App. 406; Forrester v. Forrester, 101 Miss. 155, 57 So. 553.

[66]Rogers v. Rogers, 67 N. J. Eq. 534, 58 Atl. 822.

the guilty party show that there was no repentance, it is not a bar.[67] Condonation for any offense is a conditional forgiveness, and if the offense be repeated, it revives the right of action,[68] but there can be no revival of a condoned desertion,[69] and long continued cohabitation may estop the condoning party from claiming revival.[70]

[67]Roote v. Roote, 33 App. D. C. 398, 23 L. R. A. (N. S.) 240; Turner v. Turner, 44 Ala. 437; Harrison v. Harrison, 20 Ala. 629, 56 Am. Dec. 227; Davis v. Davis, 134 Ga. 804, 68 S. E. 594, 30 L. R. A. (N. S.) 73, 20 Ann. Cas. 20; Skinner v. Skinner, 47 Ind. App. 670, 95 N. E. 128; Hartt v. Hartt, 155 Iowa 329, 135 N. W. 1007; Craig v. Craig, 129 Iowa 192, 105 N. W. 446, 2 L. R. A. (N. S.) 669; Douglass v. Douglass, 81 Iowa 258, 47 N. W. 92; LaFlamme v. LaFlamme, 210 Mass. 156, 96 N. E. 62, 39 L. R. A. (N. S.) 1133; Sewall v. Sewall, 122 Mass. 156, 23 Am. Rep. 299; Robbins v. Robbins, 100 Mass. 150, 97 Am. Dec. 91; Forrest v. Forrest, 214 Mich. 297, 183 N. W. 22; Eistedt v. Eistedt, 187 Mich. 371, 153 N. W. 676; Wellman v. Wellman, 178 Mich. 107, 144 N. W. 493; Kennedy v. Kennedy (Mo. App.), 182 S. W. 100; Meek v. Meek, 186 Mo. App. 703, 172 S. W. 1154; Dimmitt v. Dimmitt, 167 Mo. App. 94, 150 S. W. 1107; Viertel v. Viertel, 123 Mo. App. 63, 99 S. W. 759; McNamara v. McNamara, 93 Nebr. 190; 139 N. W. 1045; Anderson v. Anderson, 89 Nebr. 570, 131 N. W. 907, Ann. Cas. 1912C, 1; Shackleton v. Shackleton, 48 N. J. Eq. 364, 21 Atl. 935, 27 Am. St. 478; Timerson v. Timerson, 2 How. Prac. (N. Y.) 526; Jones v. Jones, 173 N. Car. 279, 91 S. E. 960; Page v. Page, 167 N. Car. 350, 83 S. E. 627; Gordon v. Gordon, 88 N. Car. 45, 43 Am. Rep. 729; Mosher v. Mosher, 16 N. Dak. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820, 125 Am. St. 654; Penn v. Penn, 37 Okla. 650, 133 Pac. 207; Estee v. Estee, 34 Okla. 305, 125 Pac. 455; Egidi v. Egidi, 37 R. I. 481, 93 Atl. 908, Ann. Cas. 1918A, 648; Nogees v. Nogees, 7 Tex. 538, 58 Am. Dec. 78; Ryder v. Ryder, 66 Vt. 158, 28 Atl. 1029, 44 Am. St. 833; Langdon v. Langdon, 25 Vt. 678, 60 Am. Dec. 296; Averbuch v. Averbuch, 80 Wash. 257, 141 Pac. 701, Ann. Cas. 1916B, 873; Rice v. Rice, 88 W. Va. 54, 106 S. E. 237.

[68]Hughes v. Hughes, 19 Ala. 307; Broderick v. Broderick, 40 Cal. App. 550, 181 Pac. 402; Williams v. Williams, 23 Fla. 324, 2 So. 768; Brown v. Brown, 129 Ga. 246, 58 S. E. 825; Farnham v. Farnham, 73 Ill. 497; Wagner v. Wagner, 130 Md. 346, 100 Atl. 364; Power v. Power, 217 Mich. 597, 187 N. W. 259; Elder v. Elder (Mo. App.), 186 S. W. 530; Kreighbaum v. Kreighbaum, 192 N. Y. S. 516; Taylor v. Taylor, 5 N. Dak. 58, 63 N. W. 893; Eggarth v. Eggarth, 15 Ore. 626, 16 Pac. 650; Rauch v. Rauch (Tex. Civ. App.), 237 S. W. 334; Averbuch v. Averbuch, 80 Wash. 257, 141 Pac. 701; Cozard v. Cozard, 48 Wash. 124, 92 Pac. 935; Deusenberry v. Deusenberry, 82 W. Va. 135, 95 S. E. 665. See also Moore v. Moore (Mo. App.), 186 S. W. 541.

[69]LaFlamme v. LaFlamme, 210 Mass. 156, 96 N. E. 62, 39 L. R. A. (N. S.) 1133.

[70]Abbott v. Abbott, 203 Mich. 265, 168 N. W. 950.

There is some disagreement as to what acts cause revival of a condoned offense. That repetition of the offense revives the old one is nowhere denied. But the courts are not agreed that the commission of a lesser and different offense, such as cruelty, revives a greater offense, such as adultery. The prevailing view, however, is that the offense may thus be revived.[71] In general any subsequent misconduct, whether of the same class or not, will revive the offense,[72] even where the subsequent acts would not themselves constitute a cause of divorce because not of sufficient degree.[73] Accordingly harshness or rudeness may revive extreme cruelty,[74] and conviction of a felony may revive adultery.[75] Slight incivility or inattention will not usually revive the cause.[76]

But where condonation is interposed as a defense to a suit for divorce on the ground of adultery, the plaintiff will be allowed to file an amended petition[77] charging the defendant with acts of adultery subsequent to the alleged condonation and since the commencement of the suit. If the adultery had been committed before the suit, the offense will be incorporated in the petition by amendment, but if after, it can be introduced by a supplementary petition.[78] Repetition of condoned acts, after a suit has failed on account of such condonation, does not revive the suit so as to authorize a decree therein, but affords ground for new trial.[79]

[71]Sewall v. Sewall 122 Mass. 156, 23 Am. Rep. 299; Shackelton v. Shackelton, 48 N. J. Eq. 364, 21 Atl. 935, 27 Am. St. 478; Smith v. Smith, 4 Paige (N. Y.) 432, 27 Am. Dec. 75; Langdon v. Langdon, 25 Vt. 678, 60 Am. Dec. 296. See also Kostachek v. Kostachek, 40 Okla. 747, 140 Pac. 1021. See note, Ann. Cas. 1912C, 20.

[72]Bennett v. Bennett, 48 Cal. App. 670, 192 Pac. 180; James v. James, 103 Nebr. 278, 171 N. W. 904; Bravo v. Bravo (N. J.), 114 Atl. 790; Mathewson v. Mathewson, 81 Vt. 173, 69 Atl. 646, 18 L. R. A. (N. S.) 300. See note, Ann. Cas. 1912C, 19.

[73]Sullivan v. Sullivan, 34 Ind. 368; Jefferson v. Jefferson, 168 Mass. 456, 47 N. E. 123; Cooper v. Cooper, 17 Mich. 205, 97 Am. Dec. 182; Cochran v. Cochran, 93 Minn. 284, 101 N. W. 179; James v. James, 103 Nebr. 278, 171 N. W. 904.

[74]Robbins v. Robbins, 100 Mass. 150, 97 Am. Dec. 91.

[75]See note, 31 L. R. A. 521.

[76]Stoner v. Stoner, 134 Ga. 368, 67 S. E. 1030 (selling property leaving wife unprovided for); Abbott v. Abbott, 192 Ill. 439, 61 N. E. 350; Bridge v. Bridge (N. J. Ch.), 93 Atl. 690 (drunkenness and use of vile language will not revive condoned acts). See note, 51 L. R. A. (N. S.) 463.

[77]Penn v. Penn, 37 Okla. 650, 133 Pac. 207.

[78]Lutz v. Lutz, 52 N. J. Eq. 241, 28 Atl. 315.

[79]Jones v. Jones, 59 Ore. 308, 117 Pac. 414.

§ 426. **Delay in bringing suit.**—Many states have passed statutes regulating the time within which suits for divorce on certain grounds shall be brought. In those states which have no statutory provisions governing the time within which an action shall be begun, an unreasonable delay in bringing the suit may raise a presumption of connivance, collusion, or condonation and bar the action, but this delay may be satisfactorily explained by showing that it was due to poverty, or to avoid scandal, or any other satisfactory reason.[80]

Delay in bringing suit is sometimes set up as a defense; as if a husband is cognizant of and acquiesces in his wife's adultery for a long time; but cruelty, drunkenness, etc., would not seem to be bound by this rule. But, in the absence of statute, providing the time within which an action for divorce shall be brought upon certain grounds, delay is not always a good defense.[81]

§ 427. **Recrimination.**—Recrimination is allowable as a defense, and will if sustained defeat the libel; for a party seeking a divorce must come into court with clean hands.[82] The principle on which this plea of compensatio criminis is allowed is, that a party can not justly complain of the breach of a contract which he has himself violated.[83]

The right to a divorce contemplates a guilty party and an innocent party. If both are at fault neither is entitled to a release.[84]

[80]Clark v. Clark, 97 Mass. 331; Barker v. Barker, 63 N. J. Eq. 593, 53 Atl. 4; Derby v. Derby, 21 N. J. Eq. 57; Hampton v. Hampton, 87 Va. 148, 161, 12 S. E. 340.

[81]Clark v. Clark, 97 Mass. 331; Cummins v. Cummins, 15 N. J. Eq. 138.

[82]McCarty v. McCarty (Iowa), 169 N. W. 135; Cumming v. Cumming, 135 Mass. 386, 46 Am. Rep. 476; Handy v. Handy, 124 Mass. 394; Hatfield v. Hatfield, 213 Mich. 368, 181 N. W. 968; Hoffman v. Hoffman, 43 Mo. 547; Harris v. Harris (Mo. App.), 223 S. W. 771; Nolker v. Nolker (Mo. App.), 208 S. W. 128; Hale v. Hale, 47 Tex. 336, 26 Am. Rep. 294; McMillan v. McMillan, 113 Wash. 250, 193 Pac. 673; Pierce v. Pierce, 107 Wash. 125, 181 Pac. 24. This rule is, however, sometimes relaxed for reasons of public policy or because of the peculiar exigencies of the case. Weiss v. Weiss, 174 Mich. 431, 140 N. W. 587.

[83]Bast v. Bast, 82 Ill. 584; Spansenberg v. Carter, 151 La. 1038, 92 So. 673; Ellebrecht v. Ellebrecht (Mo. App.), 243 S. W. 209; Ristine v. Ristine, 4 Rawle (Pa.) 460.

[84]Goeldner v. Goeldner, 158 Iowa 415, 139 N. W. 889 (both guilty of using harsh language toward each other); Coons v. Coons (Mo. App.), 236 S. W. 358; Speiser v. Speiser, 188 Mo. App. 328, 175 S. W. 122; Collett v. Collett, 170 Mo. App. 590, 157 S. W. 90; Barth v. Barth, 168

This would be the case where both spouses were guilty of extreme cruelty to each other.[85] The plaintiff should plead and prove an honest performance of marital duties and absence of fault on his part.[86] This plea may be sustained on evidence not as strong as might be necessary to sustain a suit for adultery; and it makes no difference whether the offense, pleaded by way of compensation, was committed before or after the fact charged in the libel. It has been questioned whether a single act of adultery is sufficient to support this plea against a series of adulteries proved on the other side; but the better opinion seems to be that it is. In order to plead recrimination it must be specifically and fully set forth in the answer.[87] The adultery of the plaintiff would bar his or her suit for divorce for any cause,[88] including desertion.[89] It is very clear that a decree will not be granted if both parties have committed adultery.[90] In New York it is held that the fact that a man had, without the knowledge of the wife, been guilty of

Mo. App. 423, 151 S. W. 769; Wallner v. Wallner, 167 Mo. App. 677, 150 S. W. 1082; Miles v. Miles, 137 Mo. App. 38, 119 S. W. 456; Goings v. Goings, 90 Nebr. 148, 133 N. W. 199; Lyon v. Lyon, 39 Okla. 111, 134 Pac. 650; Wakefield v. Wakefield, 94 Ore. 605, 185 Pac. 921; Matlock v. Matlock, 72 Ore. 330, 143 Pac. 1010; Crim v. Crim, 66 Ore. 258, 134 Pac. 13.

[85]Strickland v. Strickland, 80 Ark. 451, 97 S. W. 659; Loughran v. Loughran (Iowa), 134 N. W. 1091; Kellogg v. Kellogg, 171 Mich. 518, 137 N. W. 249; Gordon v. Gordon, 77 N. H. 597, 92 Atl. 546.

[86]Gruner v. Gruner, 183 Mo. App. 157, 165 S. W. 865; Libbe v. Libbe, 157 Mo. App. 701, 138 S. W. 685; Richardson v. Richardson, 114 N. Y. S. 912.

[87]Jones v. Jones, 18 N. J. Eq. 33, 90 Am. Dec. 607; Smith v. Smith, 4 Paige (N. Y.) 432, 27 Am. Dec. 75. But see De Marco v. De Marco, 116 App. Div. 304, 101 N. Y. S. 600 (proof of adultery must be as strong as it would be in a suit on that ground). Matrimonial offense of plaintiff occurring after filing of original bill may be pleaded by the defendant. Von Bermuth v. Von Bermuth, 76 N. J. Eq. 487, 74 Atl. 700, 139 Am. St. 784.

[88]Oster v. Oster (Tex. Civ. App.), 130 S. W. 265.

[89]Bast v. Bast, 82 Ill. 584; Huling v. Huling, 38 Ill. App. 144; Green v. Green, 125 Md. 141, 93 Atl. 400, L. R. A. 1915E, 972, Ann. Cas. 1917A, 175; Mattison v. Mattison, 60 Misc. 573, 113 N. Y. S. 1024; Ellett v. Ellett, 157 N. Car. 161, 72 S. E. 861, 39 L. R. A. (N. S.) 1135, Ann. Cas. 1913B, 1215; Ahlbom v. Ahlbom, 59 Utah 445, 204 Pac. 99; Stolz v. Stolz, 96 Wash. 227, 164 Pac. 920. But see Johnson v. Johnson (Tex.), 23 S. W. 1022; Pierce v. Pierce, 70 Vt. 270, 40 Atl. 728.

[90]Geisselman v. Geisselman, 134 Md. 453, 107 Atl. 185; Clapp v. Clapp, 97 Mass. 531; Kapitola v. Kapitola, 189 App. Div. 459, 178 N. Y. S. 734; Yost v. Yost, 54 Pa. Super. Ct. 365. See also Cumming v. Cumming, 135 Mass. 386, 46 Am. Rep. 476.

adultery before abandoning her because of her adultery, for which cause his action for divorce failed, does not prevent his taking advantage of the statutory provision that in a statutory action for support because of abandonment defendant may set up in justification the misconduct of the plaintiff.[91]

Applying the main principle a decree on the ground of cruelty will be denied where the cruelty approaches mutuality and it has been indulged by both parties.[92] So, there may be no divorce on the ground of drunkenness, where the plaintiff is equally guilty of excessive use of intoxicants.[93]

Recrimination as a bar to divorce is not limited to a charge of the same nature as that alleged in the libel;[94] it is enough if it is of the same general character and such as is reasonably calculated to have provoked the misconduct.[95]

Some of the courts apply the doctrine of comparative rectitude in cases where both parties show grounds for divorce and the fault of one is greater than that of the other party.[96] Extreme cruelty is generally held not a sufficient recriminatory defense to a charge of adultery.[97]

[91]Hawkins v. Hawkins, 193 N. Y. 409, 86 N. E. 468, 19 L. R. A. (N. S.) 468, 127 Am. St. 979, 15 Ann. Cas. 371. See also Crouch v. Crouch, 193 App. Div. 221, 183 N. Y. S. 657.

[92]Long v. Long, 217 Mich. 211, 185 N. W. 692; Barth v. Barth, 168 Mo. App. 423, 151 S. W. 769; Wolf v. Wolf, 41 N. Dak. 109, 169 N. W. 577; Lyon v. Lyon, 39 Okla. 111, 134 Pac. 650; White v. White, 100 Ore. 387, 190 Pac. 969, 197 Pac. 1080; Wiedner v. Wiedner (Tex. Civ. App.), 231 S. W. 448; Tanton v. Tanton (Tex. Civ. App.), 209 S. W. 429.

[93]Gill v. Gill, 213 Mich. 384, 181 N. W. 996.

[94]Cushman v. Cushman, 194 Mass. 38, 79 N. E. 809; Handy v. Handy, 124 Mass. 394; Lyster v. Lyster, 111 Mass. 327; Clapp v. Clapp, 97 Mass. 531; Hall v. Hall, 86 Mass. 39; Cowdrey v. Cowdrey, 211 Mich. 305, 178 N. W. 678; Shearer v. Shearer (Mo. App.), 189 S. W. 592.

[95]McNabb v. McNabb (Tex. Civ. App.), 207 S. W. 129; Staples v. Staples (Tex. Civ. App.), 136 S. W. 120.

[96]Garrett v. Garrett, 252 Ill. 318, 96 N. E. 882; Rolfsen v. Rolfsen (Ky.), 115 S. W. 213; Weiss v. Weiss, 174 Mich. 431, 140 N. W. 587; Johnsen v. Johnsen, 78 Wash. 423, 139 Pac. 189; Hall v. Hall, 69 W. Va. 175, 71 S. E. 103, 34 L. R. A. (N. S.) 758. But see Peyton v. Peyton, 97 Nebr. 663, 151 N. W. 150.

[97]Bancroft v. Bancroft, 4 Boyce (Del.) 9, 85 Atl. 561; Zimmerman v. Zimmerman, 242 Ill. 552, 90 N. E. 192; Hillenbrand v. Hillenbrand, 211 Ill. App. 624; Hughes v. Hughes, 133 Ill. App. 654; Seibert v. Seibert (N. J.), 83 Atl. 230. But see Wilson v. Wilson, 89 Nebr. 749, 132 N. W. 401.

Recrimination is one of the most frequent defenses.[98] It may be defined as a committal by the complainant of acts which afford sufficient ground for divorce.[99] Thus, if the complainant seeks a divorce on the ground of adultery, proof of adultery on his part, even if it be of only one act, will be a sufficient defense; nor does it make any difference which was the first offense, nor how great a degree of guilt exists on the part of the defendant, nor can a complainant, if guilty of adultery, obtain a divorce for any cause whatever if recrimination be pleaded and proved.[1] While the above is clear and emphatic, the law with regard to recriminating offenses other than adultery is not so prominently put forth by the courts. It is, however, the accepted doctrine by lawyers that recrimination may also apply to other offenses against the marital relation besides adultery.[2] The court has said:[3] "In this state, the statute has specified certain acts or conduct which shall constitute grounds for divorce, and so far as the matrimonial contract is concerned, the courts can not distinguish between them, whatever difference there may be from a moral point of view. The several offenses, therefore, must be held equally pleadable in bar to a suit for divorce—the one to the other, within the principle of the doctrine of recrimination." So in a Texas case[4] the court would not say, "that in no case, and under no state of circumstances should a divorce be granted, if the plaintiff is also guilty of an act of any character for which the defendant might claim a divorce. There are unquestionably well-established limitations in regard to this character of defense in such actions, to which, however, it is unnecessary for us to specially advert at present. The general doctrine, that recrimination is a valid defense, though the divorce is sought upon other grounds than adultery may, nevertheless, be said, on the very highest authority, to rest in the clearest reason and exact justice."

[98]Smith v. Smith, 181 Ky. 55, 203 S. W. 884.

[99]Hogsett v. Hogsett (Mo. App.), 186 S. W. 1171.

[1]Stillman v. Stillman, 115 Misc. 106, 187 N. Y. S. 383; Walker v. Walker, 92 Vt. 443, 104 Atl. 828; Voss v. Voss. 157 Wis. 430, 147 N. W. 634.

[2]Roberts v. Roberts, 103 Kans. 65, 173 Pac. 537; Smith v. Smith, 181 Ky. 55, 203 S. W. 884; Mosier v. Mosier, 89 Ore. 477, 174 Pac. 732; Matlock v. Matlock, 72 Ore. 330, 143 Pac. 1010; Hiecke v. Hiecke, 163 Wis. 171, 157 N. W. 747, Ann. Cas. 1918B, 497.

[3]Conant v. Conant, 10 Cal. 249, 256, 70 Am. Dec. 717.

[4]Hale v. Hale, 47 Tex. 336, 342, 26 Am. Rep. 294.

So in Massachusetts, a sentence to five years' imprisonment and adultery being equal grounds for dissolving the marriage, one sentenced to such imprisonment can not have a divorce for the other's adultery. The two offenses were held to be of the same class and degree.[5]

The broad and general rule has been frequently asserted in this country that any statutory cause for absolute divorce may be set up against any other statutory cause as recriminatory defense,[6] but that a statutory cause for limited divorce can not be set up as a defense to such cause for absolute divorce.[7] Whether condoned offenses can be set up in recrimination is not clearly settled in this country.[8]

In principle and fairness to the parties it would seem more equitable to deny the right to set up such condoned offenses. To hold otherwise, as Mr. Bishop has pointed out, would give a condoning spouse the license of profligacy for the future. So the right to set up condoned adultery has been denied.[9] Upon a libel for divorce because of adultery, if the respondent would show a like crime committed by the libellant, to prevent the divorce, he must plead it, or he will not be permitted to give it in evidence.[10]

[5]Handy v. Handy, 124 Mass. 394.

[6]Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717; Day v. Day, 71 Kans. 385, 80 Pac. 974, 6 Ann. Cas. 169; Morrison v. Morrison, 142 Mass. 361, 8 N. E. 59, 56 Am. Rep. 688; Cumming v. Cumming, 135 Mass. 386, 46 Am. Rep. 476; Church v. Church, 16 R. I. 667, 19 Atl. 244, 7 L. R. A. 385. See notes, 15 Am. Dec. 211; 86 Am. St. 333; 39 L. R. A. (N. S.) 1135.

[7]Zimmerman v. Zimmerman, 242 Ill. 552, 90 N. E. 192. See note, 39 L. R. A. (N. S.) 1135.

[8]Against allowing recrimination in such form may be cited. Jones v. Jones (Colo.), 207 Pac. 596; Anichini v. Anichini, 2 Curt. Ecc. 210; Jones v. Jones, 3 C. E. Green (N. J.) 33. Cases more inclined to permit such recrimination are Masten v. Masten, 15 N. H. 159; Wood v. Wood, 2 Paige (N. Y.) 108; Beeby v. Beeby, 1 Hag. Ecc. 789; Goode v. Goode, 2 Swab. & T. 253.

[9]Eames v. Eames, 133 Ill. App. 665; Wabeke v. Wabeke (Iowa), 98 N. W. 559; Storms v. Storms, 71 N. J. Eq. 549, 64 Atl. 700; Talley v. Talley, 215 Pa. 281, 64 Atl. 523; Rogers v. Rogers, 81 Wash. 502, 142 Pac. 1150. Where a wife condones the adultery of her husband, he can be divorced from her for a similar offense subsequently committed by her. Talley v. Talley, 215 Pa. 281, 64 Atl. 523.

[10]Haley v. Haley, 74 Cal. 489, 16 Pac. 248, 5 Am. St. 460; Newman v. Newman, 211 Mass. 508, 98 N. E. 507, Ann. Cas. 1913B, 672; Pastoret v. Pastoret, 6 Mass. 276; Jones v. Jones, 18 N. J. Eq. 33, 90 Am. Dec. 607; Smith v. Smith, 4 Paige (N. Y.) 432, 27 Am. Dec. 75.

§ 428. **Mistake.**—Mistake to be a defense to a divorce must be a bona fide mistake as to some material matter of fact, and not a mistake as to legal rights as a question of law. If one acts in a certain manner, believing he has a right under the law so to act, it is no defense, but if one acts under the honest belief that certain legal requirements are complied with, when, as a matter of fact, they are not, it may be a defense.[11] In Massachusetts, under a decree nisi which becomes absolute in six months "unless sufficient cause to the contrary appears," the libellee believing he had a right to marry, did so, and it was held the decree could not be made absolute.[12] But when the libellant was led to believe that a decree had been entered as a fact, the decree was made absolute.[13]

§ 429. **Notice of grounds.**—Where the libellant can be shown to have had knowledge of the habits, disposition, or other matters relating to the libellee, he or she is presumed to have had notice of these facts, and to have entered the married state with such knowledge and notice, and the court will refuse to grant a decree of divorce.[14]

§ 430. **Insanity.**—The general rule regarding insanity as a defense is that no acts or omissions committed by an insane person can be grounds for a divorce, unless such acts were performed while the defendant was in a lucid interval,[15] and it is generally held that the burden of proof will be on the libellant to show lucidity.[16] No divorce will be granted for unfounded charges of marital infidelity made by a party while a nervous wreck.[17] But it is well settled that insanity subsequent to the commission of the

[11]Peirce v. Peirce, 160 Mass. 216, 35 N. E. 462; Pratt v. Pratt, 157 Mass. 503, 32 N. E. 747, 21 L. R. A. 97; Moors v. Moors, 121 Mass. 232.

[12]Moors v. Moors, 121 Mass. 232.

[13]Pratt v. Pratt, 157 Mass. 503, 32 N. E. 747, 21 L. R. A. 97. See also Gordon v. Gordon, 141 Ill. 160, 30 N. E. 446, 21 L. R. A. 387, 33 Am. St. 294.

[14]Heinzman v. Heinzman, 15 Pa. Co. Ct. 669.

[15]Hartwell v. Hartwell, 234 Mass. 250, 125 N. E. 208; Longbotham v. Longbotham, 119 Minn. 139, 137 N. W. 387; Kretz v. Kretz, 73 N. J. Eq. 246, 67 Atl. 378 (adultery committed by wife while insane); Lewis v. Lewis, 60 Okla. 60, 158 Pac. 368; Steed v. Steed, 54 Utah 244, 181 Pac. 445. See also Stout v. Stout, 211 Mich. 238, 178 N. W. 648.

[16]Cohn v. Cohn, 85 Cal. 108, 24 Pac. 659; Tiffany v. Tiffany, 84 Iowa 122, 50 N. W. 554; Wertz v. Wertz, 43 Iowa 534; Powell v. Powell, 18 Kans. 371, 26 Am. Rep. 774; Hansell v. Hansell, 15 Pa. Co. Ct. 514.

[17]Bethel v. Bethel, 181 Mo. App. 601, 164 S. W. 682.

acts complained of is no defense.[18] Accordingly where the cause of action on the ground of cruelty was complete prior to the wife's insanity, the husband was held entitled to the decree notwithstanding the insanity of the wife.[19] In any event the libellee must be insane and incapable of distinguishing between right and wrong and not merely afflicted with a slight mental derangement or depravity of character.[20]

The courts of Louisiana construe the law of that state authorizing an absolute divorce where the parties have lived apart for seven years as giving the right to the divorce though one of the parties was insane during a part of the period of separation.[21] In Rhode Island, a law making ten years the period of separation is held to intend that the time of insanity is not to be included.[22]

§ 431. **Drunkenness.**—The court may declare a marriage void on the ground of the party's intoxication at the time of the celebration, if it was not afterwards consummated by cohabitation.[23] But the marriage is valid if in spite of the intoxication the party still knew what he was doing.[24]

§ 432. **Separation agreements.**—There can be no desertion where the separation of the spouse is upon mutual consent and under a separation agreement, and hence the existence of such an agreement, may be advanced as a defense to a suit for divorce on the ground of desertion,[25] but not where divorce is sought on other grounds.[26]

[18]Harrigan v. Harrigan, 135 Cal. 307, 67 Pac. 506, 87 Am. St. 118; Huston v. Huston, 150 Ky. 353, 150 S. W. 386; Thomason v. Thomason, 142 Ky. 176, 134 S. W. 161; Newcomb v. Newcomb, 13 Bush (Ky.) 544, 26 Am. Rep. 222; Garnett v. Garnett, 114 Mass. 379, 19 Am. Rep. 369; Matchin v. Matchin, 6 Pa. St. 332, 47 Am. Dec. 466; Fisher v. Fisher, 54 W. Va. 146, 46 S. E. 118, 1 Ann. Cas. 251. See notes, 82 Am. Dec. 200; 130 Am. St. 853; 34 L. R. A. 166.

[19]Cain v. Milburn, 192 Iowa 705, 185 N. W. 478.

[20]Hill v. Hill, 27 N. J. Eq. 214; Nichols v. Nichols, 31 Vt. 328, 73 Am. Dec. 352. See also Insanity, supra, Chap. 25. On insanity as affecting divorce for desertion, living apart, or non-support, see Wright v. Wright, 125 Va. 526, 99 S. E. 515, 4 A. L. R. 1331.

[21]Vincent v. Le Doux, 146 La. 144, 83 So. 439.

[22]Camire v. Camire, 43 R. I. 489, 113 Atl. 748.

[23]Selah v. Selah, 23 N. J. Eq. 185.

[24]Prine v. Prine, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87. See also note in 79 Am. St. 377.

[25]Walker v. Walker, 60 Colo. 577, 155 Pac. 332; Summers v. Summers, 179 Ind. 8, 100 N. E. 71; Lake v. Lake, 80 N. J. Eq. 350, 86 Atl. 767; Canning v. Canning, 87 Vt. 492, 89 Atl. 1088, Ann. Cas. 1916C, 344; McCoy v. McCoy, 74 W. Va. 64, 81 S. E. 562, Ann. Cas. 1916C, 367.

[26]Walker v. Walker, 125 Md. 649,

§ 433. **Provocation.**—It may be shown by way of defense that the acts of the libellee were due to, or incited by, the provoking acts of the libellant, and if this is proved a divorce will not be granted. The degree of provocation must be much stronger than the offense charged to constitute a defense.[27] It must not be merely a display of temper, passion, or abuse.[28] A divorce is not a salve to the loser in a domestic fight.[28a]

A husband may not complain of a wife's conduct in nagging and hectoring him where this conduct on her part was provoked by his undue attentions to other women.[29] Cruelty was provoked by wife who accused her husband of a peculiarly revolting crime.[30]

In one of the cases it is held that the fact that a wife refused to allow a child to attend the church of her husband in violation of an agreement made before marriage as to the religious training of their children, did not justify assaults made on the wife which were the basis of a suit for a divorce by the wife as amounting to

94 Atl. 346, Ann. Cas. 1916B, 934. Clark v. Clark, 143 Mo. App. 350, 128 S. W. 218; Archbell v. Archbell, 158 N. Car. 408, 74 S. E. 327, Ann. Cas. 1913D, 261; Canning v. Canning, 87 Vt. 492, 89 Atl. 1088, Ann. Cas. 1916C, 344.

[27]Jones v. Jones, 189 Ala. 286, 66 So. 4; King v. King, 28 Ala. 315; Eidenmuller v. Eidenmuller, 37 Cal. 364; Johnson v. Johnson, 14 Cal. 459; Garrett v. Garrett, 252 Ill. 318, 96 N. E. 882; Closz v. Closz, 184 Iowa 739, 169 N. W. 183; Owen v. Owen, 90 Iowa 365, 57 N. W. 887; Knight v. Knight, 31 Iowa 451; Baurens v. Giroux, 117 La. 696, 42 So. 224; Durand v. Her Husband, 4 Mart. (La.) 174; Skolfield v. Skolfield, 86 Maine 31, 29 Atl. 925; German v. German, 57 Mich. 256, 23 N. W. 802; Harper v. Harper, 29 Mo. 301; Rutledge v. Rutledge, 159 Mo. App. 661, 139 S. W. 1180; Gray v. Gray, 85 Misc. (N. Y.) 584, 148 N. Y. S. 1064; Page v. Page, 161 N. Car. 170, 76 S. E. 619; Mosher v. Mosher, 16 N. Dak. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820, 125 Am. St. 654; White v. White, 100 Ore. 387, 190 Pac. 969, 197 Pac. 1080; Richards v. Richards, 37 Pa. St. 225; Biddle v. Biddle, 50 Pa. Super. Ct. 30; Hopkins v. Hopkins, 34 S. Dak. 637, 150 N. W. 293; Crounse v. Crounse, 108 Va. 108, 60 S. E. 27; Voss v. Voss, 157 Wis. 430, 147 N. W. 634. Husband provoking wife by unjust charge of infidelity not entitled to divorce for cruelty of wife in resentment. Eward v. Eward, 72 Ind. App. 638, 125 N. E. 468.

[28]Ashton v. Grucker, 48 La. Ann. 1194, 20 So. 738; Albert v. Albert, 5 Mont. 577, 6 Pac. 23, 51 Am. Rep. 86; Boeck v. Boeck, 16 Nebr. 196, 20 N. W. 223.

[28a]Durand v. Her Husband, 4 Mart. (La.) 174; McCahill v. McCahill, 71 Hun (N. Y.) 224, 25 N. Y. S. 221, 54 N. Y. St. 761.

[29]Spofford v. Spofford, 18 Idaho 115, 108 Pac. 1054.

[30]Pettis v. Pettis, 82 N. J. Eq. 635, 89 Atl. 749.

cruel and inhuman treatment.[31] So, provocation justifying desertion, was not made out by proof that wife was slovenly and not sufficiently attentive to household duties.[32] Neither was it sufficient provocation for cruel treatment that a wife may have paraded her troubles before her parents more than was wise.[33] It is properly held that a wife's provocation can never justify a husband in becoming an habitual drunkard.[34]

§ 434. **Justification or excuse.**—A wife is not justified in refusing to leave comfortable surroundings at the request of her husband to come to live with him, although at the time he had no house to take her to.[35] The wife's fear that she will have too many children is no justification for leaving her husband and living apart. So mere grossness or rudeness of manner will not justify a desertion.[36]

It is no justification for desertion by the wife that she left her husband because his intercourse with her was very frequent, when there is no pretense of any peculiar debility or physical infirmity on her part.[37] The fact that the husband is accused of crime or is guilty of it, or that his failure to provide for her is due to a crime, is no justification for desertion, as she took him "for better or for worse."[38] A wife is not justified in leaving her husband because he invites members of his family to live in the house.[39] A husband is not justified in deserting his wife because she refused him marital intercourse.[40] Refusal to allow a wife to attend a church of which she is a member is not justification for leaving him.[41] The fact that the acts of cruelty were committed while parties were living apart is no justification.[42] Misconduct may be a justification for acts of cruelty.[43]

[31]Edmonds v. Edmonds, 193 Iowa 87, 185 N. W. 2.

[32]Hunter v. Hunter, 121 Ill. App. 380.

[33]Emery v. Emery, 181 Mich. 146, 147 N. W. 452.

[34]Barringer v. Barringer, 153 N. Car. 392, 69 S. E. 279.

[35]Messenger v. Messenger, 56 Mo. 329.

[36]Leavitt v. Leavitt, Wright (Ohio) 719; Bryan v. Bryan, 34 Ala. 516.

[37]Moores v. Moores, 16 N. J. Eq. 275.

[38]Foy v. Foy, 35 N. Car. 90; Hammond v. Hammond, 15 R. I. 40, 23 Atl. 143, 2 Am. St. 867.

[39]Jones v. Jones, 55 Mo. App. 523.

[40]Reid v. Reid, 21 N. J. Eq. 331.

[41]Lawrence v. Lawrence, 3 Paige (N. Y.) 267.

[42]Newby v. Newby (Cal. App.), 202 Pac. 891.

[43]Powers v. Powers, 84 App. Div. 588, 82 N. Y. S. 1022.

§ 435. **Invalidity of marriage.**—A divorce from the bonds of matrimony will not be decreed until a legal and valid marriage is proved, and the invalidity of the marriage of the parties to the suit may be set up as a defense.[44] Accordingly there may be no suit for divorce where the marriage is incestuous by reason of being within the prohibited degrees of relationship.[45] So, no divorce may be had in the case of slaves that were incapable of entering into the matrimonial contract.[46] It is not a defense that the marriage was a common-law marriage,[47] or one entered into for convenience solely.[48]

§ 436. **Abatement—Death—Other cause pending.**—Divorce is a personal right and does not survive death.[49] This is true though the divorce has been granted but has not become entirely effective at the time of the death.[50] Where property rights are involved they may be settled after death of party, and for that purpose a decree may be opened,[51] and for the same reason an action may survive as to judgment for alimony or interest of third parties.[52] An annulment proceeding involving property interests will not abate on death of either party.[53]

[44]Holtman v. Holtman (Ky.), 114 S. W. 1198; Mangue v. Mangue, 1 Mass. 240; Robinson v. Robinson, 84 N. J. Eq. 201, 93 Atl. 699 (affirming decrees 83 N. J. Eq. 150, 90 Atl. 311); Ashdown v. Ashdown, 178 N. Y. S. 565; Finn v. Finn, 62 How. Prac. (N. Y.) 83. A divorce was granted where both parties mistakenly believed they were married and had lived together as husband and wife. Robinson v. Robinson, 84 N. J. Eq. 201, 93 Atl. 699.

[45]Audley v. Audley, 196 App. Div. 103, 187 N. Y. S. 652.

[46]Lindsey v. Smith, 131 Ky. 176, 114 S. W. 779.

[47]Coad v. Coad, 87 Nebr. 290, 127 N. W. 455.

[48]Ryan v. Ryan, 156 Mo. App. 655, 137 S. W. 1014.

[49]Begbie v. Begbie, 128 Cal. 154, 60 Pac. 667, 49 L. R. A. 141; Bushnell v. Cooper, 289 Ill. 260, 124 N. E. 521, 6 A. L. R. 1517; McCurley v. McCurley, 60 Md. 185, 45 Am. Rep. 717; Heck v. Bailey, 204 Mich. 54, 169 N. W. 940; Kimball v. Kimball, 44 N. H. 122, 82 Am. Dec. 194; In re Crandall, 196 N. Y. 127, 89 N. E. 578, 134 Am. St. 830, 17 Ann. Cas. 874; Masterson v. Ogden, 78 Wash. 644, 139 Pac. 654, Ann. Cas. 1914D, 885. Dwyer v. Nolan, 40 Wash. 459, 82 Pac. 746, 1 L. R. A. (N. S.) 551, 111 Am. St. 919, 5 Ann. Cas. 890. See notes, 53 Am. Rep. 536; 2 L. R. A. (N. S.) 242; 2 Eng. Rul. Cas. 8.

[50]Gloyd v. Superior Court in and for Los Angeles County, 44 Cal. App. 39, 185 Pac. 995. Craig v. Craig, 110 Kans. 13, 202 Pac. 594 (death pending appeal); Holmberg v. Holmberg, 106 Nebr. 717, 184 N. W. 134.

[51]Lima v. Lima, 26 Cal. App. 1, 147 Pac. 233; Hill v. Victora, 180 Iowa 417, 161 N. W. 72.

[52]Masterson v. Ogden, 78 Wash. 644, 139 Pac. 654, Ann. Cas. 1914D, 885.

[53]Barth v. Barth, 102 Ky. 56, 42 S. W. 1116, 80 Am. St. 335.

Where the causes of action are different the fact that a divorce suit is pending brought by one party will not bar a subsequent suit by the other.[54] Neither is a suit in one state by one party a bar to a suit by the other party in another state.[55] The fact that an order has been made against a husband for support has been held not to bar him from securing a divorce on the ground of desertion.[56]

§ 437. **Estoppel.**—Since the state is interested in divorce proceedings estoppel is generally available to neither party.[57] However, so far as the parties themselves are concerned, they may be estopped. So one who has deceived another as to the validity of his former marriage is estopped to set up such marriage as a defense in a divorce proceeding,[58] and likewise both may be estopped where both mistakenly believed the former marriage was legal.

[54]Conner v. Pozo, 114 La. 562, 38 So. 454; Drake v. Drake, 76 N. H. 32, 78 Atl. 1071; Cook v. Cook, 159 N. Car. 46, 74 S. E. 639, 40 L. R. A. (N. S.) 83, Ann. Cas. 1914A, 1137.

[55]Omer v. Omer, 108 Kans. 95, 193 Pac. 1064; Drake v. Drake, 76 N. H. 32, 78 Atl. 1071 (even although decree nisi has been entered in first suit); Sworoski v. Sworoski, 75 N. H. 1, 70 Atl. 119. See Flaxel v. Flaxel, 101 Nebr. 799, 165 N. W. 159.

[56]Hirsch v. Hirsch, 70 Pa. Super. Ct. 583.

[57]Barringer v. Dauernheim, 127 La. 679, 53 So. 923.

[58]Johannessen v. Johannessen, 70 Misc. 361, 128 N. Y. S. 892.

CHAPTER 29

JURISDICTION

Section

440. Courts having jurisdiction.
441. Effect of place of marriage and place of offense on jurisdiction.
442. Domicil as basis of jurisdiction.
443. Domicil defined.
444. Intention as an element in domicil.
445. Change of domicil.
446. Different domicil for husband and wife.
447. Extra-territorial effect of decree.
448. Statutory time of residence.
449. Acquired jurisdiction.
450. Jurisdiction by appearance.
451. Jurisdiction of counter-claim.
452. Cross-bill by nonresident.
453. Domicil for annulment suit.

§ 440. **Courts having jurisdiction.**—As the ecclesiastical courts which, in England, originally had jurisdiction of divorce cases, were never established in this country, the only jurisdiction which any court in this country has is founded upon special statutory and constitutional provisions. Such jurisdiction is not inferred from statutes giving general jurisdiction in civil matters.[1]

[1]Martin v. Martin, 173 Ala. 106, 55 So. 632; Heatherwick v. Heatherwick, 32 Ill. 73; Masure v. Masure, 171 Ill. App. 438; Wright v. Wright, 2 Md. 429, 56 Am. Dec. 723; Fornshill v. Murray, 1 Bland Ch. (Md.) 479, 18 Am. Dec. 344; Judson v. Judson, 171 Mich. 185, 137 N. W. 103; Kelley v. Kelley, 161 Mass. 111, 36 N. E. 837, 25 L. R. A. 806, 42 Am. St. 389; State ex rel. v. Grimm, 239 Mo. 340, 143 S. W. 450, Ann. Cas. 1913B, 1188; Cizek v. Cizek, 69 Nebr. 797, 96 N. W. 657, 99 N. W. 28, 5 Ann. Cas. 464; Worthington v. District Court, 37 Nev. 212, 142 Pac. 230, L. R. A. 1916A, 696, Ann. Cas. 1916E, 1097; Livingston v. Livingston, 173 N. Y. 377, 66 N. E. 123, 61 L. R. A. 800, 93 Am. St. 600; Patton v. Patton, 67 Misc. 404, 123 N. Y. S. 329; State v. Templeton, 18 N. Dak. 525, 123 N. W. 283, 25 L. R. A. (N. S.) 234; McCarty v. McCarty, 2 Strob. L. (S. Car.) 6, 47 Am. Dec. 585; In re Christiansen, 17 Utah 412, 53 Pac. 1003, 41 L. R. A. 504, 70 Am. St. 794; Cook v. Cook, 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706. See notes, 11 L. R. A. 443; 63 Am. St. 655.

Courts having general powers in equity, or even in common law and equity combined do not, therefore, have jurisdiction in divorce, as distinguished from annulment of marriage, unless the same is expressly conferred,[2] but, although there is a difference of opinion, it seems that in the absence of a statute to the contrary, an equity court has the power to award alimony.[3]

Federal courts have no jurisdiction in divorce, although they have enforced decrees for alimony. Divorce cases can not, therefore, be removed to the federal courts under the claim that they are suits between citizens of different states.[4]

Parties may not confer jurisdiction of the cause of action by consent.[5]

§ 441. **Effect of place of marriage and place of offense on jurisdiction.**—Jurisdiction does not depend in any manner on the place where the marriage was celebrated. The interest of the state in the relation itself is such that the place where the relation was entered into is of no consequence. Only the courts of the place of domicil of one or other of the parties has power to dissolve the union.[6]

Neither is it essential in most states that the offense was committed in the state in which the divorce is sought.[7] So also it is

[2]Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 8 Pac. 709; Dunham v. Dunham, 97 Conn. 440, 117 Atl. 504 (superior court given exclusive jurisdiction under laws of Connecticut); Murray v. Murray, 134 Md. 653, 107 Atl. 550; Heck v. Bailey, 204 Mich. 54, 169 N. W. 940; State v. Templeton, 18 N. Dak. 525, 123 N. W. 283, 25 L. R. A. (N. S.) 234; Addams v. State (Ohio St.), 135 N. E. 667. (Court of insolvency of Cuyahoga county, Ohio, has jurisdiction of divorce).

[3]Outlaw v. Outlaw, 118 Md. 498, 84 Atl. 383.

[4]Barber v. Barber, 21 How. (U. S.) 582, 16 L. ed. 226; Bowman v. Bowman, 30 Fed. 849; Johnson v. Johnson, 13 Fed. 193.

[5]Sharpe v. Sharpe, 134 Mo. App. 278, 114 S. W. 584.

[6]Cheely v. Clayton, 110 U. S. 701, 28 L. ed. 298, 4 Sup. Ct. 328; Tolen v. Tolen, 2 Blackf. (Ind.) 407, 21 Am. Dec. 742; Harding v. Alden, 9 Greenl. (Maine) 140, 23 Am. Dec. 549; Carty v. Carty, 70 W. Va. 146, 73 S. E. 310, 38 L. R. A. (N. S.) 297; Hubbell v. Hubbell, 3 Wis. 662, 62 Am. Dec. 702. No jurisdiction where neither party domiciled in state. Aspinwall v. Aspinwall (Nev.), 184 Pac. 810. See note, 59 L. R. A. 151.

[7]Cheely v. Clayton, 110 U. S. 701, 28 L. ed. 298, 4 Sup. Ct. 328; Doran v. Doran (Del.), 117 Atl. 24; Stewart v. Stewart, 32 Idaho 180, 180 Pac. 165; Tolen v. Tolen, 2 Blackf. (Ind.) 407, 21 Am. Dec. 742; Harding v. Alden, 9 Greenl. (Maine) 140, 23 Am. Dec. 549; Sworoski v.

the law in most states that there is no jurisdiction to grant a divorce for an offense committed within the state if the domicil of the parties is in another state.[8] It has been held, however, that jurisdiction to grant a divorce for an offense committed within the state of domicil at the time of such domicil, is in the state where the offense was committed although the parties have since acquired a new residence.[9] This is not the general view, however, the usual rule being that the state of residence will take jurisdiction no matter where the offense was committed or where the parties were domiciled at the time if the plaintiff is otherwise qualified by citizenship or otherwise to maintain the suit.[10]

Proceedings for divorce may be instituted where the plaintiff, and under some circumstances the defendant, has a domicil. The place of the marriage, or the offense and the residence of the defendant are of no consequence.[11]

The Civil Code of Louisiana gives jurisdiction to the courts of that state in suits for divorce for abandonment after removal of the husband to another state. This provision is closely construed by the courts and has been held without application when the husband was a resident of a sister state and though married in Louisiana never lived in that state and immediately after marriage took his bride to New York. The court took the view that the husband having no domicil in Louisiana could not have removed therefrom as intended by the code provision.[12]

§ 442. **Domicil as basis of jurisdiction.**—The place of residence of the parties determines the jurisdiction of the court. If the parties live in different states each state has jurisdiction over

Sworoski, 75 N. H. 1, 70 Atl. 119; Ackerman v. Ackerman, 200 N. Y. 72, 93 N. E. 192; Newlin v. Newlin, 94 Vt. 26, 108 Atl. 516; Hubbell v. Hubbell, 3 Wis. 662, 62 Am. Dec. 702. See notes, 21 Am. Dec. 752; 59 L. R. A. 154.

[8]Frary v. Frary, 10 N. H. 61, 32 Am. Dec. 395. See note, 59 L. R. A. 134.

[9]Muller v. Hilton, 13 La. Ann. 1, 71 Am. Dec. 504; Dorsey v. Dorsey, 7 Watts (Pa.) 349, 32 Am. Dec. 767. See note, 59 L. R. A. 155.

[10]Thompson v. Thompson, 91 Ala. 591, 8 So. 419, 11 L. R. A. 443; Dunham v. Dunham, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70; Vachikinas v. Vachikinas, 91 W. Va. 181, 112 S. E. 316; Cook v. Cook, 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706.

[11]Watkins v. Watkins, 135 Mass. 83; Burlen v. Shannon, 115 Mass. 438; Shaw v. Shaw, 98 Mass. 158; Tiederman v. Tiederman, 36 Nev. 494, 137 Pac. 824; Prosser v. Warner, 47 Vt. 667, 19 Am. Rep. 132.

[12]Smithers v. Smithers, 145 La. 752, 82 So. 879.

the rest and each state may dissolve the relation so far as the party within its jurisdiction is concerned.[13]

Formerly it was held that the locus of the cause gave jurisdiction over the parties to a divorce suit, but as this doctrine interfered with the conceded right of a state to control the status of its citizens when such parties subsequently acquired a domicil in another state, it has been abandoned and, in the absence of statutory regulations, the place where the cause arose is immaterial.[14] So also it is not the domicil of the party at the time of marriage or at the time of the trial of the cause, but at the time of the application for divorce, that determines the jurisdiction of the court.[15]

As each state has the power to make laws governing its citizens, some states have statutory provisions which make important the consideration of the place of the cause and other requirements, such as cohabitation and similar provisions, and the statutes of each state should always be examined before bringing suit.[16]

Where the domicil has been maintained a sufficient length of time the suit may be maintained though plaintiff is not a naturalized citizen of the United States.[17] The plaintiff should allege and prove residence as part of his case.[18]

§ 443. **Domicil defined.**—Domicil means the place where a person lives or has his home to which, when absent from it, he

[13]Worthington v. District Court, 37 Nev. 212, 142 Pac. 230, L. R. A. 1916A, 696, Ann. Cas. 1916E, 1097; Lister v. Lister, 86 N. J. Eq. 30, 97 Atl. 170; Crouch v. Crouch, 193 App. Div. 221, 183 N. Y. S. 657; Borda v. Borda, 43 R. I. 384, 113 Atl. 118. The marital status for purpose of jurisdiction follows the marital domicil. Aspinwall v. Aspinwall (Nev.), 184 Pac. 810.

[14]Barber v. Root, 10 Mass. 260; Jones v. Jones, 67 Miss. 195, 6 So. 712, 19 Am. St. 299; People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274; Barber v. Barber, 89 Misc. 519, 151 N. Y. S. 1064.

[15]Kapigian v. Minassian, 212 Mass. 412, 99 N. E. 264, Ann. Cas. 1913D, 535; Harteau v. Harteau, 31 Mass. 181, 25 Am. Dec. 372; Barber v. Root, 10 Mass. 260; Leith v. Leith, 39 N. H. 20; Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Ditson v. Ditson, 4 R. I. 87; Duxstad v. Duxstad, 17 Wyo. 411, 100 Pac. 112, 129 Am. St. 1138.

[16]Hick v. Hick, 5 Bush (Ky.) 670; D'Auvilliers v. De Livaudais, 32 La. Ann. 605; Muller v. Hilton, 13 La. Ann. 1, 71 Am. Dec. 504; Harding v. Alden, 9 Greenl. (Maine) 140, 23 Am. Dec. 549; Harteau v. Harteau, 31 Mass. 181, 25 Am. Dec. 372; Foss v. Foss, 58 N. H. 283.

[17]Vachikinas v. Vachikinas, 91 W. Va. 181, 112 S. E. 316.

[18]Gallagher v. Gallagher (Tex. Civ. App.), 214 S. W. 516; McLean v. Randall (Tex. Civ. App.), 135 S. W. 1116.

intends to return, and from which he has no present purpose to remove.[19] The terms "domicil" and "residence" are generally held to be synonymous.[20]

§ 444. **Intention as an element in domicil.**—Mere sojourn in any state will not support a divorce. A domicil is necessary,[21] and this means a bona fide domicil.[22] Intent governs the matter of the acquisition of the domicil.[23] The mere going into a state with the intention of returning when the divorce has been procured is not the establishment of a bona fide domicil.[24]

Bodily presence in any state, no matter how long continued, can not make a change of domicil. The old domicil is not lost nor is a new one gained by mere bodily presence. Statutes of the various states in speaking of the time required to gain a residence for divorce, mean and always have been construed to mean, the length of domicil required. There is a vast difference between a bona fide domicil and a mere sojourn or temporary living in a state.[25] The Supreme Court of Massachusetts has said,

[19]Putnam v. Johnson, 10 Mass. 488; Horne v. Horne, 31 N. Car. 99; Anderson v. Anderson, 42 Vt. 350. See also Krone v. Cooper, 43 Ark. 554; Towson v. Towson, 126 Va. 640, 102 S. E. 48. "The word 'domicil,' as applied to the marriage relation, means a home where the husband and wife dwell together in amity." Buchholz v. Buchholz, 63 Wash. 213, 115 Pac. 88, Ann. Cas. 1912D, 395. Presumably it would continue to be their domicil even though their relations were not altogether amicable.

[20]Cohen v. Cohen, 3 Boyce (Del.) 361, 84 Atl. 122; Connolly v. Connolly, 33 S. Dak. 346, 146 N. W. 581; Miller v. Miller, 88 Vt. 134, 92 Atl. 9, L. R. A. 1915D, 852. See also Terrill v. Terrill, 2 Alaska 475.

[21]Residence must be bona fide. Anthony v. Tarpley (Cal.), 187 Pac. 779; actual not constructive, residence. Wood v. Wood, 140 Ark. 361, 215 S. W. 681; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21; Calef v. Calef, 54 Maine 365, 92 Am. Dec. 549; People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260; Rumping v. Rumping, 36 Mont. 39, 91 Pac. 1057, 12 L. R. A. (N. S.) 1197, 12 Ann. Cas. 1090; Van Fossen v. State, 37 Ohio St. 317, 41 Am. Rep. 507.

[22]Wood v. Wood, 140 Ark. 361, 215 S. W. 681; Messenger v. Messenger, 188 Iowa 367, 176 N. W. 260; Newth v. Newth (Mass.), 135 N. E. 551; Walker v. Walker (Nev.), 198 Pac. 433; Halpine v. Halpine, 52 Pa. Super. Ct. 80; Blondin v. Brooks, 83 Vt. 472, 76 Atl. 184.

[23]Winans v. Winans, 205 Mass. 388, 91 N. E. 394, 28 L. R. A. (N. S.) 992; King v. King, 74 N. J. Eq. 824, 71 Atl. 687, 135 Am. St. 731.

[24]Anthony v. Tarpley, 45 Cal. App. 72, 187 Pac. 779; Presson v. Presson, 38 Nev. 203, 147 Pac. 1081; Williams v. Williams, 78 N. J. Eq. 13, 78 Atl. 693.

[25]Sneed v. Sneed, 14 Ariz. 17, 123 Pac. 312, 40 L. R. A. (N. S.) 99; Holmes v. Holmes, 186 Iowa 336, 170 N. W. 793, 8 A. L. R. 1534; Carpenter v. Carpenter, 30 Kans. 712,

"The finding of the single justice clearly means the deceased did not get a domicil in South Dakota. He meant to stay there ninety days, and such further time, perhaps, as was necessary to get his divorce, and then he meant to come back to Massachusetts. It is true that he meant to do all that was needful to get a divorce, but he meant it because he was mistaken as to what was needful. In other words, he only meant to do what he supposed to be needful and that was not enough."[26]

In a leading case, the court says, "a residence for however long a time it may be continued, can not constitute a domicil without the intention of permanently making it a home, nor can the shortness of time in which the new home is enjoyed defeat the acquisition, for in the latter there would be the factum et animus."[27]

A temporary residence in a place for health, pleasure, or for any reason can not give a domicil. Whether a summer residence or a winter residence is a domicil, is a question of the intention of the occupant, he being allowed to select, as a rule, his domicil. So it is immaterial what kind of a residence the person has, whether owned or rented, large or small, if it is intended for a domicil.[28] The United States Supreme Court and the courts of all the states have always held that divorce judgments founded on any presence within the state less than bona fide residence or domicil is worthless and void because given without jurisdiction.[29]

Intention, however, must be expressed. Mere intention is not sufficient. There must be acts and circumstances,[30] and there must be an intention to remain permanently.[31] Accordingly

2 Pac. 122, 46 Am. Rep. 108; Watkinson v. Watkinson, 68 N. J. Eq. 632, 60 Atl. 931, 69 L. R. A. 397, 6 Ann. Cas. 326; State v. Herren, 175 N. Car. 754, 94 S. E. 698. See notes, 12 L. R. A. (N. S.) 1100; 28 L. R. A. (N. S.) 992.

[26]Andrews v. Andrews, 176 Mass. 92, 57 N. E. 333, affirmed in 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. 237. See Atherton v. Atherton, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. 544, reversing same case in 155 N. Y. 129, 49 N. E. 933, 40 L. R. A. 291, 63 Am. St. 650.

[27]Horne v. Horne, 31 N. Car. (9 Ired.) 99.

[28]Mitchell v. United States, 88 U. S. 350, 22 L. ed. 584; Abington v. North Bridgewater, 40 Mass. 170; Hairston v. Hairston, 27 Miss. 704, 61 Am. Dec. 530; Follweiler v. Lutz, 112 Pa. St. 107, 2 Atl. 721.

[29]Andrews v. Andrews, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. 237.

[30]Bradfield v. Bradfield, 154 Mich. 115, 117 N. W. 588, 129 Am. St. 468; Gallagher v. Gallagher (Tex. Civ. App.), 214 S. W. 516.

[31]Andrade v. Andrade, 14 Ariz. 379, 128 Pac. 813; Sneed v. Sneed, 14 Ariz. 17, 123 Pac. 312, 40 L. R. A. (N. S.) 99; Taylor v. Taylor (Vt.), 112 Atl. 355.

where one removes all his property from a state and leaves himself no place to which he may return, no property to claim his interest, no home, he has nothing upon which his intention to maintain his domicil can seize, no way in which it can express itself. It is but an empty intention.[32] The following is the language of a leading case:

"On the part of the complainant it is claimed that the words 'resident' and 'reside,' as used in the law, do not have the same meaning as the word 'domicil'; that the question of intention can not be considered in determining such residence, whether with reference to the coming into the state or that of remaining. It is urged with much ability that the legislature, by making the remaining within the state a required, definite time, to-wit, six months, designed to make such time the evidence of intention, without reference to the motive of the inhabitancy, or the future design of the party. And it is further claimed that even if this is not the law, then the testimony shows that complainant is a resident within the strictest construction of the term, and had been for six months before the filing of her bill.

"We can not concur entirely in the first part of this proposition. The residence contemplated by our law, in these cases, can not, in our opinion, be that of the sojourner—the visitor—that of one here on business, or for the accomplishing of a particular purpose —with no intention of remaining. The animus manendi must exist, in order to constitute a residence. Not that, in the language of Vattel, it shall be a habitation fixed with the intention of always remaining, but rather that there shall be a fixed habitation or residence, without any present intention of removing therefrom.

"The bona fide resident designs and expects to continue his home where he brings his suit. The one who has a residence temporary and fugitive in its character, however, leaves so soon as divorced, careless of any fraud he may have perpetrated, or any imposition practiced.

"But, not to further enlarge here, let us next ascertain what 'the approved usage of the language' would dictate in giving this construction. And here we may remark, that such is the character of our language that nearly, and indeed most of the words in general use, will be found to vary in meaning, according

[32]Turner v. Turner, 87 Vt. 65, 88 Atl. 3, 47 L. R. A. (N. S.) 505.

to the context or connection in which they are used. This might be illustrated by a very large reference. Take the words 'settlement,' 'sentiment,' 'right,' 'apparent,' 'reasonable,' 'loud,' levity,' and 'restraint,' as an illustration.

"Many of these words we have selected at random from the chapter regulating divorce and alimony; and the curious, by giving these words their frequent conceded meaning, without reference to the connection, will readily see the change or jargon that would be made in this chapter. So it is with the word reside or resident, in speaking of its construction from the approved usage of the language. Webster's definition is, to dwell permanently, for a length of time; to have a settled abode for a time. When the word is applied to the natives of a state, or others who reside in it as permanent citizens, we use it only with reference to the part of a city or country in which man dwells. One who resides or dwells in a place for some time. A man lodges, stays, remains, abides, for a day or a very short time, but reside implies a longer time, though not definite. To set, to settle. It will be observed that the learned lexicographer uses the word 'dwell' in this definition. The definition of that is, 'to abide as a permanent,' 'or to inhabit for a time;' 'to live in a place.' Dwell may signify a residence for life. And in this definition he uses the words 'inhabit' and 'live.' To inhabit is to occupy as a place of settled residence; to live is 'to abide, to dwell, to have a settled residence in any place.' So that, while no definite time is necessarily implied from the word resident or reside, yet permanency is implied, and expressly used in giving the definition. But take the usage of the word. When we say a man resides in Iowa, do we mean he is on a visit or a business trip? When we speak of A's being a resident of New York, do we mean he has gone on a pleasure excursion or to attend to a law suit? If you meet a stranger in our streets, who has been within our state for a year on business, and ask him his residence, he will say 'I reside in New York (or Boston), but I am at present remaining, staying or sojourning in your state.' He would never think of saying, 'I reside in Iowa.' And the truth is, that these words have a signification when applied to the citizen, inhabitant, or dweller in a state, that is clear, definite, and well understood; and approved usage clearly attaches to it more than a mere remaining, sojourning or abiding, without a view to permanency or citizenship. We never approve of its use if applied to a person who has no intention to remain in

our state, or an affirmative intention of leaving when a particular object is accomplished, or when his business is concluded.

"Let us now see whether these words have, or have not, a peculiar and appropriate meaning in law. This we must determine by reference to the text books, the construction given to them by courts, and the connection in which they are generally used.

"Bouvier defines the word resident as follows: 'A person coming into a place, with an intention to establish his domicil or permanent residence, and who in consequence actually remains there. Time is not so essential as the intent.'[33] 'Art. 4. The principal domicil of every one is that which he makes the seat and center of his affairs, and which he does not leave but on some particular occasion, from whence, when absent, he is said to be from home, or when he returns to, he is said to have come home.' 'Art. 5. Since the domicil is the place of one's residence, it is all one as to the domicil of a person, whether he reside or dwell in his own house, or in that of another, which he leases, or possesses by some other title. And for the same reason, that it is the residence which makes the domicil; he who has a house of his own in a place where he does not reside has not for all that, his domicil there.' By the common and canon law, the word residence was peculiarly used in relation to the benefice of the parson and vicar, and his continuance therein. For reading of prayers and preaching, as also for purposes of hospitality, and to maintain the house or cure in repair, he was required to be present, to abide or dwell there; and the word resident is used to show or express this character of permanency or living.[34]

"It will be found[35] that the learned author uses the words domicil and residence, in the same connection, not perhaps entirely in the same sense, but speaks of the animus manendi, as essential to the establishment of a resident, national character.

*** Paige, J., refers to the fact that *** a distinction had been recognized between domicil and residence.[36] He also refers to Vattel's definition of domicil. It is also stated that, 'the residence of a foreign minister at the court to which he is accredited, is only a temporary residence. He is not then animus manendi. The same may be said of the officers, soldiers and seamen in the army

[33]2 Law Dict. 468; Domat. Lib. 2, 485.

[34]1 Blackstone 392.

[35]Kent Comm. 76.

[36]Frost v. Brisbin, 19 Wend. (N. Y.) 11, 32 Am. Dec. 423; Crawford v. Wilson, 4 Barb. (N. Y.) 520.

and navy. They may be said to have their domicil in one place and their residence in another. But, generally, residence and domicil, mean the same thing. The place where a man carries on his established business, and has his permanent residence, is his domicil. Inhabitance and residence are generally used as synonymous terms. Inhabitancy and residence do not mean precisely the same thing as domicil, when the latter term is applied to successions to personal estate, but they mean a fixed and permanent abode or dwelling place for the time being, as contradistinguished from a mere temporary locality of existence.'[37]

"It was held ***[38] that a resident within the state, was one who had a residence of a permanent and fixed character, not one who had a mere residence of a temporary nature. *** Shaw, C. J., says: 'The questions of residence, inhabitancy, or domicil, although not in all respects precisely the same, are nearly so, and depend much on the same evidence.'[39] *** Dayton, J., says: 'The expression, "fixed residence," is generally used as tantamount to domicil, though I am not prepared to say whether they are or not, in all respects convertible terms.'[40] *** Woodworth, J., says: 'A person resident, is defined to be one dwelling or having his abode in any place; an inhabitant, one that resides in a place,'[41] and it was there held, that inhabitant and resident signified the same thing. It is true, that in a subsequent case[42] these definitions were doubted by C. J. Nelson; but while this doubt is expressed, it is there held, 'that a transient visit does not make the resident; that there must be a settled, fixed abode; an intention to remain permanently.' It is held,[43] that: 'There is no ambiguity in the word resident. Every man is a resident, who has taken up his permanent abode in the state.' This case was very fully argued by able counsel, and the whole subject of the meaning of the word citizen, inhabitant, and resident, is very fully reviewed. It is there very clearly recognized, that the term inhabitant, refers to the place of a person's residence, and excludes the idea of an occasional or temporary residence, but contemplates that which is bona fide.

[37]Matter of Wrigley, 8 Wend. (N. Y.) 140.

[38]Matter of Fitzgerald, 2 Caines (N. Y.) 318.

[39]Thorndike v. Boston, 1 Metc. (Mass.) 245.

[40]Cadwalader v. Howell, 18 N. J. L. 138.

[41]Roosevelt v. Kellogg, 20 Johns. (N. Y.) 210.

[42]Frost & Dickinson v. Brisbin, 19 Wend. (N. Y.) 11, 32 Am. Dec. 423.

[43]Spragins v. Houghton, 2 Scam. (Ill.) 377.

"The constitution of Kentucky in 1833, required residence in the state, and actual residence in the county, for a certain time, as qualifications for electors. In the celebrated contested election case of Letcher v. Moore, in Congress, it was held that the terms there used meant the same as that given to the word 'home' in the vernacular tongue, and the term domicil by the writers on the civil law. But let us look further into the use of these words and their connection in the constitutions and statutes of different states. In Maine, in their constitution and laws, published in 1819, in defining the qualifications of representatives, and in giving jurisdiction in cases of divorce, the words live and reside are used. Kentucky, in her new constitution, in speaking of the qualification of electors and representatives, uses the word reside. So it is by the new constitution of Indiana. Michigan, in the published laws of 1846, uses the word reside in speaking of voters, and also of jurisdiction in divorce cases. So does Missouri, in the laws of 1845, on the subject of divorce. We have not examined the statutes of other states. But in those referred to, can it be pretended that a temporary, casual or fugitive residence was meant, and not a permanent one? We apprehend not. And no case can be found, under these constitutions and laws, that recognizes any such construction. Their framers were aware of the fixed, settled, and well understood meaning of those terms, and hence their use. And here, we would remark, that it is seldom, if ever, that we find the word domicil used, in providing for the inhabitancy or residence of the citizen, in our constitutions and statutes. It may be found in the Civil Code of Louisiana, and a few other statutes following to some extent the rules of the civil law, but it is unusual; and we regard it as a legitimate deduction therefrom, that the words resident, reside, and inhabitant, which are most generally used, have a legal meaning in such connection; and that the intention of remaining permanently is an element in determining the same —that they include the idea of permanency. Otherwise, we must presume that it was no part of the object of the lawmaker that permanency, or the intention to abide and remain, should be an element in such residence. This we can not do.

"It is true, that the question of intention may at times be obscure and difficult of ascertainment. And the same may be said with reference to the word domicil, in the settling of which, it is conceded in the argument here, we must look to the intention. The

same difficulty arises with regard to many things depending on intention under the law; and yet, that intention has to be ascertained from the best lights presented in each particular case. On this question, as in others, certain acts or circumstances afford presumptive evidence of the intention, and, until rebutted, will be conclusive, while other cases may arise, where such intention, must be deduced from a great variety of minor circumstances. So that this is in truth, an argument that is addressed more against the policy of the law and the difficulty of its administration, than as tending to militate against the construction here given.

"It is doubtless true, that authorities will be found not concurring in detail with those above cited. Indeed, what is and is not a residence, for various purposes, has been a subject of much controversy. We are not aware, however, of any authority that holds that a mere transient, temporary sojourn, with no intention to remain permanently, can constitute a legal residence.

"As not maintaining the positions above stated, we are referred by complainant's counsel to Story:[44] 'Two things,' says the author, 'must concur to constitute domicil: first, a residence; and secondly, the intention of making it the home of the party. There must be the fact and the intent.' We are not able to see that the same author gives any definition to the term resident or residence. The word domicil, we may also suggest, is that used by the old law writers, and even modern text books, as conveying, according to law language, more fully the whole meaning arrived at. And yet, as here used and defined, it does not seem to us, that the author can be understood as saying that residence, or the term resident, means a dwelling, an abiding without reference to intention or permanence. True it is, there must be the fact of the intent. Now, what fact? We answer, the act of abiding; the fact of a dwelling; a habitation; and having this residence—having an abode—this abode, this dwelling, then, if the intent exists, the domicil is perfect. In other words, the mere intent, without the fact of residence or abiding, can not constitute the domicil. Neither can the intent, without having the abode, the home, the place to dwell, constitute the residence. Residence, as there used, we think, has reference to the fact that the citizen or person has a place that, to use an expressive word, is called home, with no present intention of removing therefrom. Not that the person

[44]Story's Conflict of Laws, § 44.

is to remain continuously there, in order to retain his residence or domicil, but if absent, for a long or short time, with the animus revertendi, the domicil still continues."

A Carolina case[45] "asserts the same doctrine, as above quoted from Judge Story, and indeed so much of it as relates to this question will be found to be copied from that work. The judge, however, in that case, says that 'domicil, in its ordinary and familiar use means the place where a person lives or has his home; while, in a large sense, it is where he has his true, fixed, and permanent home, to which, when absent from it, he intends to return, and from which he has no present purpose to remove.' In other words, he recognizes an ordinary and familiar use of the word domicil, and also its use in an enlarged sense; and lays it down, that the fact of residence must exist, and also an intention. It would be as hard to conceive a residence without a place or locality to abide, dwell, or live, as it would to conceive of a domicil without the same. And that, in our opinion, is what is meant: and that it is not intended that a man may have a residence, in legal acceptation, without the reference to intention, any more than he can have a domicil."[46]

An army officer subject to orders which at any time may transfer him to another post can not be said to be domiciled at any post unless he indicates an intention to make a particular post his place of permanent abode.[47] But the fact that one is on military duty in an army camp does not prevent his claiming residence then within the meaning of laws requiring residence in the county of the suit for divorce.[48]

§ 445. **Change of domicil.**—Every person must have one domicil, and is presumed to have that one until he has acquired another by change of residence, coupled with an intention to acquire a new one. No person can have two domicils at the same time.[49] In order to acquire a new domicil, a person must leave one place and take up a residence in another with a bona fide in-

[45]Horne v. Horne, 31 N. Car. (9 Ired.) 99.

[46]Hinds v. Hinds, 1 Iowa (1 Clarke) 36.

[47]Pendleton v. Pendleton, 109 Kans. 600, 201 Pac. 62.

[48]Percy v. Percy (Cal.), 207 Pac. 369.

[49]Desmare v. United States, 93 U. S. 605, 23 L. ed. 959; Mitchell v. United States, 21 Wall. (U. S.) 350, 22 L. ed. 584; Culbertson v. Board of Comrs., 52 Ind. 361; Abington v. North Bridgewater, 40 Mass. 170; De Meli v. De Meli, 67 How. Prac. (N. Y.) 20.

tention of making the latter his legal and permanent residence.[50] It follows, therefore, that when a person whose legal domicil is in one state, goes into another for the sole purpose of procuring a divorce and with no intention of remaining there, he does not acquire that domicil which is necessary to give the court jurisdiction, and the divorce may be declared void for lack of jurisdiction by the courts of the state of his domicil, it being considered that the courts of one state have no power to change the status of citizens of another state.[51]

Where, however, the change is made in good faith, then it is not material that one of the purposes in making the change was to procure a divorce.[52]

§ 446. **Different domicil for husband and wife.**—While it is generally stated that the domicil of the husband is the domicil of the wife, it is also well settled that where there is a cause for a divorce, the wife may acquire such domicil apart from that of the husband as will enable the court to take jurisdiction of the complaint.[53] It has been held also that a wife may acquire a separate domicil whenever it is necessary or proper,[54] as where the husband deserts his wife.[55]

[50]Sneed v. Sneed, 14 Ariz. 17, 123 Pac. 312, 40 L. R. A. (N. S.) 99; Carpenter v. Carpenter, 30 Kans. 712, 2 Pac. 122, 46 Am. Rep. 108; Bechtel v. Bechtel, 101 Minn. 511, 112 N. W. 883, 12 L. R. A. (N. S.) 1100; Gould v. Gould, 194 N. Y. S. 745. See notes, 12 L. R. A. (N. S.) 1100; 28 L. R. A. (N. S.) 992.

[51]Sewall v. Sewall, 122 Mass. 156, 23 Am. Rep. 299; Colburn v. Colburn, 70 Mich. 647, 38 N. W. 607; People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260; Hoffman v. Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; Pawling v. Willson, 13 Johns. (N. Y.) 192. See note, 12 L. R. A. (N. S.) 1103.

[52]Gildersleeve v. Gildersleeve, 88 Conn. 689, 92 Atl. 684, Ann. Cas. 1916B, 920.

[53]Winston v. Winston, 50 App. D. C. 321, 271 Fed. 551; Pearlstine v. Pearlstine, 148 Ga. 756, 98 S. E. 264; George v. George, 190 Ky. 706, 228 S. W. 408; Auxier v. Auxier, 155 Ky. 174, 159 S. W. 678; George v. George, 143 La. 1032, 79 So. 832; Melchers v. Bertolido, 118 Misc. 196, 192 N. Y. S. 781; Ensign v. Ensign, 54 Misc. 289, 105 N. Y. S. 917; Cache v. Cache, 12 Ohio App. 140.

[54]Garner v. Garner, 56 Md. 127; Burtis v. Burtis, 161 Mass. 508, 37 N. E. 740; Shaw v. Shaw, 98 Mass. 158; Hood v. Hood, 93 Mass. 196, 87 Am. Dec. 709; Shute v. Sargent, 67 N. H. 305, 36 Atl. 282; Ditson v. Ditson, 4 R. I. 87.

[55]Brown v. Brown, 164 Ill. App. 589; Perkins v. Perkins, 225 Mass. 82, 113 N. E. 841, L. R. A. 1917B, 1028; Wagoner v. Wagoner, 287 Mo. 567, 229 S. W. 1064. "The exception" (to the rule that a married woman has no other domicil, and can acquire no other, than that of her husband) "arises whenever it becomes necessary and proper that the

In case of desertion by the husband the domicil of the wife will remain at the place where the desertion occurred until she acquires another domicil,[56] and generally a wife who is forced for any sufficient ground to leave her husband may establish a separate domicil.[57] This domicil may be established in another state.[58]

§ 447. **Extra-territorial effect of decree.**—No state has a right to dissolve the marriage of persons who are residents of another state.[59] But a decree of divorce granted by a court of the state having jurisdiction over the petitioning party as a citizen of the state is, by the constitution of the United States, valid in all the states.[60] For the purpose of divorce, the general rule of jurisprudence is, that a divorce granted in the place of the domicil of both parties, and there valid, is good everywhere.[61] Every state and territory has enacted laws governing divorce and the laws of all the states within the United States require that one of the parties to the divorce action must have a bona fide domicil in the state or territory of the suit for a certain length of time before the courts acquire jurisdiction to pronounce a divorce judgment. Whenever a state has refused to grant a divorce, or whenever the state courts throughout the United States and the United States Supreme Court have refused to accord faith and credit to the divorce judgment of a sister state therein, it has been on account of lack of domicil because of fraud or because there was a lack of notice to the defendant. One having a domicil in Massachusetts, for instance, does not lose that domicil or gain a new domicil by going to another state and remaining there for the length of time required to gain a domicil, applying for a divorce, obtaining a decree and immediately returning to Massachusetts, because the

wife should acquire a separate domicil, as, when the misconduct of the husband compels her to leave him, or when he abandons her." Stevens v. Allen, 139 La. 663, 71 So. 936, L. R. A. 1916E, 1115.

[56]Hibbert v. Hibbert, 72 N. J. Eq. 778, 65 Atl. 1028; State ex rel. v. Morse, 31 Utah 213, 87 Pac. 705, 7 L. R. A. (N. S.) 1127.

[57]Sneed v. Sneed, 14 Ariz. 17, 123 Pac. 312, 40 L. R. A. (N. S.) 99; Lamont v. Lamont, 134 Ga. 523, 68 S. E. 96; Miller v. Miller, 67 Ore. 359, 136 Pac. 15; Patch v. Patch, 86 Vt. 225, 84 Atl. 815.

[58]Ransom v. Ransom, 54 Misc. 410, 104 N. Y. S. 198; Buckley v. Buckley, 50 Wash. 213, 96 Pac. 1079, 126 Am. St. 900; Carty v. Carty, 70 W. Va. 146, 73 S. E. 310, 38 L. R. A. (N. S.) 207.

[59]Beard v. Beard, 21 Ind. 321; Lister v. Lister, 86 N. J. Eq. 30, 97 Atl. 170; People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274.

[60]Ditson v. Ditson, 4 R. I. 87.

[61]Clark v. Clark, 62 Mass. 385.

proof of intention is lacking and the divorce so obtained is worthless.

It is a fraud on the laws of the state which require that a divorce action be brought in the state of the domicil. The courts of one state can not divorce the citizens of another state.[62] A decree or judgment of divorce that is invalid where it is rendered can not have any validity accorded to it in any other state or country.[63]

[62]Haddock v. Haddock, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. 525.

[63]Sistare v. Sistare, 218 U. S. 1, 54 L. ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061; Olmsted v. Olmsted, 216 U. S. 386, 54 L. ed. 530, 30 Sup. Ct. 292; Andrews v. Andrews, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. 237; Streitwold v. Streitwold, 181 U. S. 179, 45 L. ed. 807, 21 Sup. Ct. 553; Bell v. Bell, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. 551; Mitchell v. United States, 88 U. S. 350, 22 L. ed. 584; Strait v. Strait, 3 McArthur (D. C.) 415; Wood v. Wood, 54 Ark. 172, 15 S. W. 459, 43 Am. St. 42; Medina v. Medina, 22 Colo. 146, 43 Pac. 1001; Beach v. Beach, 6 Dak. 371, 43 N. W. 701; Shrader v. Shrader, 36 Fla. 502, 18 So. 672; Phelan v. Phelan, 12 Fla. 449; House v. House, 25 Ga. 473; Stewart v. Stewart, 32 Idaho 180, 180 Pac. 165; Dunham v. Dunham, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70; Becker v. Becker, 160 Ind. 407, 66 N. E. 1010; Watkins v. Watkins, 125 Ind. 163, 25 N. E. 175, 21 Am. St. 217; Williamson v. Williamson, 179 Iowa 489, 161 N. W. 482; Whitcomb v. Whitcomb, 46 Iowa 437; Patterson v. Patterson, 57 Kans. 275, 46 Pac. 304; Blake v. Dudley, 111 La. 1096, 36 So. 203; Gregory v. Gregory, 78 Maine 187, 3 Atl. 280, 57 Am. Rep. 792; Andrews v. Andrews, 176 Mass. 92, 57 N. E. 333, (see same case, 188 U. S. 14, 47 L. ed. 366), 23 Sup. Ct. 237; Commonwealth v. Kendall, 162 Mass. 221, 38 N. E. 504; Adams v. Adams, 154 Mass. 290, 28 N. E. 260, 13 L. R. A. 275; Sewall v. Sewall, 122 Mass. 156, 23 Am. Rep. 299; Chase v. Chase, 72 Mass. 157; Reed v. Reed, 52 Mich. 117, 17 N. W. 720, 50 Am. Rep. 247; Thelen v. Thelen, 75 Minn. 433, 78 N. W. 108; Bomsta v. Johnson, 38 Minn. 230, 36 N. W. 341; Suter v. Suter, 72 Miss. 345, 16 So. 673; Carter v. Carter, 88 Mo. App. 302; Wisdom v. Wisdom, 24 Nebr. 551, 39 N. W. 594, 8 Am. St. 215; Leith v. Leith, 39 N. H. 20; Streitwolf v. Streitwolf, 58 N. J. Eq. 563, 41 Atl. 876, 43 Atl. 683, 78 Am. St. 630; Magowan v. Magowan, 57 N. J. Eq. 322, 42 Atl. 330, 73 Am. St. 645; Firth v. Firth, 50 N. J. Eq. 137, 24 Atl. 916; McShane v. McShane, 45 N. J. Eq. 341, 19 Atl. 465; Flower v. Flower, 42 N. J. Eq. 152, 7 Atl. 669; Doughty v. Doughty, 28 N. J. Eq. 581; Winston v. Winston, 165 N. Y. 553, 59 N. E. 273; Bell v. Bell, 4 App. Div. 527, 40 N. Y. S. 443, 74 N. Y. St. 876, affirmed in 157 N. Y. 719, 53 N. E. 1123, and 181 U. S. 175, 45 L. ed. 864, 21 Sup. Ct. 551; State v. Herren, 175 N. Car. 754, 94 S. E. 698; Smith v. Smith, 10 N. Dak. 219, 86 N. W. 721; Van Fossen v. State, 37 Ohio St. 317, 41 Am. Rep. 507; Beach v. Beach, 4 Okla. 359, 46 Pac. 514; Appeal of Zerfass, 135 Pa. St. 522, 19 Atl. 1056; State v. Watson, 20 R. I. 354, 39 Atl. 193, 78 Am. St. 871; Petition of Vetterlein, 14 R. I. 378; Hare v. Hare, 10 Tex. 355; Cook v. Cook, 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706.

§ 448. **Statutory time of residence.**—Statutes generally provide for and specify the length of time during which the plaintiff must have been a resident of the state in which suit is brought. These statutes are regarded everywhere as mandatory and their conditions must be complied with before the court can acquire jurisdiction of the subject matter.[64] No act of the defendant can waive the necessity of proving this prescribed jurisdictional residence.[64a] The residence must be for the statutory period immediately preceding the filing of the complaint,[65] and where a bona fide domicil is established there are no deductions for temporary absences from the state.[66] It is the rule in some of the states that where the parties were residents of the state at the time of the commission of the matrimonial offense on which the suit is based the statutory time of residence is not required.[67]

Where the wife has lived in a sister state up to the time of bringing the suit against her husband in the state of his residence she may not claim a constructive domicil based on her husband's residence.[68]

[64]Winston v. Winston, 50 App. D. C. 321, 271 Fed. 551; Sneed v. Sneed, 14 Ariz. 17, 123 Pac. 312, 40 L. R. A. (N. S.) 99; Coleman v. Coleman, 23 Cal. App. 423, 138 Pac. 362; Miller v. Miller, 33 Fla. 453, 15 So. 222, 24 L. R. A. 137; Asling v. Asling, 88 Kans. 331, 128 Pac. 185; Howell v. Herriff, 87 Kans. 389, 124 Pac. 168, Ann. Cas. 1913E, 429; Workman v. Workman, 191 Ky. 124, 229 S. W. 379; Laboute v. Laboute, 210 Mass. 319, 96 N. E. 675; Bradfield v. Bradfield, 154 Mich. 115, 117 N. W. 588, 129 Am. St. 468; Rumping v. Rumping, 36 Mont. 39, 91 Pac. 1057, 12 L. R. A. (N. S.) 1197, 12 Ann. Cas. 1090; Worthington v. District Court, 37 Nev. 212, 142 Pac. 230, L. R. A. 1916A, 696, Ann. Cas. 1916E, 1097; Pugh v. Pugh, 25 S. Dak. 7, 124 N. W. 959, 32 L. R. A. (N. S.) 954; Gallagher v. Gallagher (Tex. Civ. App.), 214 S. W. 516; Gamblin v. Gamblin, 52 Tex. Civ. App. 479, 114 S. W. 408; Blankenship v. Blankenship, 125 Va. 595, 100 S. E. 538. See notes, 11 L. R. A. 444; 12 L. R. A. (N. S.) 1100; 20 Ann. Cas. 341.

[64a]Winston v. Winston, 50 App. D. C. 321, 271 Fed. 551; Clopton v. Clopton, 10 N. Dak. 569, 88 N. W. 562, 88 Am. St. 749; Holton v. Holton, 64 Ore. 290, 129 Pac. 532, 48 L. R. A. (N. S.) 779.

[65]Coulter v. Coulter, 124 Mo. App. 149, 100 S. W. 1134; Keil v. Keil, 80 Nebr. 496, 114 N. W. 570; Heath v. Heath, 44 Pa. Super. Ct. 118; Walker v. Walker, 32 R. I. 28, 78 Atl. 339.

[66]Cummings v. Cummings, 133 Ky. 1, 117 S. W. 289; Laplace v. Briere (La.), 92 So. 881; Fox v. Fox (Tex. Civ. App.), 179 S. W. 883; Duxstad v. Duxstad, 17 Wyo. 411, 100 Pac. 112, 129 Am. St. 1138.

[67]Cohagan v. Cohagan, 294 Ill. 439, 128 N. E. 494; Dings v. Dings, 123 Ill. App. 318; Clark v. Clark, 191 Mo. App. 278, 177 S. W. 1077; McConnell v. McConnell, 167 Mo. App. 680, 151 S. W. 175; Fitzpatrick v. Fitzpatrick, 131 Tenn. 54, 173 S. W. 444.

[68]George v. George, 190 Ky. 706, 228 S. W. 408. But see Berger v.

§ 449. **Acquired jurisdiction.**—While it is settled that a court of one state has no jurisdiction over a citizen of, or one having domicil in, another state, sufficient to enable it to bind such citizen by its decrees, yet, if one of the parties has a domicil in the state and the court has jurisdiction over him or her, it may sometimes acquire sufficient jurisdiction by publication, personal service, or the appearance of the defendant, to enable it to pass upon the question of divorce as affecting the status of one of its citizens.[69] The jurisdiction thus acquired is of no value to give any extra-territorial power to its decrees, and they must be limited to the simple determination of the status of the citizens of its own state and no more. Even this authority is strongly denied by decisions in some states and by express statute in others.[70] If the innocent party has retained his original domicil in the state, it is generally held that the court, by constructive or personal notice, may acquire jurisdiction over the absent defendant.[71] As the domicil of the wife follows that of the husband, when the husband moves to another state and gains a domicil there, jurisdiction is also acquired over the wife by constructive or personal notice, when she refuses to follow him.[72]

§ 450. **Jurisdiction by appearance.**—While the consent of either or both parties can not, of itself, give the court of another state jurisdiction, yet if the court has jurisdiction over the subject matter, by virtue of the domicil of one of the parties, the appearance of the defendant, in person or by attorney, completes the jurisdiction of the court over his person.[73]

§ 451. **Jurisdiction of counter-claim.**—Generally where the plaintiff has invoked the jurisdiction of the court for divorce, the court has jurisdiction to give the defendant separate maintenance prayed for by counterclaim.[74]

Berger, 89 N. J. Eq. 430, 105 Atl. 496.

[69]Snyder v. Snyder, 10 Phila. (Pa.) 306, 1 Week No. Cas. 187; Ditson v. Ditson, 4 R. I. 87.

[70]Dunham v. Dunham, 57 Ill. App. 475; Doughty v. Doughty, 27 N. J. Eq. 315; People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274; Prosser v. Warner, 47 Vt. 667, 19 Am. Rep. 132; Cook v. Cook, 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706.

[71]Standridge v. Standridge, 31 Ga. 223; Burtis v. Burtis, 161 Mass. 508, 37 N. E. 740; Donnelly v. West, 60 How. Prac. (N. Y.) 428; Stephens v. Stephens, 62 Tex. 337.

[72]Loker v. Gerald, 157 Mass. 42, 31 N. E. 709, 16 L. R. A. 497, 34 Am. St. 252.

[73]Harrison v. Harrison, 20 Ala. 629, 56 Am. Dec. 227; Jones v. Jones, 108 N. Y. 415, 15 N. E. 707, 2 Am. St. 447.

[74]Burtt v. Burtt, 59 Utah 457, 204 Pac. 91.

§ 452. **Cross-bill by nonresident.**—On the theory that where equity has once assumed jurisdiction on a matter it will retain such jurisdiction until the equities are settled, courts have granted divorces to nonresident cross-complainants even after the plaintiff had dismissed his complaint.[75]

§ 453. **Domicil for annulment suit.**—There is a difference in the law as applied to annulment suits and as applied to divorce on the question of necessary time of residence, and it has been generally held that no specific length of time of residence is required in an annulment proceeding.[76] In some states, however, the language of the statute is such as to indicate the intention of the legislature to treat both classes of cases the same in this respect.[77] Where the cause alleged in the complaint was the infancy of one of the parties and the marriage was performed in an adjoining state from that of the domicil of the parties for the sake of avoiding the law of the state of domicil it was held that the state of domicil had jurisdiction to nullify the marriage even though the marriage was legal where celebrated.[78]

[75]Jenness v. Jenness, 24 Ind. 355, 87 Am. Dec. 335; Clutton v. Clutton, 108 Mich. 267, 66 N. W. 52, 31 L. R. A. 160. See notes, 59 L. R. A. 149; 9 Ann. Cas. 1200.

[76]Montague v. Montague, 25 S. Dak. 471, 127 N. W. 639, 30 L. R. A. (N. S.) 745, Ann. Cas. 1912C, 591.

[77]Eliot v. Eliot, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568. See notes, 30 L. R. A. (N. S.) 747; Ann. Cas 1912C, 594.

[78]Cunningham v. Cunningham, 206 N. Y. 341, 99 N. E. 845, 43 L. R. A. (N. S.) 355.

CHAPTER 30

PARTIES

Section

455. Who may be plaintiffs.
456. Who are proper defendants.
457. Aliens.
458. Authority to sue for annulment.
459. Incompetency of parties.
460. Incompetent defendants and their guardians.
461. Legal status of wife as a party.
462. Intervening parties.

§ 455. **Who may be plaintiffs.**—The right to bring suit for divorce is limited to the parties to the marriage.[1] In most states the right belongs only to the "innocent party," though in some states the statutes permit either party to bring suit. As a general rule no third person is considered to be so interested in the result of the suit as to be allowed to maintain proceedings.[2] In some states the plaintiff is required to sign the libel or complaint, and in such cases no substitution is allowed even in extreme cases.[3]

§ 456. **Who are proper defendants.**—The general rule that no third person is interested in divorce proceedings is varied by the circumstances that there may be questions of property rights, the custody and maintenance of children, and alimony for the wife to be determined. In cases where the property of the defendant is sought to be reached, any person claiming an interest in such property may be joined as a party defendant.[4] Aside

[1]Lance v. Mason, 151 Ark. 114, 235 S. W. 394.

[2]Worthy v. Worthy, 36 Ga. 45, 91 Am. Dec. 758; Mohler v. Shank, 93 Iowa 273, 61 N. W. 981, 34 L. R. A. 161, 57 Am. St. 274; Birdzell v. Birdzell, 33 Kans. 433, 6 Pac. 561, 52 Am. Rep. 539; Winslow v. Winslow, 7 Mass. 96; Hoffman v. Hoffman, 43 Mo. 547; Mountholly v. Andover, 11 Vt. 226, 34 Am. Dec. 685.

[3]Newcomb v. Newcomb, 13 Bush (Ky.) 544, 26 Am. Rep. 222; Gould v. Gould, 1 Metc. (Mass.) 382 (attorney can not sign when authorized by letter); Daniels v. Daniels, 56 N. H. 219; Philbrick v. Philbrick, 27 Vt. 786; Morgan v. Morgan, 2 Curt. Ecc. 679.

[4]Kashaw v. Kashaw, 3 Cal. 312; Busenbark v. Busenbark, 33 Kans. 572, 7 Pac. 245; Thurston v. Thurs-

from property rights, no other consideration makes it proper to join third persons as defendants. Children may have an interest in the proceedings, which may be in the nature of a property interest, but not such as to permit joining them as defendants.[5] Mere allegation of a suggestion in the petition that a husband could dispose of his property so as to defeat the claims of his wife in alimony will not warrant the addition of third persons as parties defendant.[6] The interest of the parents of the parties is not such as to permit of their being joined as defendants, though they were parties to the marriage contract.[7] The guardian of a defendant ward should be joined as a party if any question of alimony or property rights is involved.[8]

§ 457. **Aliens.**—An alien who has lived in the state the required period of time may sue for divorce.[9]

§ 458. **Authority to sue for annulment.**—Annulment proceedings are in general personal to the parties married.[10]

Where the ground for annulment is mental incapacity at the time of marriage, suit may be brought by the guardian or other legal representative.[11]

The parents of an infant can not be parties to a proceeding in annulment for nonage of betrothed. Such proceeding is strictly personal to the persons married.[12]

§ 459. **Incompetency of parties.**—It is well settled that where no property rights are involved an insane person, by himself or by guardian, can not bring a suit for divorce, as the right is a strictly personal one.[13] This doctrine has been modified by the

ton, 58 Minn. 279, 59 N. W. 1017; Wetmore v. Wetmore, 5 Ore. 469; Varney v. Varney, 54 Wis. 422, 11 N. W. 694; Gibson v. Gibson, 46 Wis. 449, 1 N. W. 147; Damon v. Damon, 28 Wis. 510.

[5]Baugh v. Baugh, 37 Mich. 59, 26 Am. Rep. 495; Faulk v. Faulk, 23 Tex. 653.

[6]Puckett v. Puckett, 174 Ala. 315, 56 So. 585.

[7]D'Auvilliers v. De Livaudais, 32 La. Ann. 605.

[8]Tiffany v. Tiffany, 84 Iowa 122, 50 N. W. 554.

[9]Sedgwick v. Sedgwick, 50 Colo. 164, 114 Pac. 488, Ann. Cas. 1912C, 653.

[10]Ridgely v. Ridgely, 79 Md. 298, 29 Atl. 597, 25 L. R. A. 800; McKinney v. Clark, 2 Swan. (Tenn.) 321, 58 Am. Dec. 59.

[11]Crump v. Morgan, 38 N. Car. 91, 40 Am. Dec. 447.

[12]In re Hollopeter, 52 Wash. 41, 100 Pac. 159, 21 L. R. A. (N. S.) 847, 132 Am. St. 952, 17 Ann. Cas. 91.

[13]Worthy v. Worthy, 36 Ga. 45, 91 Am. Dec. 758; Bradford v. Abend, 89 Ill. 78, 31 Am. Rep. 67; Birdzell v. Birdzell, 33 Kans. 433, 6 Pac. 561, 52 Am. Rep. 539.

statutes of some states, which permit insane persons to bring suit by guardian.[14] A spendthrift may bring a bill for divorce, as it is a personal right, but he can not do so by guardian.[15]

If a minor wife is of sufficient legal age to contract marriage, she may bring suit to dissolve it.[16]

§ 460. **Incompetent defendants and their guardians.**—There are two kinds of guardians who may appear in divorce suits, a guardian appointed generally to care for the estate of the ward and a guardian ad litem, appointed by the court for the purpose of protecting the interests of his ward during the suit. A general guardian may, as a rule, and under modern statutory provisions, come in and defend, where any question involving the estate of his ward is to be considered. The guardian ad litem is appointed by the court on suggestion, or on its own motion.[17]

The action should be brought against defendant and his committee where he was declared insane and a committee appointed after action brought against him when of sound mind.[18]

§ 461. **Legal status of wife as a party.**—The disability of coverture is practically removed from the wife under modern decisions and statutory provisions, so that a feme covert may bring suit for divorce without a next friend or guardian ad litem.[19]

§ 462. **Intervening parties.**—Formerly the co-respondent was not allowed to intervene in divorce cases, although his character and reputation were assailed, but the modern tendency is to allow such intervention.[20] In Massachusetts he is allowed by express statute to appear and defend whether libellee does or not.[21] Under the New York code of civil procedure a co-respond-

[14]Cowan v. Cowan, 139 Mass. 377, 1 N. E. 152; Sims v. Sims, 121 N. Car. 297, 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. 665; Crump v. Morgan, 38 N. Car. (3 Ired.) 91, 40 Am. Dec. 447; Thayer v. Thayer, 9 R. I. 377.

[15]Winslow v. Winslow, 7 Mass. 96; Richardson v. Richardson, 50 Vt. 119.

[16]Bentley v. Bentley, 149 Ga. 707, 102 S. E. 21, 17 A. L. R. 896; Besore v. Besore, 49 Ga. 378.

[17]Heller v. Heller, 6 How. Prac. (N. Y.) 194; Stratford v. Stratford, 92 N. Car. 297.

[18]Huston v. Huston, 150 Ky. 353, 150 S. W. 386.

[19]Jones v. Jones, 18 Maine 308, 36 Am. Dec. 723; Amos v. Amos, 4 N. J. Eq. 171; Wright v. Wright, 3 Tex. 168.

[20]Howell v. Herriff, 87 Kans. 389, 124 Pac. 168, Ann. Cas. 1913E, 429; Clay v. Clay, 21 Hun. (N. Y.) 609.

[21]Mass. Gen. Laws, 1921, chap. 208,

ent has all the rights of a party in an action for absolute divorce,[22] but may lose that right by delay in asserting it.[23]

Where the property interests of third parties are involved, it is proper for such parties to intervene to the extent necessary to protect such property, but not in any manner to interfere with the divorce proceeding itself.[24]

A public officer is required by the statutes of some states to appear in divorce cases to protect the interests of the state.[25]

In Colorado, when the defendant in a divorce case fails to appear, the court must appoint an attorney who shall secure a fair and impartial hearing of the cause.[26] In Idaho, when the ground of a petition for divorce is insanity, the district attorney must defend.[27] The rule is the same in Utah.[28] In Indiana it is the duty of the prosecuting attorney to appear and resist a petition for divorce if it is not contested.[29] In Michigan, if there are children under the age of fourteen years, it is the duty of the prosecuting attorney to intervene, but failure to do this is an irregularity which does not necessarily affect the jurisdiction of the court.[30] In Oregon, the state is constituted a party in

§ 9. So also in New York, see Raymon v. Williston, 213 Fed. 525. In the District of Columbia in divorce cases based on adultery the co-respondent must be made a party defendant by serving process upon him. D. C. Code, § 983 (31 Stat. at L. 1347, chap. 854). But if the identity of the co-respondent can not be established, this is not necessary. McLarren v. McLarren, 45 App. D. C. 237, 1 A. L. R. 1412 and annotated on page 1414.

[22]Shaw v. Shaw, 140 N. Y. S. 388.

[23]Stafford v. Stafford, 92 Misc. (N. Y.) 563, 156 N. Y. S. 459.

[24]Bennett v. Bennett, 15 Okla. 286, 81 Pac. 632, 70 L. R. A. 864. See note, Ann. Cas. 1913E, 430.

[25]See § 61, ante. Creamer v. Creamer, 36 Ga. 618; State v. Brinneman, 120 Ind. 357, 22 N. E. 332; Scott v. Scott, 17 Ind. 309; Yeager v. Yeager, 43 Ind. App. 313, 87 N. E. 144; Willcox v. Wayne Circuit Judge, 83 Mich. 1, 47 N. W. 29; Eggerth v. Eggerth, 15 Ore. 626, 16 Pac. 650; Taylor v. Taylor, 144 Tenn. 311, 232 S. W. 445. "Actions for divorce are not like ordinary civil actions, and in a great number of instances are not governed by the same rules. In many respects they are sui generis. Though not mentioned in the pleadings, the public is a third party in such actions, and the judge may, in large degree, take care of such party's interest." 2 Bishop Marriage and Divorce, sec. 489 (Ed. 1891), quoted in Milster v. Milster, 200 Mo. App. 603, 209 S. W. 620.

[26]Mills Ann. Stat. 1912, § 2247.

[27]Idaho Comp. Stat. 1919, §§ 7037-7039.

[28]Utah Comp. Laws 1917, § 2995.

[29]Burns' Stat. 1914 §§ 1073, 1074. Scott v. Scott, 17 Ind. 309.

[30]Comp. Laws 1915, § 11433. Cole v. Cole, 193 Mich. 655, 160 N. W. 418.

divorce suits and it is the duty of the district attorney to prevent fraud or collusion and to control the proceedings for the defense.[31] In Washington it is the duty of the prosecuting attorney to control the defense.[32]

[31]Ore. Laws 1920, § 1020. Smythe v. Smythe, 80 Ore. 150, 149 Pac. 516, 156 Pac. 785, Ann. Cas. 1918D, 1094.

[32]Rem. Comp. Law 1922, § 995.

CHAPTER 31

INTERMEDIATE PROCESS

Section

465. Cross-bill, libel, or petition.
466. Contest by guardian.
467. Amendments discretionary.
468. Interlocutory orders.
469. Interlocutory decrees.
470. Protection of wife pending suit.
471. Bill of particulars.

§ 465. **Cross-bill, libel, or petition.**—It is generally provided by statute that the defendant, who may have cause for divorce, may file with his answer to the complaint of the plaintiff a cross-pleading[1] setting forth the grounds for his action and such other facts and allegations as may be required. The cross-pleading may contain the answer, though some courts hold that the libel should be answered before the cross-libel is filed.[2]

The defendant, in his cross-pleading, may pray for any kind of relief in the power of the court, and there should be a general denial of the allegations made by the plaintiff.[3] Where the action is for separation a counterclaim for absolute divorce may be interposed.[4] In Louisiana, however, a wife sued for divorce on the ground of separation for seven years may not reconvene for a divorce on the ground of adultery.[5] It is not necessary to allege domicil, residence, or other jurisdictional facts, as the court has both parties before it.[6] He may accordingly set up

[1]Earl v. Earl, 81 N. J. Eq. 444, 86 Atl. 940.

[2]Gilpin v. Gilpin, 12 Colo. 504, 21 Pac. 612; Glasscock v. Glasscock, 94 Ind. 163; Hoffman v. Hoffman, 43 Mo. 547; Harrison v. Harrison, 46 N. J. Eq. 75, 19 Atl. 126.

[3]Mott v. Mott, 82 Cal. 413, 22 Pac. 1140; Wadsworth v. Wadsworth, 81 Cal. 182, 22 Pac. 648, 15 Am. St. 38; Butler v. Butler, 38 N. J. Eq. 626; Cook v. Cook, 159 N. Car. 46, 74 S. E. 639, 40 L. R. A. (N. S.) 83, Ann. Cas. 1914A, 1137; Borda v. Borda, 43 R. I. 384, 113 Atl. 118; Pease v. Pease, 72 Wis. 136, 39 N. W. 133. But see Sharpe v. Sharpe, 134 Mo. App. 278, 114 S. W. 584.

[4]Rolle v. Rolle, 194 N. Y. S. 661; Crouch v. Crouch, 193 App. Div. 221, 183 N. Y. S. 657.

[5]Dowie v. Becker, 149 La. 160, 88 So. 777.

[6]Leseuer v. Leseuer, 31 Barb. (N.

grounds for divorce which have accrued since the original petition was filed.[7] And where the original suit was for annulment a cross-bill will lie for divorce,[8] and it is within the power of the court to allow temporary alimony to the defendant.[9] Cross-bills for divorce have been allowed in other than annulment or divorce proceedings. The requirement is that the cross-bill for divorce must be germane to the subject of the complaint, as, for instance, where the complaint was one asking for a restraining order against the wife, restraining her from competing with the husband in his business, a cross-bill for divorce was proper, since if divorce was granted the complaint would be undermined and fall.[10]

§ 466. **Contest by guardian.**—In Massachusetts, the court has jurisdiction to entertain a petition filed by a third party representing that a libellant for divorce is insane; and, if such incapacity is established to the satisfaction of the court, it will appoint a guardian ad litem to conduct the cause.[11] The appointment by the court of a guardian ad litem for a respondent to a libel, on the ground of insanity, is prima facie evidence of the respondent's insanity at any subsequent stage of the case.[12]

§ 467. **Amendments discretionary.**—Amendments to the pleadings may be made at any time[13] in the discretion of the court, with or without terms, and the exercise of such discretion is not a ground for an exception.[14] Thus, a bill for divorce for desertion or adultery may be amended by alleging cruelty as a cause for separation.[15] So, complaint for divorce may be amend-

Y.) 330; Clutton v. Clutton, 108 Mich. 267, 66 N. W. 52, 31 L. R. A. 160.

[7]Von Bernuth v. Von Bernuth, 76 N. J. Eq. 487, 74 Atl. 700, 139 Am. St. 784.

[8]Wadsworth v. Wadsworth, 81 Cal. 182, 22 Pac. 648, 15 Am. St. 38. See note, Ann. Cas. 1912B, 743.

[9]Sodini v. Sodini, 94 Minn. 301, 102 N. W. 861, 110 Am. St. 371.

[10]Root v. Root, 164 Mich. 638, 130 N. W. 194, 32 L. R. A. (N. S.) 837, Ann. Cas. 1912B, 740. See note, Ann. Cas. 1912B, 743.

[11]Denny v. Denny, 90 Mass. 311.

[12]Little v. Little, 79 Mass. 264.

[13]Barrington v. Barrington, 201 Ala. 185, 77 So. 711.

[14]Wellman v. Wellman, 191 Ill. App. 514; Harrington v. Harrington, 107 Mass. 329; Ford v. Ford, 104 Mass. 198; Gardner v. Gardner, 68 Mass. 434; Commonwealth v. Giles, 67 Mass. 466; Tolzman v. Tolzman, 130 Minn. 342, 153 N. W. 745; Whipp v. Whipp, 54 N. H. 580; Shay v. Shay, 9 Phila. (Pa.) 521; Hunt v. Hunt (Tex. Civ. App.), 196 S. W. 967.

[15]Zachary v. Zachary, 141 Ga. 404, 81 S. E. 120; Anderson v. Anderson,

ed so as to ask for annulment.[16] So an amendment may be allowed to cover marital misconduct after filing the complaint.[17] And so, it has been held proper to permit amendments alleging specific acts of cruelty after the proof were all in.[18] Clerical errors may be corrected by amendment,[19] and very generally amendments may be allowed to conform to the proofs.[20] In New York, a complaint for separation may be amended to show the jurisdictional fact of marriage within the state.[21]

Matters supplemental to the original complaint or answer may be brought in by supplemental pleadings.[22]

§ 468. **Interlocutory orders.**—In all proceedings for divorce and for the custody of minor children, interlocutory orders may be passed by a single judge, either in term time or vacation.[23]

The court has the right to exercise all its powers, whether legal or equitable, to maintain and carry out its jurisdiction over the subject-matter so as to make it effectual.[24]

§ 469. **Interlocutory decrees.**—In some states, after notice by publication or the summons has been served and the time given by statute for appearing has expired, if the defendant fails to appear, the complainant is entitled to a decree pro confesso and will be allowed to take testimony ex parte.[25]

4 Maine 100, 16 Am. Dec. 237. See also Penn v. Penn, 37 Okla. 650, 133 Pac. 207.

[16]Sortore v. Sortore, 70 Wash. 410, 126 Pac. 915.

[17]Hicks v. Stewart, 53 Tex. Civ. App. 401, 118 S. W. 206.

[18]Hall v. Hall, 172 Mich. 210, 137 N. W. 536.

[19]Cole v. Cole, 113 Maine 358, 94 Atl. 120.

[20]Rea v. Rea, 174 Mo. App. 715, 161 S. W. 278; Rose v. Rose, 129 Mo. App. 175, 107 S. W. 1089; Gust v. Gust, 70 Wash. 695, 127 Pac. 292.

[21]Dulso v. Dulso, 170 App. Div. 67, 156 N. Y. S. 90.

[22]Schwab v. Schwab, 93 Md. 382, 49 Atl. 331, 52 L. R. A. 414 (supplemental defense); Feigley v. Feigley, 7 Md. 537, 61 Am. Dec. 375; Adams v. Adams, 20 N. H. 299, 51 Am. Dec. 219.

[23]Robinson v. Robinson, 123 N. Car. 136, 31 S. E. 371.

[24]Schooler v. Schooler, 77 Ga. 601, 603.

[25]See divorce laws of the several states, chap. 50. In re Walker's Estate, 176 Cal. 402, 168 Pac. 689; Zachary v. Zachary, 141 Ga. 404, 81 S. E. 120. Reconciliation of parties and their living together after interlocutory decree and before final decree, will prevent the securing of such final decree by the party whose fault was condoned by the reconciliation. Olson v. Superior Court, 175 Cal. 250, 165 Pac. 706, 1 A. L. R. 1589. See note in 1 A. L. R. 1591, on the right of a court to enter final decree after time fixed by interlocutory decree expires.

§ 470. **Protection of wife pending suit.**—In Massachusetts, the court sitting in any county may, on the petition of the wife, prohibit the husband from imposing any restraint on her personal liberty during the pendency of the libel.[26] In one of the cases it is held that an order excluding the husband from his residence pending a divorce hearing was an abuse of discretion where there was no showing that he had either inflicted or threatened to inflict physical injury to the wife.[27]

§ 471. **Bill of particulars.**—The defendant in a divorce suit may petition the court for a bill of specifications or particulars, if the pleadings are too vague, as the defendant should have a full opportunity to understand the nature of the charge and to prepare his defense. The court may in its discretion allow the bill. So where a libel charged, generally, that the respondent had committed various acts of adultery, at divers times, with persons unknown, during a period of eight years, the court ordered the libellant to file a bill of particulars.[28]

And one who has furnished a bill of specifications or particulars is confined to the bill.[29] Evidence of acts of adultery not mentioned in the specifications, is not admissible.[30]

[26]Mass. Gen. Laws 1921, chap. 208, § 18.

[27]Luitwieler v. Luitwieler (Cal. App.), 207 Pac. 931.

[28]Adams v. Adams, 33 Mass. 254; Furthmann v. Furthmann, 155 App. Div. (N. Y.) 202, 139 N. Y. S. 1055. See also Weis v. Weis, 123 App. Div. 409, 107 N. Y. S. 1061.

[29]Harrington v. Harrington, 107 Mass. 329; Gardner v. Gardner, 68 Mass. 434; Commonwealth v. Snelling, 32 Mass. 321.

[30]Commonwealth v. Giles, 67 Mass. 466. For a case where the affidavit of the defendant's attorney was held not sufficient to warrant the granting of a motion for a bill of particulars, see Knox v. Knox, 79 Misc. 648, 140 N. Y. S. 356.

CHAPTER 32

VENUE, PROCESS AND SERVICE

Section

475. Venue.
476. Summons and its service in general—Appearance.
477. Entry and order of notice.
478. Who may serve process.
479. Personal service.
480. Notice by publication or constructive notice.
481. Notice by registered letter.
482. Validity of decree obtained on publication or service outside of the state where defendant did not appear.
483. Personal service outside of state.
484. Acceptance of service.
485. Identifying witness.
486. Proof of service.
487. Regularity in service.

§ 475. **Venue.**—The statutes of the different states plainly set forth the venue in actions for divorce. In a few states the petition may be brought in any county within the state, but, as a rule, libels for divorce must be heard and determined in a court of the county in which one of the parties lives, except when the libellant has left the county in which the parties have lived together, the adverse party still living therein, the libel may be heard and determined in the court having jurisdiction for that county. Careful attention should be paid to local statutes.[1] A

[1]Weyer v. Weyer, 40 Cal. App. 765, 182 Pac. 776; Way v. Way, 64 Ill. 406; Carpenter v. Carpenter, 30 Kans. 712, 2 Pac. 122, 46 Am. Rep. 108; Miller v. Miller, 141 Ky. 681, 133 S. W. 588; Glaude v. Peat, 43 La. Ann. 161, 8 So. 884; Harding v. Alden, 9 Maine 140, 23 Am. Dec. 549; Banister v. Banister, 150 Mass. 280, 22 N. E. 900; Hanson v. Hanson, 111 Mass. 158; Brown v. Brown, 10 Nebr. 349, 6 N. W. 397; Wood v. Wood, 181 N. Car. 227, 106 S. E. 753; Schmid v. Schmid, 10 Ohio App. 24; Sherwood's Appeal, 17 Week. No. Cas. (Pa.) 338, 4 Atl. 455. Right to object to venue lost by default, and decree pro confesso. White v. White, 206 Ala. 231, 89 So. 579. Where husband confined in penitentiary in a county other than that in which he and his wife resided, the venue in a suit by the wife for divorce is in the county

statutory provision as to county in which suit may be brought is mandatory.[2]

After decree and order for custody and support a change of venue may not be had.[3]

§ 476. **Summons and its service in general—Appearance.**—The summons to be valid must state with reasonable certainty the time and place for appearance.[4] Where defendant has a legal residence in the state the summons should be served by copy left at his place of abode though he may be temporarily absent therefrom.[5]

A general appearance dispenses with service of summons and gives jurisdiction over the defendant.[6] But a special appearance and plea will not have this effect.[7]

§ 477. **Entry and order of notice.**—Due process in service is as necessary in divorce proceedings as in other causes.[8] Usually the statute makes special provision for service in divorce proceedings, but in the absence of such provision the usual rules in civil actions will govern.[9]

After a libel has been drawn, it must be filed in the office of the clerk of the court for the county having jurisdiction, and in most states, the clerk issues the order of notice to the defendant.[10] There must be a strict compliance with the order for substituted service.[11]

where they resided. McLeod v. McLeod, 144 Ga. 359, 87 S. E. 286. Residence in statutes fixing venue is equivalent to domicil. Harrison v. Harrison, 117 Md. 607, 84 Atl. 57. Under West Virginia code suit is to be brought either in the county where parties last cohabited or in county of defendant's residence. Jennings v. McDougle, 83 W. Va. 186, 98 S. E. 162.

[2]Hubner v. Hubner, 67 Ore. 557, 136 Pac. 667.

[3]Julian v. Julian, 60 Ind. App. 520, 111 N. E. 196.

[4]Perry v. Perry, 94 Vt. 487, 111 Atl. 632.

[5]Stallings v. Stallings, 127 Ga. 464, 56 S. E. 469, 9 L. R. A. (N. S.) 593.

[6]Hendrick v. Biggar, 209 N. Y. 440, 103 N. E. 763; Freeman v. Freeman, 126 App. Div. 601, 110 N. Y. S. 686.

[7]Masure v. Masure, 171 Ill. App. 438.

[8]Ingram v. Ingram, 143 Ala. 129, 42 So. 24, 111 Am. St. 31.

[9]Stallings v. Stallings, 127 Ga. 464, 56 S. E. 469, 9 L. R. A. (N. S.) 593.

[10]Labotiere v. Labotiere, 8 Mass. 383; Randall v. Randall, 7 Mass. 502; Mace v. Mace, 7 Mass. 212; Anonymous, 5 Mass. 197.

[11]Miller v. Miller, 37 Nev. 257, 142 Pac. 218 (service by mailing to only one of the two places designated not sufficient).

§ 478. **Who may serve process.**—Where the method and time of serving summons is regulated by statute, but no provision is made as to who may serve the same, the presumption is that it was the intention of the legislature that it should be served by the same officer who serves other writs and summons.[12] Under such a statute, a constable or a disinterested person can not serve the summons, unless by a special order of court.[13] Where a number of days' service is specified by law, a service within a less number of days does not furnish ground for quashing the writ, but it will be continued for further service.[14]

§ 479. **Personal service.**—In all cases where the defendant is a resident of the state, he must be served personally with the summons and in most states with a certified copy of the libel.[15] It is not personal service to leave at the last and usual place of abode of the libellee an attested copy of the libel, nor is a reading of it, where personal service is ordered with the summons.[16]

§ 480. **Notice by publication or constructive notice.**—If the bill alleges that the defendant is a nonresident, the law usually provides that constructive service of notice by publication shall be made.[17]

Notice by publication does not give the court jurisdiction over the defendant, unless he or she voluntarily appears. If, however, he or she has been regularly summoned, the court has jurisdiction to pass a decree.[18] Every essential requisite for this form of service must affirmatively appear.[19] However, it has been held not necessary that the affidavit for publication should state the residence of plaintiff;[20] nor that there is no person in the state on

[12]Spafford v. Spafford, 16 Vt. 511.

[13]Leavitt v. Leavitt, 135 Mass. 191; Brown v. Brown, 15 Mass. 389.

[14]Bratton v. Bratton, 79 Ind. 588.

[15]Stone v Stone, 25 N. J. Eq. 445.

[16]Welch v. Welch, 16 Ark. 527; Smith v. Smith, 9 Mass. 422; Randall v. Randall, 7 Mass. 502; Mallette v. Scheerer, 164 Wis. 415, 160 N. W. 182.

[17]Taylor v. Taylor, 64 Fla. 521, 60 So 116; Clark v. Clark, 191 Mass. 128, 77 N. E. 702; Homston v. Homston, 3 Mass. 159; Stone v. Stone, 134 Mo. App. 242, 113 S. W. 1157; Cache v. Cache, 12 Ohio App. 140; Wanamaker v. Wanamaker, 10 Phila. (Pa.) 466; Ditson v. Ditson, 4 R. I. 87; Griffin v. Griffin, 54 Tex. Civ. App. 619, 117 S. W. 910.

[18]Garner v. Garner, 56 Md. 127; Hinkle v. Lovelace, 204 Mo. 208, 102 S. W. 1015, 11 L. R. A. (N. S.) 730, 120 Am. St. 698, 11 Ann. Cas. 794; King v. King, 84 N. Car. 32.

[19]Parker v. Parker, 222 Fed. 186.

[20]Roberts v. Fagan, 76 Kans. 536, 92 Pac. 559.

whom process may be served that would bind the defendant;[21] nor that it state in express terms that the residence of defendant was not known to affiant.[22] An affidavit has been held sufficient which stated that defendant could not be found in the state and that affiant believed that he lived in a named city in Mexico though it did not expressly state that personal service could not well be made on the defendant.[23] Another affidavit was held sufficient which alleged "that defendant is a nonresident of this state, or that he has absconded or absented himself from his usual place of abode in this state so that the ordinary process of law can not be served upon him."[24]

Fraud in obtaining this form of service will occur where the affiant in the affidavit for service withholds necessary information. There was a case of this character where the husband swore that his wife had left for parts unknown when the facts were that his wife was under his guardianship as an incompetent and he had personally procured the pass under which she traveled to a known destination.[25]

It is generally required that the notice of the order should state the object of the suit.[26] It has been held that the fact that the publication notice did not run in the name of the state does not invalidate the divorce.[27]

§ 481. **Notice by registered letter.**—Besides notice by publication, the court may order that a copy of the libel be mailed by registered letter to the last known address of the defendant, and the registered receipt, with the signature of the defendant, may be used as evidence that the defendant received the letter, provided the handwriting of the defendant can be proved to the satisfaction of the court.[28]

§ 482. **Validity of decree obtained on publication or service outside of the state where defendant did not appear.**—It has been

[21]Taylor v. Taylor, 64 Fla. 521, 60 So. 116.

[22]Becklin v. Becklin, 99 Minn. 307, 109 N. W. 243.

[23]State v. Doyle, 107 Minn. 498, 120 N. W. 902.

[24]Hinkle v. Lovelace, 204 Mo. 208, 102 S. W. 1015, 11 L. R. A. (N. S.) 730, 120 Am. St. 698, 11 Ann. Cas. 794.

[25]Williams v. Williams (Cal. App.), 206 Pac. 650.

[26]Brant v. Brant, 71 N. J. Eq. 66, 71 Atl. 350; Schwarzmiller v. Schwarzmiller, 111 Wash. 672, 191 Pac. 808.

[27]Gordon v. Munn, 87 Kans. 624, 125 Pac. 1, Ann. Cas. 1914A, 783.

[28]See divorce laws of various states, infra, chap. 50, and Smith v. Smith, 4 Greene (Iowa) 266.

held, in Louisiana, that where a divorce a vinculo matrimonii is sought by one of the parties to a marriage that was celebrated in Louisiana, conformably to Louisiana laws, against the other party, who is an absentee, permanently residing beyond the territorial limits thereof, a court of Louisiana has ample jurisdiction and authority to decide the issue, since it involves a civil status; and that jurisdiction attracts to it authority to bring such absentee into court by means of substituted service of citation, and subject him to the judgment pronounced.[29]

§ 483. **Personal service outside of state.**—In some states the statutes provide that personal service may be made outside the state, and such service is equivalent to service by publication. It may be done in addition to the publication and will be considered actual notice, which is always deemed desirable in divorce cases.[30]

The New York courts will not recognize a decree of divorce granted against a resident of the state of New York, unless he or she was personally served with notice, and this must be done in addition to publication. The weight of authority favors this rule.[31]

§ 484. **Acceptance of service.**—An acceptance of service in uncontested cases is not sufficient, as it may give rise to a suspicion of collusion. The provisions as to service must be strictly complied with.[32]

§ 485. **Identifying witness.**—In some states the law requires that, in serving a libel for divorce, an identifying witness shall accompany the officer when he serves the libel to point out the defendant, in order that service may be made on the right party. Such witness must be a person who knows both parties, and knows that they are reputed to be husband and wife.[33]

§ 486. **Proof of service.**—If the defendant is a nonresident, the record should contain proof that the notice was duly published according to the order of the court for the required length of time, and that the statute was complied with.[34] Where the

[29]Butler v. Washington, 45 La. Ann. 279, 12 So. 356, 19 L. R. A. 814.

[30]Burns v. Burns, 61 Mo. App. 612; Doughty v. Doughty, 28 N. J. Eq. 581.

[31]See divorce laws of New York, infra, chap. 50.

[32]Bittinger v. Bittinger, 4 Pa. Dist. 441; Weatherbee v. Weatherbee, 20 Wis. 499.

[33]See divorce laws of various states, infra, chap. 50.

[34]Burns v. Burns, 61 Mo. App. 612.

statute provides that a copy of the libel or the summons be mailed to the last known address of the defendant, and the letter was addressed, "Mrs. R. L. Smith," to a post office where the defendant was always known and addressed as "Mrs. Asahel L. Smith," it is not enough to establish a valid constructive service.[35] The proof of service must comply with the local statute. No variation as to time, name, or address will be permitted.[36]

§ 487. **Regularity in service.**—The requirements of the statute must be strictly complied with in every case, and any irregularity in the service, either personally or by publication, will cause it to be held insufficient. Thus, misprint of a name in the copy published has been held sufficient to invalidate the service.[37] But the defect may be waived if the defendant voluntarily appears.[38]

[35]Smith v. Smith, 4 Greene (Iowa) 266.

[36]Smith v. Smith, 4 Greene (Iowa) 266; Jenne v. Jenne, 7 Mass. 94; Burns v. Burns, 61 Mo. App. 612; Stone v. Stone, 25 N. J. Eq. 445. "It is the fact of service and not the mere proof of it that gives the court jurisdiction." Zahorka v. Geith, 129 Wis. 498, 504, 109 N. W. 552.

[37]Jenne v. Jenne, 7 Mass. 94.

[38]Rouse v. Rouse, 47 Iowa 422; Stone v. Stone, 25 N. J. Eq. 445; Jamieson v. Jamieson, 11 Hun 38, 53 How. Pr. (N. Y.) 112; Freeman v. Freeman, 126 App. Div. (N. Y.) 601, 110 N. Y. S. 686; Pollock v. Pollock, 9 S. Dak. 48, 68 N. W. 176.

CHAPTER 33

PLEADINGS

Section

490. Drawing bill or libel—Affidavits.
491. Amendments.
492. Residence.
493. Alleging causes—Generally.
494. Desertion.
495. Intoxication—Incapacity.
496. Cruel treatment.
497. Adultery.
498. Issues can be no broader than the pleadings.
499. No waiver by pleadings.
500. Answer—Cross-complaint.
501. Reply.
502. Who may sign libel.
503. Verification of libel.
504. Any number of causes may be inserted.
505. Amenability to charge of libel because of allegations in complaint.

§ 490. **Drawing bill or libel—Affidavits.**—Proceedings for divorce are commenced by drawing the bill of complaint, petition, or libel, which must set forth the names of the parties; when and where they were married;[1] the present residence of both parties;[2] the cause of action; the place where the cause of action accrued;[3] and that the petitioner has always been true to his or her marriage vows. If there are children, there should be a prayer asking for the care and custody of the children. If the petitioner seeks alimony, there should be a prayer requesting the allowance of alimony pendente lite, or permanent alimony as the case may be.

[1]Farley v. Farley, 94 Ala. 501, 10 So. 646, 33 Am. St. 141; Etheridge v. Etheridge, 120 Md. 11, 87 Atl. 497; Andrews v. Andrews, 75 Tex. 609, 12 S. W. 1124.

[2]Terrill v. Terrill, 2 Alaska 475; Rumping v. Rumping, 36 Mont. 39, 91 Pac. 1057, 1059, 12 L. R. A. (N. S.) 1197, 12 Ann. Cas. 1090; Holton v. Holton, 64 Ore. 290, 129 Pac. 532, 48 L. R. A. (N. S.) 779.

[3]Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717; White v. White, 121 Va. 244, 92 S. E. 811.

In case the petitioner is the wife, she may ask that an order be issued restraining the husband from interfering with her property or person during the pendency of the libel, and she may further pray that an attachment may issue on the real or personal property of the defendant to secure alimony. In stating the allegations in the libel or petition, great care should always be taken to follow the language of the statutes.[4]

Accurate pleadings are demanded,[5] and the proofs must correspond to the allegations.[6] The facts necessary to confer jurisdiction over the subject matter must be pleaded.[7] The ultimate facts must be alleged but not the evidence.[8] The courts generally give a liberal construction as to matters of form but strict construction against pleader as to statement of facts.[9] Allegation of marriage will suffice without designating it as a lawful marriage.[10]

In jurisdictions where affidavits are required as to residence and occupation or absence of collusion there must be a strict compliance with law in order to confer jurisdiction.[11] The allegations in the affidavit are deemed denied though there is no express denial in the answer.[12] Where a verified complaint contains the facts of residence a separate affidavit covering this matter could seem not necessary.[13]

[4]Stewart v. Stewart, 2 Swan (Tenn.) 591; Horne v. Horne, 1 Tenn. Ch. 259; Ward v. Ward, 1 Tenn. Ch. 262; Hare v. Hare, 10 Tex. 355. All facts whose existence are essential to the exercise of jurisdiction over the subject matter of the suit should be alleged. Hancock v. Hancock, 55 Fla. 680, 45 So. 1020, 15 L. R. A. (N. S.) 670; Jones v. Jones, 173 N. Car. 279, 91 S. E. 960.

[5]Rowden v. Rowden (Tex. Civ. App.), 212 S. W. 302.

[6]Bratton v. Bratton, 62 Fla. 442, 56 So. 411.

[7]Prall v. Prall, 58 Fla. 496, 50 So. 867, 26 L. R. A. (N. S.) 577. Hancock v. Hancock, 55 Fla. 680, 45 So. 1020, 15 L. R. A. (N. S.) 670; Griffin v. Griffin, 130 Ga. 527, 61 S. E. 16, 16 L. R. A. (N. S.) 937, 14 Ann. Cas. 866; McGee v. McGee, 161 Mo. App. 40, 143 S. W. 77.

[8]Hubbell v. Hubbell, 7 Cal. App. 661, 95 Pac. 664; Etheridge v. Etheridge, 120 Md. 11, 87 Atl. 497.

[9]Hays v. Hays, 40 Ind. App. 471, 82 N. E. 90.

[10]Cole v. Cole, 113 Maine 358, 94 Atl. 120; Etheridge v. Etheridge, 120 Md. 11, 87 Atl. 497.

[11]Wills v. Wills, 176 Ind. 631, 96 N. E. 763; Foreman v. Foreman (Ind. App.), 131 N. E. 419; Hinkle v. Lovelace, 204 Mo. 208, 102 S. W. 1015, 11 L. R. A. (N. S.) 730, 120 Am. St. 698, 11 Ann. Cas. 794; King v. King, 75 Pa. Super. Ct. 19.

[12]Williams v. Williams, 180 N. Car. 273, 104 S. E. 561.

[13]Miller v. Miller, 55 Ind. App. 644, 104 N. E. 588.

§ 491. **Amendments.**—The courts are usually liberal in the matter of allowing amendments to pleadings in divorce proceedings.[14] In one of the cases where a party petitioned for divorce for desertion, and afterwards petitioned for divorce for constructive desertion upon the same underlying facts, the court allowed the petitioner to amend the first petition by substituting a charge of constructive desertion for the allegation of actual desertion and to dismiss the second petition.[15]

§ 492. **Residence.**—Residence or domicil, as provided by the statute, must be alleged with particularity. The statutory period of residence is jurisdictional and can not be waived by any act of the defendant. While it is not necessary to follow the language of the statute, it is important to specify all the facts therein required to give the court jurisdiction.[16] A defect may be reached by special demurrer.[17] The allegation should be that of the residence immediately or next before the filing of the petition.[18] The appearance of the defendant will not cure failure to allege statutory residence.[19] And so also, it being a jurisdictional question, failure to allege statutory residence may be raised for the first time on appeal.[20]

[14]Wilber v. Wilber, 90 N. J. Eq. 7, 105 Atl. 664.

[15]McLaughlin v. McLaughlin, 90 N. J. Eq. 322, 107 Atl. 260.

[16]Winston v. Winston, 50 App. D. C. 321, 271 Fed. 551; Martin v. Martin, 173 Ala. 106, 55 So. 632; Olsen v. Olsen, 4 Alaska 624; Flynn v. Flynn, 171 Cal. 746, 154 Pac. 837; Prall v. Prall, 58 Fla. 496, 50 So. 867, 26 L. R. A. (N. S.) 577; Beckman v. Beckman, 53 Fla. 858, 43 So. 923; Miller v. Miller, 55 Ind. App. 644, 104 N. E. 588; Canther v. Canther, 46 Ind. App. 504, 91 N. E. 813; Garver v. Garver, 145 Mo. App. 353, 130 S. W. 369; Gordon v. Gordon, 128 Mo. App. 710, 107 S. W. 410; Rumping v. Rumping, 36 Mont. 39, 91 Pac. 1057, 12 L. R. A. (N. S.) 1197, 12 Ann. Cas. 1090; Holton v. Holton, 64 Ore. 290, 129 Pac. 532, 48 L. R. A. (N. S.) 779; Lynn v. Lynn, 76 Pa. Super. Ct. 428; Frazer v. Frazer, 71 Pa. Super. Ct. 382; Gamblin v. Gamblin, 52 Tex. Civ. App. 479, 114 S. W. 408; Blankenship v. Blankenship, 125 Va. 595, 100 S. E. 538. Only necessary in Florida that petitioner allege that he is a citizen of the state. Howey v. Howey (Mo.), 240 S. W. 450. See note, 12 Ann. Cas. 1093.

[17]Dillon v. Dillon, 45 Cal. App. 191, 187 Pac. 27; Blankenship v. Blankenship, 125 Va. 595, 100 S. E. 538.

[18]Robinson v. Robinson, 149 Mo. App. 733, 129 S. W. 725; Keller v. Keller, 144 Mo. App. 98, 129 S. W. 492; Metzler v. Metzler (N. J. Eq.), 69 Atl. 965; Parrish v. Parrish, 52 Ore. 160, 96 Pac. 1066; Ramsdell v. Ramsdell, 47 Wash. 444, 92 Pac. 278.

[19]Holton v. Holton, 64 Ore. 290, 129 Pac. 532, 48 L. R. A. (N. S.) 779.

[20]Rumping v. Rumping, 36 Mont. 39, 91 Pac. 1057, 12 L. R. A. (N. S.) 1197, 12 Ann. Cas. 1090.

In North Carolina the allegation is sufficiently made in the affidavit and where this is done it is not fatal that it is not set out in the complaint.[21] The Nevada courts hold that a husband who does not allege his own domicil in the state does meet the requirement by an allegation of his wife's residence in the state but without averment of facts entitling her to a separate domicil. In the absence of such an allegation the law will presume the domicil of the wife to be the same as that of the husband.[22]

A variance between allegation and proof of residence is generally held fatal to plaintiff's action.[23]

§ 493. **Alleging causes—Generally.**—The complaint should set out the grounds of divorce with sufficient particularity to enable the defendant to make his defenses.[24]

Statutes prescribing grounds of divorce are mandatory and the statutory ground must be accurately pleaded and clearly proved,[25] but this does not demand that offense shall be alleged in language of the statute.[26] The allegations should be as complete in a suit for separation as those in a suit for divorce.[27]

Where the statute provides that acts relied upon must have been committed within the state, it is necessary to allege that the acts of the defendant, for which divorce is asked, were committed within the state wherein suit is brought.[28]

Though the complaint may set out numerous grounds it is only necessary to prove one sufficient charge to entitle plaintiff to a divorce. It is not required that he shall sustain all charges.[29]

A petition may be good as a petition for alimony though it prays for divorce and alimony and is fatally defective as a petition for divorce as disclosing a lack of the necessary residence within the state.[30]

[21]Williams v. Williams, 180 N. Car. 273, 104 S. E. 561.

[22]Aspinwall v. Aspinwall (Nev.), 184 Pac. 810.

[23]Lagerholm v. Lagerholm, 133 Mo. App. 306, 112 S. W. 720.

[24]Farr v. Farr, 34 Miss. 597, 69 Am. Dec. 406; Joyner v. Joyner, 59 N. Car. 322, 82 Am. Dec. 421; Jennings v. McDougle, 83 W. Va. 186, 98 S. E. 162. Insufficient allegations aided by trial amendment stating time and details. Erwin v. Erwin (Tex. Civ. App.), 231 S. W. 834.

[25]Bishop v. Bishop, 155 Ky. 679, 160 S. W. 176.

[26]Marolf v. Marolf, 191 Mo. App. 239, 177 S. W. 819.

[27]Walker v. Walker (R. I.), 94 Atl. 672.

[28]Robinson v. Robinson, 149 Mo. App. 733, 129 S. W. 725.

[29]Winterberg v. Winterberg, 177 Ill. App. 493.

[30]Shaw v. Shaw, 10 Ohio App. 216.

Undue exaggeration is condemned. Thus a court strongly censured a husband's petition for divorce which charged the wife with separate acts of adultery on 1,805 consecutive days, and then reduced this in a bill of particulars to 8, mostly indefinite and on the hearing to 1 alone, when practically all that time he and his wife have been living together.[31]

§ 494. **Desertion.**—It is sufficient to allege desertion in statutory terms coupled with a statement that the husband without cause left the wife penniless and continued away from her for the statutory time without contributing to her support.[32] An allegation that on or about a day certain the defendant wilfully and without cause disregarded his marital vows and deserted the plaintiff against her will and without her consent, is sufficient without an allegation that the desertion continued to the time of filing the complaint.[33] If the period of desertion has completely elapsed before the filing of the petition, it is not material that an earlier date for its commencement was alleged.[34]

Abandonment may also be alleged as an element in a charge of cruelty.[35] Where the abandonment occurred in a sister state, the pleader should allege that abandonment was a cause for divorce in such state.[36] The continuance of the desertion to the time of filing the complaint has been held sufficiently averred by a recital that on or about a certain date the defendant wilfully and without cause deserted and abandoned plaintiff, and has continued to live separate and apart from plaintiff against her will and without her consent.[37] The facts constituting constructive desertion must be pleaded where that ground is the basis of the suit.[38]

§ 495. **Intoxication—Incapacity.**—It is sufficient to allege drunkenness in the language of the statute.[39] The allegation of

[31]Cartan v. Cartan, 93 N. J. Eq. 175, 115 Atl. 353.

[32]Fielding v. Fielding, 67 Fla. 143, 64 So. 546. Wilful neglect is sufficiently covered by the averment that since defendant's desertion he has left plaintiff destitute without any means of support and during such time has failed to contribute anything toward her support. Krzepicki v. Krzepicki, 167 Cal. 449, 140 Pac. 13.

[33]Grierson v. Grierson, 156 Cal. 434, 105 Pac. 120, 134 Am. St. 137.

[34]Byrne v. Byrne, 93 N. J. Eq. 5, 114 Atl. 754.

[35]Wright v. Wright, 200 Ala. 489, 76 So. 431.

[36]George v. George, 190 Ky. 706, 228 S. W. 408.

[37]Grierson v. Grierson, 156 Cal. 434, 105 Pac. 120, 134 Am. St. 137.

[38]Thomas v. Thomas (N. J.), 74 Atl. 125.

[39]See note, 34 L. R. A. 452.

incapacity at time of marriage must set out that such incapacity continues and appears incurable.[40]

§ 496. **Cruel treatment.**—Acts of cruel and inhuman treatment and indignities must be set out with particularity and the statutory degree specifically alleged,[41] though it is not necessary that the exact language of the statute be set out.[42] The time and place may be set out with reasonable exactness.[43]

It should be alleged that the treatment complained of was without sufficient provocation,[44] and injuriously affected the safety, health or personal comfort of complainant.[45] The wife should plead and prove that she and her husband had separated and were living apart at the time of commencing the suit based on cruel and inhuman treatment.[46] That plaintiff had ceased marital relations with defendant was held sufficiently covered by an allegation that at a certain time she ceased to live with defendant as his wife and had in no way since condoned his treatment of her.[47] In one of the cases cruelty was held sufficiently covered by an allegation that defendant had rendered their living together intolerable by

[40]Hobbs v. Hobbs, 10 Cal. App. 97, 101 Pac. 22.

[41]MacMahon v. MacMahon, 170 Ala. 338, 54 So. 165; Hickson v. Hickson, 54 Fla. 556, 45 So. 474; Tabers v. Tabers (Ky.), 242 S. W. 584; Marolf v. Marolf, 191 Mo. App. 239, 117 S. W. 819; Joyner v. Joyner, 59 N. Car. 322, 82 Am. Dec. 421; Walker v. Walker (R. I.), 94 Atl. 672; Denning v. Denning (Tex. Civ. App.), 99 S. W. 1029. See also Shockey v. Shockey, 191 Ky. 839, 231 S. W. 508; Otton v. Otton, 196 App. Div. 403, 188 N. Y. S. 255. Defendant induced plaintiff to visit his sister and refused to permit him to return home, threatened to have him arrested, and abandoned and refused to care for him though he was in failing health, sufficient statement of cause of action. McLane v. McLane, 88 Nebr. 833, 130 N. W. 745. Complaint held sufficient which charged defendant with uncleanliness of person, vituperation and grossly immodest conduct, resulting in destruction of plaintiff's happiness, wreck of his home, and impairment of health. McAllister v. McAllister, 37 Nev. 92, 139 Pac. 781. Allegation of choking, calling vile names, threats, command to leave, and weakened and nervous condition resulting from treatment, sufficient. Kapp v. District Court, 31 Nev. 444 103 Pac. 235.

[42]Nelson v. Nelson, 18 Cal. App. 602, 123 Pac. 1099.

[43]Wellman v. Wellman, 191 Ill. App. 514; Lynch v. Lynch, 138 La. 1094, 71 So. 195.

[44]Garsed v. Garsed, 170 N. Car. 672, 87 S. E. 45; Dowdy v. Dowdy, 154 N. Car. 556, 70 S. E. 917.

[45]Taylor v. Taylor, 63 Fla. 659, 58 So. 238.

[46]Bruner v. Bruner (Ind.), 135 N. E. 578.

[47]Hudson v. Hudson, 204 Ala. 75, 85 So. 282.

continual fault finding, contempt, indifference and studied neglect.[48] In another case extreme cruelty was held sufficiently set forth by an allegation that defendant habitually called plaintiff vulgar names in the presence of other people in the public streets, and told him she would not cook for him any longer, and drove him from his house.[49] In still another case a charge of cruel and inhuman treatment was held sufficiently averred in a complaint which set out that a wife had stated to numerous people in the community that plaintiff was unchaste, all of which she knew to be false; that she endeavored to destroy his business; that she was petulant and irritable, frequently asserting that she cared nothing for him, for his home, or business; that she refused to take any interest in the home, or to prepare the daily meals for himself and his hands; that she read frivolous literature, to the neglect of her household duties, and was cold, abusive, and indifferent to plaintiff's happiness, by reason of which she kept complainant in continual distress and trouble, destroying his peace of mind and breaking up his home.[50] It has been held not sufficient as an allegation of cruelty that defendant was unduly familiar with other men.[51] The fact of specific allegations of cruelty giving dates and places has been held not to prevent proof of other instances of misconduct not pleaded.[52] An allegation that the acts of cruelty were "unendurable" sufficiently satisfies a statutory requirement that the cruelties shall be "unsupportable."[53]

§ 497. **Adultery.**—A complaint charging adultery should set out particularly the time and place of the acts, and, if known, the party with whom the illicit intercourse was had.[54] Very generally plaintiff may not set up acts of adultery committed after the commencement of the action.[55]

§ 498. **Issues can be no broader than the pleadings.**—The issues and proof are confined to that which was pleaded,[56] but evi-

[48]Dunn v. Dunn, 114 Ark. 516, 170 S. W. 234.

[49]Fagan v. Fagan, 82 Nebr. 388, 117 N. W. 992.

[50]Massey v. Massey, 40 Ind. App. 407, 80 N. E. 977, 81 N. E. 732.

[51]Benson v. Benson, 45 Utah 514, 146 Pac. 564.

[52]Eistedt v. Eistedt, 187 Mich. 371, 153 N. W. 676.

[53]Gamblin v. Gamblin, 52 Tex. Civ App. 479, 114 S. W. 408.

[54]Hahn v. Hahn, 136 Ill. App. 301; Jenkins v. Maier, 118 La. 130, 42 So. 722; Marsh v. Marsh, 16 N. J. Eq. 391, 84 Am. Dec. 164; Weedon v. Weedon, 34 Pa. Super. Ct. 358.

[55]Tuttle v. Tuttle, 191 N. Y. S. 769.

[56]Mini v. Mini, 141 Cal. xvii, 45 Pac. 1044.

dence which gives character to certain acts alleged is admissible,[57] and the plaintiff should not be compelled to prove specific acts to the exclusion of evidence of general confessions or evidence showing a general course of conduct.[58]

In one of the cases a defense to a wife's suit for divorce on the ground of cruel and inhuman treatment that she had previously obtained a divorce from another husband on that ground, was held not open to the husband because not presented by the pleadings.[59] In California the courts will presume that there is no community property—in the absence in the petition for divorce of an allegation of the existence of such property.[60]

§ 499. **No waiver by pleadings.**—Because of the interest of the general public in divorce proceedings, nothing is waived by the pleadings or any collateral agreements between the parties. Strict proof of every necessary allegation may be required.[61]

§ 500. **Answer—Cross-complaint.**—In all contested cases an answer setting up the defense relied upon should be regularly filed,[62] and where affirmative defense is relied upon it should be set out in the same definite manner as if alleged in the complaint.[63]

Insanity,[64] condonation,[65] and recrimination must be specially pleaded where relied on.[66]

The answer may put in issue only the jurisdictional fact of residence under the civil code of California.[67] Where jurisdiction

[57]Wellman v. Wellman, 191 Ill. App. 514; Westphal v. Westphal, 81 Minn. 242, 83 N. W. 988; Lando v. Lando, 177 N. Y. S. 396.

[58]Ketcham v. Ketcham, 32 App. Div. 26, 52 N. Y. S. 961; Hoernig v. Hoernig, 109 Wis. 229, 85 N. W. 346.

[59]Nichols v. Nichols, 189 Ky. 500, 225 S. W. 147.

[60]Weyer v. Weyer, 40 Cal. App. 765, 182 Pac. 776.

[61]Coleman v. Coleman, 23 Cal. App. 423, 138 Pac. 362; Barringer v. Dauernheim, 127 La. 679, 53 So. 923; Newman v. Newman, 211 Mass. 508, 98 N. E. 507, Ann. Cas. 1913B, 672.

[62]Lyons v. Lyons, 272 Ill. 329, 111 N. E. 977.

[63]Bancroft v. Bancroft, 4 Boyce (Del.) 9, 85 Atl. 561 (adultery); McNeir v. McNeir, 129 N. Y. S. 481.

[64]Anderson v. Anderson, 89 Nebr. 570, 131 N. W. 907, Ann. Cas. 1912C, 1; Laudo v. Laudo, 177 N. Y. S. 396.

[65]Skinner v. Skinner, 47 Ind. App. 670, 95 N. E. 128; Breedlove v. Breedlove, 27 Ind. App. 560, 61 N. E. 797; Wallace v. Wallace, 171 Ky. 192, 188 S. W. 331. But see Saville v. Saville, 103 Ore. 117, 203 Pac. 584.

[66]Newman v. Newman, 211 Mass. 508, 98 N. E. 507, Ann. Cas. 1913B, 672. But see Geisselman v. Geisselman, 134 Md. 453, 107 Atl. 185.

[67]Dillon v. Dillon, 45 Cal. App. 191, 187 Pac. 27.

is denied, though in general terms proof of the fact should be made.[68]

Leave to file a defensive pleading in a divorce case out of time should be allowed very much as a matter of course.[69] Under the practice in some of the states a defendant may file a general denial and also plead condonation.[70]

The defendant may file a cross bill and ask independent relief and where he does so, his suit is as separate and distinct from that of plaintiff as if plaintiff had brought no suit and the finding of the court should be on each separately.[71] It is not necessary that the cross bill should allege residence within the state for statutory time.[72] The defendant may plead by cross bill a matrimonial offense entitling him to a divorce which accrued after the filing of the bill but before the filing of the cross bill.[73] A cross complaint asking divorce for fraud of the wife in concealing the fact that she had a venereal disease will be treated as a prayer for the annulment of the marriage.[74]

§ 501. **Reply.**—In a case where the answer in divorce suit pleaded res judicata and stated the facts relied on for such defense a reply was held to present no triable issue of fact which admitted the facts but denied their effect as res judicata.[75]

§ 502. **Who may sign libel.**—In most states the libel or petition must be signed by the libellant or petitioner, if of sound mind and of the age of legal consent to marry. A libel can not be sustained if signed by a guardian or by an attorney, although the attorney was specially empowered to sign it.[76] In some states, however, the attorney may sign the petition or libel, but it is always better that the petitioning party should sign.

[68]Kinser v. Kinser, 186 Ky. 173, 216 S. W. 121.

[69]O'Grady v. O'Grady, 109 Kans. 105, 197 Pac. 859; Wilber v. Wilber, 90 N. J. Eq. 7, 105 Atl. 664.

[70]O'Rourke v. O'Rourke, 58 Colo. 300, 144 Pac. 890.

[71]Slocum v. Slocum, 86 Ark. 469, 111 S. W. 806. On a bill by a husband to enjoin a wife from continuing a competitive business she may maintain a cross bill for divorce. Root v. Root, 164 Mich. 638, 130 N. W. 194, 32 L. R. A. (N. S.) 837, Ann. Cas. 1912B, 740.

[72]Newman v. Newman, 27 Okla. 381, 112 Pac. 1007.

[73]Von Bernuth v. Von Bernuth, 76 N. J. Eq. 487, 74 Atl. 700, 139 Am. St. 784.

[74]Koehler v. Koehler, 137 Ark. 302, 209 S. W. 283.

[75]Vickers v. Vickers (Nev.), 199 Pac. 76.

[76]Gould v. Gould, 42 Mass. 382; Winslow v. Winslow, 7 Mass. 96; Willard v. Willard, 4 Mass. 506, Daniels v. Daniels, 56 N. H. 219; Richardson v. Richardson, 50 Vt. 119.

§ 503. **Verification of libel.**—In most states it is not necessary that the libel or petition should be sworn to.[77] In some states verification is a jurisdictional prerequisite,[78] and applies to a cross petition praying extraordinary equitable relief.[79] But these states do not require verification of trial amendments to conform to proof.[80] Where a particular method of verification is prescribed, it must be strictly followed, but if none is provided the usual form in civil cases will suffice.[81] It is held improper to verify partly on personal knowledge and partly on information and belief.[82]

In Rhode Island, the petition must be signed and sworn to by the petitioner, if of sound mind and of legal age to contract marriage, otherwise after notice to the party in whose name the petition shall be filed, the court may allow such petition to be signed and sworn to by a resident guardian or next friend.[83]

§ 504. **Any number of causes may be inserted.**—Any number of legal causes for divorce may be inserted in the libel, and satisfactory proof of any one or more of them, in the absence of a prevailing defense, will be sufficient to warrant the granting of a decree,[84] but the allegations should not be too general.[85]

In the code states the separate grounds for divorce should be stated in separate paragraphs.[86]

Where property rights grow out of the marriage relation a cause of action in relation thereto may be joined with the divorce,[87] but otherwise a joinder of such actions is improper.[88]

[77]Slocum v. Slocum, 86 Ark. 469, 111 S. W. 806; Musselman v. Musselman, 44 Ind. 106.

[78]Robertson v. Robertson (Mo.), 163 S. W. 266, complaint in suit for annulment should be verified in like manner as bill for divorce. Johnson v. Johnson, 142 N. Car. 462, 55 S. E. 341.

[79]McLaughlin v. McLaughlin, 128 Ga. 653, 58 S. E. 156.

[80]Rea v. Rea, 174 Mo. App. 715, 161 S. W. 278; Garver v. Garver, 145 Mo. App. 353, 130 S. W. 369.

[81]Kelly v. Kelly, 18 Nev. 49, 1 Pac. 194, 51 Am. Rep. 732; Hoffman v. Hoffman, 30 Pa. St. 417; Burdick v. Burdick, 7 Wash. 533, 35 Pac. 415.

[82]Knol v. Knol, 171 Ill. App. 412.

[83]R. I. Gen. Laws 1909, p. 859, § 9.

[84]Morris v. Morris, 20 Ala. 168; Quarles v. Quarles, 19 Ala. 363; Young v. Young, 4 Mass. 430.

[85]Fitzgerald v. Fitzgerald (Tex. Civ. App.), 168 S. W. 452.

[86]Grierson v. Grierson, 156 Cal. 434, 105 Pac. 120, 134 Am. St. 137.

[87]Singer v. Singer, 165 Ala. 144, 51 So. 755, 29 L. R. A. (N. S.) 819, 138 Am. St. 19, 21 Ann. Cas. 1102. See note, 29 L. R. A. (N. S.) 819.

[88]See note, L. R. A. (N. S.) 821.

§ 505. **Amenability to charge of libel because of allegations in complaint.**—Naming a person with whom one of the parties has committed adultery, in a divorce proceeding before a court having jurisdiction of the parties and subject-matter, is absolutely privileged and is not actionable.[89]

[89]Jones v. Brownlee, 161 Mo. 258, 61 S. W. 795, 53 L. R. A. 445.

CHAPTER 34

EVIDENCE

Section

510. Rules of evidence in general.
511. Burden of proof in general.
512. Pleadings as evidence.
513. Parties as witnesses.
514. Domicil and residence.
515. On plea of jurisdiction.
516. Presumptions and evidence in general.
517. Evidence of libellee.
518. Corroboration.
519. Degree of proof.
520. Depositions and affidavits.
521. Records of conviction.
522. Evidence of young children.

§ 510. **Rules of evidence in general.**—The evidence in a suit for divorce must establish satisfactorily one of the statutory grounds of divorce set out in the complaint. Mere suspicion will not suffice.[1] The allegations must be established by a preponderance of the evidence.[2] Proof of the grounds on which divorce is asked must be made though the defendant is indifferent,[3] or does not defend.[4] The evidence must, in all cases, respond to the issues made by the pleadings.[5] Thus, proof of the frequent intermarriage of the ancestors of the parties, who are cousins, and of the evil tendency of the marriage of relations in producing deformed, or sickly and imbecile children, is incompetent—the contract of marriage not having been broken on any such ground.[6] Slight proof of fact of marriage will suffice where marriage is not denied.[7]

[1]Williams v. Williams, 136 Ky. 71, 123 S. W. 337.

[2]Gruner v. Gruner, 183 Mo. App. 157, 165 S. W. 865.

[3]Peretti v. Peretti, 165 Cal. 717, 134 Pac. 322.

[4]Johnson v. Johnson, 122 Ark. 276, 182 S. W. 897; Nelson v. Nelson, 18 Cal. App. 602, 123 Pac. 1099; Topfer v. Topfer (N. J. Eq.), 68 Atl. 1071.

[5]Cooper v. Cooper, 51 Ind. App. 374, 99 N. E. 782.

[6]Simmons v. Simmons, 8 Mich. 318.

[7]Houlton v. McGuirk, 122 La. 359,

Affidavits are not admissible to establish a ground for divorce.[8]

§ 511. **Burden of proof in general.**—The burden of proof in divorce cases is upon the plaintiff to prove his case and all uncertainties of fact should be resolved against him.[9] He must prove all the material allegations of the libel by the best evidence procurable. The court will not assume anything to be determined unless it is actually proved.[10] In many states, before the court can grant a divorce on the ground of adultery, it must affirmatively appear by satisfactory proof of good character or otherwise, that the plaintiff has not been guilty of the same crime.[11]

The plaintiff, among other things, has the burden of proof of his charge of desertion;[12] of a legal marriage to the defendant;[13] his own good conduct;[14] that the impotency alleged existed at the time of the marriage and is incurable;[15] that he was not in fault in causing the abandonment of which he complains;[16] that violence used by him was justified;[17] that the physical condition

47 So. 681, 16 Ann. Cas. 1117; Overing v. Provensal, 117 La. 653, 42 So. 211.

[8]Johnson v. Johnson, 122 Ark. 276, 182 S. W. 897.

[9]Johnson v. Johnson, 107 Ark. 262, 154 S. W. 503; Martin v. Martin, 151 La. 530, 92 So. 46; Keenan v. Keenan, 219 Mass. 107, 106 N. E. 568; O'Hern v. O'Hern, 206 Mo. App. 651, 228 S. W. 533; Clark v. Clark, 191 Mo. App. 278, 177 S. W. 1077; Gordon v. Gordon, 88 N. J. Eq. 436, 103 Atl. 31.

[10]Paul v. Paul, 201 Ill. App. 595; Harrington v. Harrington, 107 Mass. 329; German v. German, 57 Mich. 256, 23 N. W. 802; Clark v. Clark, 191 Mo. App. 278, 177 S. W. 1077; Wurth v. Wurth (N. J. Ch.), 104 Atl. 644; Rogers v. Rogers, 81 N. J. Eq. 311, 88 Atl. 370 (desertion); Fischer v. Fischer, 18 N. J. Eq. 300; Linden v. Linden, 36 Barb. (N. Y.) 61; Heath v. Heath, 44 Pa. Super Ct. 118 (statutory residence); McCulloch v. McCulloch, 69 Tex. 682, 7 S. W. 593, 5 Am. St. 96; Hampton v. Hampton, 87 Va. 148, 12 S. E. 340; Anderson v. Anderson, 78 W. Va. 118, 88 S. E. 653, 2 A. L. R. 1617; Gleason v. Gleason, 4 Wis. 64. "The statements of the complaint for a divorce are not taken as true because of the failure of the defendant to answer, or his or her admission of their truth, and must be proved." Johnson v. Johnson, 122 Ark. 276, 278, 182 S. W. 897; Flynn v. Flynn, 171 Cal. 746, 154 Pac. 837.

[11]Hogsett v. Hogsett (Mo. App.), 186 S. W. 1171; Dismukes v. Dismukes, 1 Tenn. Ch. 266.

[12]Johnson v. Johnson, 107 Ark. 262, 154 S. W. 503.

[13]Petras v. Petras, 7 Boyce (30 Del.) 290, 105 Atl. 835.

[14]Nolker v. Nolker (Mo. App.), 208 S. W. 128.

[15]Kinkaid v. Kinkaid, 256 Ill. 548, 100 N. E. 217.

[16]Pope v. Pope, 161 Ky. 104, 170 S. W. 504; Adair v. Adair, 31 Ky. L. 956, 104 S. W. 365.

[17]Bernard v. Lay, 128 La. 733, 55 So. 336.

of the wife was not such as to justify her refusal of intercourse;[18] that the defendant had been convicted of felony;[19] that residence was acquired with the intention of remaining in the state and not for the purpose of securing a divorce;[20] that a new domicile selected by him was a reasonable place of abode;[21] that his attempt at reconciliation was bona fide;[22] that the defendant husband had the ability to provide for his family and that his neglect to do so was wanton and cruel.[23]

The burden of proving reconciliation,[24] condonation,[25] recrimination,[26] and, of causes justifying desertion is on the defendant.[27]

The burden of proof of adultery,[28] and of impotency is on the one making the charge.[29]

§ 512. **Pleadings as evidence.**—Allegations of recrimination, contained in the pleadings in cross-libels for divorce, can not be introduced in evidence as admissions of the facts therein alleged.[30] Neither can statements of complainant for divorce be taken as true because of defendant's failure to answer.[31]

§ 513. **Parties as witnesses.**—In some states, the parties to a divorce suit cannot testify; in other states their testimony must be corroborated.[32] They are not competent for the reason that they are husband and wife, and the policy of the law is not to allow them to testify against each other unless permitted by

[18]Ingraham v. Ingraham, 40 Cal. App. 578, 181 Pac. 234.

[19]Luper v. Luper, 61 Ore. 418, 96 Pac. 1099.

[20]Abbott v. Abbott, 75 Pa. Super. Ct. 483.

[21]Bibb v. Bibb (Cal. App.), 179 Pac. 214.

[22]Appleton v. Appleton, 107 Wash. 280, 181 Pac. 861.

[23]Keenan v. Keenan, 219 Mass. 107, 106 N. E. 568.

[24]Martin v. Martin, 151 La. 530, 92 So. 46.

[25]Randall v. Randall, 175 Ill. App. 392; Greims v. Greims, 80 N. J. Eq. 233, 83 Atl. 1001; Ingram v. Ingram, 58 Pa. Super. Ct. 522.

[26]Jackson v. Jackson, 49 Pa. Super. Ct. 18.

[27]Hamilton v. Hamilton, 87 W. Va. 534, 105 S. E. 771.

[28]Thiess v. Thiess, 124 Md. 292, 92 Atl. 922.

[29]Tierney v. Tierney, 169 Mich. 600, 135 N. W. 654.

[30]Demelman v. Burton, 176 Mass. 363, 57 N. E. 665; Banks v. Banks, 118 Miss. 783, 79 So. 841; Cameron v. Cameron, 2 Coldw. (Tenn.) 375.

[31]Scarborough v. Scarborough, 54 Ark. 20, 14 S. W. 1028; Rie v. Rie, 34 Ark. 37; Miller v. Miller, 65 Ore. 551, 131 Pac. 308, 133 Pac. 86.

[32]Darrow v Darrow, 122 Ark. 346, 183 S. W. 746; Lewis v. Lewis, 167 Cal. 732, 141 Pac. 367, 52 L. R. A. (N. S.) 675; Leonard v. Leonard, 174 Iowa 734, 156 N. W. 803; Dicus v. Dicus, 131 Md. 87, 101 Atl. 697.

special statute.[33] In suits for nullity of the marriage both parties are competent to testify, for the question to be determined is whether they are husband and wife.[34]

§ 514. **Domicil and residence.**—As the jurisdiction of a court to try a divorce case is based on domicil, evidence is admissible concerning the residence and intention of the parties to establish a domicil, as it will enable the court to determine whether the parties or either of them has a legal domicil in the state where such suit is brought.[35]

A statutory provision for proof of residence by a stated number of witnesses is mandatory and can not be waived.[36] The evidence to establish this fact must be clear and definite.[37] On the issue of residence evidence is admissible that the party was often seen in the place claimed as a residence.[38] Evidence that one goes into another state and votes therein is held not conclusive on the subject of a change of domicil.[39]

Where plaintiff fails to appear, defendant who has filed a cross complaint for affirmative relief may prove the residence of the plaintiff to support the jurdisdiction of the court.[40]

§ 515. **On plea of jurisdiction.**—Where a plea to the jurisdiction is filed by the defendant, the plaintiff must prove such allegations as to residence, domicil, and other jurisdictional facts, as to establish the jurisdiction of the court.[41]

§ 516. **Presumptions and evidence in general.**—There are some general presumptions in the law of evidence which apply to divorce cases, such as the presumption of innocence, the presump-

[33]Turpin v. State, 55 Md. 462; Anonymous, 58 Miss. 15.

[34]Le Brun v. Le Brun, 55 Md. 496; Shafto v. Shafto, 28 N. J. Eq. 34; Greenwalt v. McEnelley, 85 Pa. St. 352.

[35]Whittaker v. Whittaker, 151 Ill. 266, 37 N. E. 1017; Albee v. Albee, 141 Ill. 550, 31 N. E. 153; Calef v. Calef, 54 Maine 365, 92 Am. Dec. 549; Harteau v. Harteau, 31 Mass. 181, 25 Am. Dec. 372; Borda v. Borda (R. I.), 117 Atl. 392.

[36]Canther v. Canther, 46 Ind. App. 504, 91 N. E. 813; Blauser v. Blauser, 44 Ind. App. 117, 87 N. E. 152.

[37]Abbott v. Abbott, 75 Pa. Super. Ct. 483.

[38]Bernon v. Bernon, 15 Cal. App. 341, 114 Pac. 1000.

[39]Miller v. Miller, 67 Ore. 359, 136 Pac. 15.

[40]State v. Moran, 37 Nev. 404, 142 Pac. 534.

[41]Schrow v. Schrow, 103 Mass. 574; Harteau v. Harteau, 31 Mass. 181, 25 Am. Dec. 372; De Meli v. De Meli, 120 N. Y. 485, 24 N. E. 996, 17 Am. St. 652.

tion of legality and regularity, and presumptions which have special application, such as arises from the relation of the parties. These are treated under various titles elsewhere as are other special matters of evidence.

A presumption of cohabitation from living in the same house is rebuttable by positive proof to the contrary.[42] Desertion is not presumed from the fact that the husband and wife do not live and cohabit together.[43] The nonaccess of the husband will not be presumed.[44] There is no presumption that impotency is incurable.[45] There is a presumption that one visiting a brothel committed adultery therein.[46]

§ 517. **Evidence of libellee.**—The evidence of the libellee, as well as the evidence of any other party, is admissible,[47] but it is viewed with the same caution displayed towards the evidence of an interested party.[48]

§ 518. **Corroboration.**—The statutes of some of the states require evidence in divorce cases to be corroborated,[49] and refuse to grant a divorce upon the uncorroborated testimony, admissions, or confessions of the parties to the suit as to any element necessary to sustain a decree of divorce.[50] While there is no general rule, aside from statute, requiring corroboration, courts are so reluctant to decide cases on such evidence, that it amounts to nearly the same thing, and evidence of the parties should be corroborated, when possible.[51] The rule does not prevent the ad-

[42]Bruner v. Bruner (Ind.), 135 N. E. 578; Stieglitz v. Stieglitz, 92 N. J. Eq. 292, 112 Atl. 310.

[43]Reynolds v. Reynolds, 68 W. Va. 15, 69 S. E. 381, Ann. Cas. 1912A, 889.

[44]Taylor v. Taylor, 123 App. Div. 220, 108 N. Y. S. 428.

[45]Hobbs v. Hobbs, 10 Cal. App. 97, 101 Pac. 22.

[46]Johanson v. Johanson, 12 Cal. App. 635, 108 Pac. 55.

[47]Voss v. Voss, 157 Wis. 430, 147 N. W. 634.

[48]Harrington v. Harrington, 107 Mass. 329.

[49]De Cloedt v. De Cloedt, 24 Idaho 277, 133 Pac. 664.

[50]Read v. Read (Ark.), 240 S. W. 410; Pryor v. Pryor, 151 Ark. 150, 235 S. W. 419; Lemberger v. Lemberger (Cal. App.), 203 Pac. 786; Veeder v. Veeder, 189 Iowa 912, 179 N. W. 136; Strickland v. Strickland (N. J.), 117 Atl. 391; Foster v. Foster (N. J.), 114 Atl. 333; Bissell v. Bissell, 93 N. J. Eq. 537, 117 Atl. 252; Williams v. Williams, 92 N. J. Eq. 672, 114 Atl. 319; Stieglitz v. Stieglitz, 92 N. J. Eq. 292, 112 Atl. 310; Matthews v. Matthews, 91 N. J. Eq. 149, 108 Atl. 926; Carsten v. Carsten, 90 N. J. Eq. 181, 107 Atl. 45; Parmly v. Parmly, 90 N. J. Eq. 490, 106 Atl. 456; Howard v. Howard, 77 N. J. Eq. 186, 78 Atl. 195; Wiedner v. Wiedner (Tex. Civ. App.), 231 S. W. 448.

[51]Nolley v. Nolley, 122 Ark. 440, 183 S. W. 954; Arnold v. Arnold,

mission of this form of evidence. It merely forbids entry of a decree on such evidence alone.[52] There is no definite rule as to the degree of corroboration required, but each case must be decided according to its own facts and circumstances.[53]

The purpose of the statute and the rules requiring corroboration is to prevent collusion and where it is evident that there is no collusion[54] or where the matrimonial offense is of such a character as to make corroboration difficult[55] the rule is not strictly applied and slight evidence in corroboration will ordinarily suffice. So, the requirement of corroboration is generally held not so strictly construed as to matters not denied by answer.[56] That there is no collusion would seem plain where the defendant

115 Ark. 32, 170 S. W. 486; Shelton v. Shelton, 102 Ark. 54, 143 S. W. 110; Sylvis v. Sylvis, 11 Colo. 319, 17 Pac. 912; Donaldson v. Donaldson, 31 Idaho 180, 170 Pac. 94; Whitlock v. Whitlock, 268 Ill. 218, 109 N. E. 6; Wellington v. Wellington, 137 Ill. App. 394; Snouffer v. Snouffer, 150 Iowa 58, 129 N. W. 326; Robbins v. Robbins, 100 Mass. 150, 97 Am. Dec. 91; Ortman v. Ortman, 92 Mich. 172, 52 N. W. 619; Hertz v. Hertz, 126 Minn. 65, 147 N. W. 825; Gruner v. Gruner, 183 Mo. App. 157, 165 S. W. 865; Paden v. Paden, 28 Nebr. 275, 44 N. W. 228; Rogers v. Rogers, 89 N. J. Eq. 1, 104 Atl. 32; Hague v. Hague, 85 N. J. Eq. 537, 96 Atl. 579; Norcross v. Norcross, 82 N. J. Eq. 195, 91 Atl. 733; Williams v. Williams, 81 N. J. Eq. 17, 85 Atl. 611; Tuttle v. Tuttle, 21 N. Dak. 503, 131 N. W. 460, Ann. Cas. 1913B, 1; Aikens v. Aikens, 57 Pa. Super. Ct. 424; Lohmuller v. Lohmuller (Tex. Civ. App.), 135 S. W. 751.

[52]Perkins v. Perkins, 29 Cal. App. 68, 154 Pac. 483; Bell v. Bell, 15 Idaho 7, 96 Pac. 196.

[53]Malone v. Malone, 76 Ark. 28, 88 S. W. 840; Bell v. Bell, 15 Idaho 9, 96 Pac. 196. In Minnesota it is not required that the corroboration should extend to every item of testimony; it is enough that the corroborating testimony tends to support the complaint. Hertz v. Hertz, 126 Minn. 65, 147 S. W. 825. In New Jersey the necessity for corroborating testimony applies not only to the cause of divorce but to every necessary element. Williams v. Williams, 81 N. J. Eq. 17, 85 Atl. 611.

[54]Lundy v. Lundy, 23 Ariz. 213, 202 Pac. 809; McDonald v. McDonald, 155 Cal. 665, 102 Pac. 927, 25 L. R. A. (N. S.) 45; Crum v. Crum (Cal. App.), 207 Pac. 506; Broderick v. Broderick, 40 Cal. App. 550, 181 Pac. 402; Piatt v. Piatt, 32 Idaho 407, 184 Pac. 470; Thompson v. Thompson (Ind. App.), 130 N. E. 655; Heinmuller v. Heinmuller, 133 Md. 491, 105 Atl. 745; Stewart v. Stewart (N. J.), 114 Atl. 851; Averett v. Averett, 189 App. Div. 250, 178 N. Y. S. 405.

[55]Brautigam v. Brautigam, 181 Cal. 157, 183 Pac. 529; Thompson v. Thompson, 32 N. Dak. 530, 156 N. W. 492; Tuttle v. Tuttle, 21 N. Dak. 503, 131 N. W. 460, Ann. Cas. 1913B, 1.

[56]Allen v. Allen, 188 Mich. 532, 155 N. W. 488; Butler v. Butler, 134 N. Y. S. 108; Tobin v. Tobin, 60 Pa. Super. Ct. 476. But see Sisk v. Sisk, 99 Ark. 94, 136 S. W. 987.

employs counsel and vigorously contests the suit by proper pleadings.[57]

Where numerous acts of cruelty are testified to, it is enough if there is corroboration as to some of the acts.[58] The corroboratory evidence may be entirely circumstantial.[59] Letters in which abusive names were used and charges of infidelity were made by a husband may amount to corroboration of the wife's evidence of cruel treatment.[60] But the fact that one of the parties does not take the stand to deny the testimony of the other party is not to be taken as corroboratory of the testimony of the witness.[61]

§ 519. **Degree of proof.**—The rules governing the weight and admissibility of evidence on the specific causes for divorce that may be alleged in the libel are the rules of the civil,[62] rather than the criminal courts, and it is not necessary to present such evidence as would be competent and sufficient to establish guilt in a criminal case.[63]

In Texas, however, the burden of proof is held similar in extent to the proof demanded in criminal cases and requires proof of the matrimonial offense charged beyond a reasonable doubt.[64] The proof in all cases, however, should be clear and convincing.[65] It is not necessary that the charge of extreme cruelty should be

[57]Lundy v. Lundy, 23 Ariz. 213, 202 Pac. 809; Crum v. Crum (Cal. App.), 207 Pac. 506.

[58]Crum v. Crum (Cal. App.), 207 Pac. 506.

[59]Lundy v. Lundy, 23 Ariz. 213, 202 Pac. 809; Percy v. Percy (Cal.), 207 Pac. 369; Hines v. Hines, 192 Iowa 569, 185 N. W. 91; Meek v. Meek, 92 N. J. Eq. 23, 112 Atl. 409; Carsten v. Carsten, 90 N. J. Eq. 181, 107 Atl. 45; Bolmer v. Edsall (N. J.), 106 Atl. 646; Parmly v. Parmly, 90 N. J. Eq. 490, 106 Atl. 456; Robinson v. Robinson, 83 N. J. Eq. 150, 90 Atl. 311; Earl v. Earl, 81 N. J. Eq. 444, 86 Atl. 940.

[60]Rogers v. Rogers, 35 Idaho 645, 208 Pac. 234.

[61]Matthews v. Matthews, 91 N. J. Eq. 149, 108 Atl. 926.

[62]Colletti v. Tranchina, 151 La. 403, 91 So. 818; Macomber v. Macomber, 35 R. I. 372, 87 Atl. 170 (same for absolute as for partial divorce); Lamb v. Lamb, 126 Va. 256, 101 S. E. 223.

[63]Carter v. Carter, 62 Ill. 439; Balswick v. Balswick, 179 Ill. App. 118; Pittman v. Pittman, 72 Ill. App. 500; Powell v. Powell, 104 Ind. 18, 3 N. E. 639; Smith v. Smith, 5 Ore. 186. So strong and clear as to carry conviction. Huff v. Huff, 73 W. Va. 330, 80 S. E. 846, 51 L. R. A. (N. S.) 282. But see Luderitz v. Luderitz, 88 N. J. Eq. 103, 102 Atl. 661.

[64]McCrary v. McCrary, 230 S. W. 187.

[65]Berger v. Berger, 89 N. J. Eq. 430, 105 Atl. 496; Hartner v. Hartner, 75 Pa. Super. Ct. 342; Erwin v. Erwin (Tex. Civ. App.), 231 S. W. 834; Rowden v. Rowden (Tex. Civ. App.), 212 S. W. 302; Grim v. Grim, 126 Va. 245, 101 S. E. 140.

supported by evidence of physical violence. Cruelty may result from conduct giving mental distress to the recipient.[66]

Evidence on the question of reconciliation must show the good faith of the party making that claim.[67] Connivance does not require express evidence to establish it. It may be shown by the acts and conduct of the parties.[68]

§ 520. **Depositions and affidavits.**—The statutes of most states provide for taking the testimony of a witness in a divorce case by deposition, as well as orally, and also provide the manner and form of taking such depositions. But if there are no such provisions, the deposition may be taken in the same manner and subject to the same restrictions as depositions in other civil cases.[69] Ex parte affidavits are not admissible.[70]

§ 521. **Records of conviction.**—A plea of guilty to a charge of assault and battery, if followed by a conviction, may be shown by the record as a judicial admission of the fact.[71] When the plea is not guilty or nolo contendere, it is not admissible.[72]

§ 522. **Evidence of young children.**—The evidence of young children is admitted in divorce cases as in other cases, making due allowance in the case of the children of the parties for natural interest and possible bias, though in practise, the evidence of these latter is rarely admitted, if any other evidence can be procured, the claim being made that children should be trained to have equal respect for both parents.[73]

[66]O'Hern v. O'Hern, 206 Mo. App. 651, 228 S. W. 533; Beem v. Beem, 104 Ore. 472, 207 Pac. 604; Lynn v. Lynn, 76 Pa. Super. Ct. 428; Borda v. Borda (R. I.), 117 Atl. 362. See also Kemp v. Kemp, 144 La. 671, 81 So. 221.

[67]Klemmer v. Klemmer (Cal. App.), 187 Pac. 85.

[68]Hammond v. Hammond (Mass.), 132 N. E. 724.

[69]Allen v. Allen, 44 Nev. 243, 193 Pac. 539; Whipple v. Whipple, 43 N. H. 235; Hassett v. Hassett, 5 Pa. Dist. Ct. 604; Bell v. Bell, 9 Week. No. Cas. (Pa.) 509; Richmond v. Richmond, 10 Yerg. (Tenn.) 343.

[70]Gardner v. Gardner, 142 Ark. 292, 218 S. W. 663.

[71]Bradley v. Bradley, 11 Maine 367; Burgess v. Burgess, 47 N. H. 395.

[72]Bradley v. Bradley, 11 Maine 367.

[73]Kneale v. Kneale, 28 Mich. 344. See also Draper v. Draper, 68 Ill. 17, in which case a child of nine was permitted to testify in behalf of her mother, the plaintiff. It appeared that the child understood the nature and effect of an oath. In trial of divorce cases the court is not governed by strict rules of evidence or practice, but exercises a broad discretion, as well in the admission of evidence, as in other respects. Carpenter v. Carpenter, 78 N. H. 440, 101 Atl. 628, L. R. A. 1917F, 974; Warner v. Warner, 69 N. H. 137, 44 Atl. 908.

CHAPTER 35

DECREES

Section

525. Decrees in general.
526. Decree of nullity.
527. Decree of affirmation.
528. Judgments by default.
529. Decree a vinculo matrimonii.
530. Decree nisi.
531. Decree a mensā et thorō—Decree on denial of absolute divorce.
532. Divorce a mensā et thorō—Louisiana procedure.
533. Modification of decree.
534. Collateral attack on decrees.
535. Effect of the decree.
536. Conclusiveness of decrees—Res judicata.
537. Divorced woman's right to resume her maiden name or name of former husband.
538. Separate support and maintenance.
539. Restrictions against marrying after divorce.
540. Reporting criminal offense to civil authorities.

§ 525. **Decrees in general.**—The action for divorce is purely statutory and the judgment or decree must be one authorized by statute.[1] The decree should conform to the pleadings and the evidence in the case.[2] The general rule is that decree may not be rendered on the pleadings without hearing evidence.[3]

The court should find as to legal residence.[4] The finding on question of desertion should be that it was without reasonable

[1]Graham v. Graham, 149 Wis. 602, 136 N. W. 162. A decree is voidable when granted without affirmative proof of substantial compliance with an order for substituted service. Miller v. Miller, 37 Nev. 257, 142 Pac. 218.

[2]Phillips v. Phillips, 176 Ala. 308, 58 So. 252; Hollenhof v. Hollenhof, 25 Ill. App. 236; Stout v. Stout, 211 Mich. 238, 178 N. W. 648; Sherley v. Sherley (Tex. Civ. App.), 237 S. W. 645; Wass v. Wass, 41 W. Va. 126, 23 S. E. 537.

[3]Miller v. Miller, 65 Ore. 551, 131 Pac. 308, 133 Pac. 86.

[4]Coleman v. Coleman, 23 Cal. App. 423, 138 Pac. 362.

cause and continued without cause for the statutory period.[5] But it is held that the decree will not be invalidated for the failure to recite jurisdictional facts admitted by the pleadings,[6] or for the failure to incorporate the findings therein.[7] And where the decree is properly entered it will not be rendered invalid by reason of the improper spelling of proper names.[8] It would seem that the court rests under a mandatory duty to grant a decree where the evidence clearly shows the existence of the grounds for divorce.[9]

Where a statutory ground for divorce is established, it is held that the court may not refuse a decree because of information derived from a different proceeding of facts mitigating the fault of the defendant.[10] Statutory conditions are impliedly incorporated in the decree. Hence a statutory provision that a divorce shall not become absolute for six months becomes a part of the decree though not expressly incorporated therein.[11] It is not an essential part of the decree that the court dispose of the custody of children.[12]

It is very clear that a decree of divorce on a void marriage is itself void.[13]

§ 526. **Decree of nullity.**—A decree of nullity declares the marriage alleged to have been contracted to be null and void. In other words, the fact that no marriage ever took place is judicially determined.[14]

§ 527. **Decree of affirmation.**—Where the validity of a marriage is in question, and the marriage is declared valid, a decree of affirmation is entered as an adjudication of its validity.[15]

[5]Fricke v. Fricke, 124 Ill. App. 39.

[6]Jones v. Jones, 71 Colo. 420, 207 Pac. 596; Marshall v. Marshall, 88 Mo. App. 325.

[7]Dracovich v. Dracovich, 53 Cal. App. 361, 200 Pac. 44. But see Cuneo v. Cuneo, 40 Cal. App. 564, 181 Pac. 229.

[8]Richardson v. King, 157 Iowa 287, 135 N. W. 640.

[9]Lewis v. Lewis, 167 Cal. 732, 141 Pac. 367, 52 L. R. A. (N. S.) 675; Lowman v. Lowman, 165 Cal. 352, 132 Pac. 439; Spitsnaugle v. Spitsnaugle, 87 Kans. 408, 124 Pac. 162; Marolf v. Marolf, 191 Mo. App. 239, 177 S. W. 819; Miles v. Miles, 137 Mo. App. 38, 119 S. W. 456; Morgan v. Morgan, 134 Mo. App. 160, 113 S. W. 722. But see Parramore v. Parramore, 61 Fla. 701, 55 So. 795; Steed v. Steed, 54 Utah 244, 181 Pac. 445.

[10]Spitsnaugle v. Spitsnaugle, 87 Kans. 408, 124 Pac. 162.

[11]Calvert v. Calvert, 52 Utah 598, 176 Pac. 731.

[12]Arndt v. Arndt, 177 Mo. App. 420, 163 S. W. 282.

[13]Snell v. Snell, 191 Ill. App. 239.

[14]See Form, § 990, p. 797.

[15]See Form, § 989, p. 797.

§ 528. **Judgments by default.**—It may be observed generally that judgments by default in divorce cases are not favored by the courts.[16] In such cases the facts upon which relief is sought must be established. The court should proceed with the same formality as if all parties were present and demand as satisfactory proof to sustain the grounds set out as if all parties were in court.[17] The rule requiring full proof applies likewise to consent decrees.[18] There must be a due service of process to sustain such a judgment.[19]

Ex parte affidavits are not admissible in evidence on such a hearing.[20]

Applications to set aside default decrees are addressed to the sound discretion of the court,[21] and must be made in good faith and with promptness.[22] The moving papers for opening a default should set forth facts from which the court can satisfy itself that the defendant has a meritorious defense,[23] and that there has been no change in the condition of the parties since the decree.[24]

There is no presumption of fraud in obtaining a default decree, and if this is the ground relied upon to set the default aside it must be proved conclusively.[25] There is fraud justifying the vacation of a judgment where the plaintiff knew the address of the defendant and failed to impart any information on the subject to the attorney appointed by the court to represent such absent defendant.[26] The case of fraud is very plain where the

[16]Grant v. Grant, 84 N. J. Eq. 81, 92 Atl. 791; Fox v. Fox, 143 App. Div. 483, 127 N. Y. S. 989; Mott v. Mott, 134 App. Div. 569, 119 N. Y. S. 483.

[17]Rehfuss v. Rehfuss, 169 Cal. 86, 145 Pac. 1020; Kirkpatrick v. Kirkpatrick, 152 Cal. 316, 92 Pac. 853; State ex rel. v. Wolfe, 63 Fla. 290, 58 So. 841; Spencer v. Spencer, 61 Fla. 777, 55 So. 71; Hancock v. Hancock, 55 Fla. 680, 45 So. 1020, 15 L. R. A. (N. S.) 670; Brick v. Brick, 65 Mich. 230, 31 N. W. 907, 33 N. W. 761.

[18]Patrick v. Patrick, 30 Ky. L. 1364, 101 S. W. 328.

[19]Townsand v. Townsand, 21 Ill. 540.

[20]Gardner v. Gardner, 142 Ark. 292, 218 S. W. 663.

[21]Anderson v. Anderson (Cal. App.), 204 Pac. 426; Lessig v. Lessig, 136 Wis. 403, 117 N. W. 792.

[22]Carmichael v. Carmichael, 101 Ore. 172, 199 Pac. 385.

[23]Bandler v. Bandler, 187 N. Y. S. 358. Harris v. Harris (Tex. Civ. App.), 230 S. W. 224.

[24]Summers v. Summers, 146 Ky. 653, 143 S. W. 27.

[25]Hakes v. Brown, 213 Mich. 278, 182 N. W. 77.

[26]Stewart v. Stewart, 101 Ark. 86, 141 S. W. 193.

successful party makes false statements in his petition and affidavit as to residence of parties.[27] In passing upon the matter of setting aside the default the court may consider the effect on innocent third persons.[28] The state has an interest in having decree in undefended suit set aside for fraud,[29] and only a slight showing is required.[30] A party against whom a default divorce decree has been entered may estop himself from raising the question of defects in service of process by laches, neglect or long acquiescence.[31]

A default judgment in a divorce action, absolutely void for want of jurisdiction, may be attacked by the defendant at any time, either by direct or collateral proceedings.[32]

§ 529. **Decree a vinculo matrimonii.**—A decree of absolute divorce from the bonds of matrimony is a full and complete dissolution of the marriage tie, abrogating all marital rights and obligations, and leaving both parties free to marry again.[33] The marriage tie having been legally severed, husband and wife are to all intents and purposes strangers to each other, and if they afterwards have sexual intercourse with one another, they are guilty of fornication or adultery. Property rights are restored to the parties as they existed at the time of the marriage as far as practicable, and a decree of divorce does not affect any transfer of property made during coverture by the parties, but it forever bars dower and curtesy, or any future interest in the other spouse's estate.[34]

A divorce from the bonds of matrimony will not be decreed unless a legal marriage be proved.[35]

A judgment granting a divorce absolute in form is final, though the statute of the state authorizes the court of its own motion, or on the application of either party within one year to vacate or modify the same.[36] Under the Wisconsin statute an

[27]De Souza v. De Souza (R. I.), 92 Atl. 983.

[28]Carmichael v. Carmichael, 101 Ore. 172, 199 Pac. 385.

[29]Jones v. Jones, 83 N. J. Eq. 571, 91 Atl. 819.

[30]Rehfuss v. Rehfuss, 169 Cal. 86, 145 Pac. 1020.

[31]Farr v. Farr, 190 Iowa 1005, 181 N. W. 268.

[32]Belknap v. Belknap, 154 Iowa 213, 134 N. W. 734.

[33]Claudius v. Melvin, 146 Cal. 257, 79 Pac. 897; Whitesell v. Mills, 6 Ind. 231; McCraney v. McCraney, 5 Iowa 232, 68 Am. Dec. 702; Barber v. Root, 10 Mass. 260; Hunt v. Thompson, 61 Mo. 148; Zahorka v. Geith, 129 Wis. 498, 109 N. W. 552.

[34]Starr v. Pease, 8 Conn. 541; Clark v. Slaughter, 38 Miss. 64.

[35]Mangue v. Mangue, 1 Mass. 240.

[36]Yates v. Yates, 157 Wis. 219, 147 N. W. 60.

absolute divorce may be granted on a complaint for a limited divorce where the proof warrants such a judgment.[37] The public policy of some of the states is opposed to the granting of limited divorces because such divorces impose a compulsory celibacy on persons neither married nor divorced.[38] The courts very generally have the power to enter nunc pro tunc decrees.[39]

§ 530. **Decree nisi.**—In some states, in the first instance, a decree nisi is entered, which allows a certain time to elapse before the decree is made absolute, at the end of which time it may become absolute, unless in the meantime good cause is shown why the decree should not be made absolute. Only parties interested can appear and show cause.[40] The decree is purely interlocutory,[41] by which is meant a decree made pending a cause and before final hearing on the suits and which implies further action of the court to give complete relief.[42]

If, at any time before the decree nisi is made absolute, the parties live together again, the decree will be void. A decree nisi does not absolutely dissolve the marriage.[43] Where there has been such living together, which amounts to condonation, the decree will be set aside though not attacked by either party.[44] The marital status is not affected by the interlocutory decree, further than it establishes conclusively, unless set aside on appeal or in some other manner provided by statute, the right to divorce upon the expiration of the statutory period.[45] On the theory that

[37]Shequin v. Shequin, 161 Wis. 183, 152 N. W. 823.

[38]Coon v. Coon, 163 Mich. 644, 129 N. W. 12.

[39]Austin v. Austin, 173 Mich. 47, 138 N. W. 237, Ann. Cas. 1914D, 749.

[40]In re Seiler, 164 Cal. 181, 128 Pac. 334, Ann. Cas. 1914B, 1093; Dell v. Superior Court of San Diego County, 53 Cal. App., 436, 200 Pac. 85; Gould v. Superior Court in and for City and County of San Francisco, 47 Cal. App. 197, 191 Pac. 56; Morgan v. Morgan (Del.), 111 Atl. 540 (one year in Delaware); Koffman v. Koffman, 193 Mass. 593, 79 N. E. 780; Sparhawk v. Sparhawk, 114 Mass. 355; Fox v. Davis, 113 Mass. 255, 18 Am. Rep. 476; Grant v. Grant, 84 N. J. Eq. 81, 92 Atl. 791.

[41]Remley v. Remley (Cal. App.), 193 Pac. 604.

[42]Parsons v. Parsons, 40 Utah 602, 122 Pac. 907.

[43]Ames v. Chew, 46 Mass. 320; Dean v. Richmond, 22 Mass. 461; Grant v. Grant, 84 N. J. Eq. 81, 92 Atl. 791; Howatt v. Howatt, 158 App. Div. 28, 142 N. Y. S. 908; White v. White, 167 Wis. 615, 168 N. W. 704; Noble v. Noble, L. R. 1 P. 691; Norman v. Villars, 2 Ex. D. 359. See also Gloyd v. Superior Court in and for Los Angeles County, 44 Cal. App. 39, 185 Pac. 995.

[44]Howell v. Dunning, 109 Wash. 591, 187 Pac. 365, 188 Pac. 30.

[45]Gould v. Superior Court in and for City and County of San Francis-

an innocent party may not be forced to take a divorce against his will, a plaintiff may have the interlocutory decree set aside.[46]

§ 531. **Decree a mensa et thoro—Decree on denial of absolute divorce.**—A decree from bed and board is not a dissolution of the marriage tie and the parties may mutually and voluntarily apply to rescind the decree. Until the decree is rescinded, there is complete separation from bed and board and all rights of cohabitation.[47] The parties are still regarded as husband and wife.[48]

Generally speaking a decree absolute and a decree a mensa et thoro rests upon the same ground; the law merely permitting the court, in his discretion, to grant either kind of divorce.[49] The discretion intended is a sound legal discretion to be exercised with a reasonable regard to the rights of both parties.[50] Under this principle the court has the power to grant a separation from bed and board where an absolute divorce is refused and the evidence shows the propriety or necessity for this form of relief.[51] So, the court may dismiss a bill as to a charge of adultery and decree a legal separation from bed and board for cruelty where the suit is based on both grounds.[52]

§ 532. **Divorce a mensa et thoro—Louisiana procedure.**—The Louisiana procedure allows a divorce from bed and board in the first instance which ripens into a right to an absolute divorce after the lapse of two years without reconciliation. In the proceedings for an absolute divorce the court only considers whether a judgment for divorce from bed and board has been rendered, that two years have elapsed, that no judgment of divorce has been obtained by plaintiff and that there has been no reconcilia-

co, 47 Cal. App. 197, 191 Pac. 56. See also Quinn v. Quinn (Cal. App.), 193 Pac. 593.

[46]Willoughby v. Willoughby, 71 Colo. 356, 206 Pac. 792. See also Bishop v. Bishop, 82 Misc. 676, 144 N. Y. S. 143.

[47]Pierce v. Burnham, 45 Mass. 303; Horning v. Horning, 162 Mich. 130, 127 N. W. 275.

[48]Ellison v. Mobile, 53 Ala. 558; Freeman v. Belfer, 173 N. Car. 581, 92 S. E. 486, L. R. A. 1917E, 886.

[49]Gray v. Gray (Ark.), 98 S. W. 975.

[50]Ramsey v. Ramsey, 162 Ky. 741, 172 S. W. 1082.

[51]Bottom v. Bottom, 143 Ky. 666, 137 S. W. 198; De Ferrari v. De Ferrari, 220 Mass. 38, 107 N. E. 404; Heinze v. Heinze, 107 Minn. 43, 119 N. W. 489; Pick v. Pick, 99 Nebr. 433, 156 N. W. 769; Pittis v. Pittis, 82 N. J. Eq. 635, 89 Atl. 749; Crawford v. Crawford, 54 Pa. Super. Ct. 304; Wells v. Wells, 27 S. Dak. 257, 130 N. W. 780. See also Voss v. Voss, 157 Wis. 430, 147 N. W. 634.

[52]Yates v. Yates, 36 App. D. C. 518.

tion. The court will not venture into an inquiry into the grounds on which the first judgment was rendered or into the subsequent conduct of the defendant.[53]

§ 533. **Modification of decree.**—The court entering a decree has the power to modify it.[54] An application for a modification of the decree is a continuation of the original action,[55] and generally should be by supplemental petition.[56]

§ 534. **Collateral attack on decrees.**—The decree regularly entered where the court has jurisdiction is not ordinarily subject to attack by a stranger in a collateral proceeding.[57]

On collateral attack a decree of divorce is as conclusive as any other decree.[58] The want of jurisdiction of the court to render the decree may, however, be attacked collaterally.[59] If a decree is void it can be attacked collaterally, but if voidable only, it must be attacked by a direct action.[60] It is not ground for collateral attack on the decree that it was obtained on fraudulent or perjured evidence;[61] or that there were defects in the service of

[53]Tortorich v. Maestri, 146 La. 124, 83 So. 431.

[54]State v. Superior Court, 78 Wash. 372, 139 Pac. 42. May not be modified after expiration of term of rendition. Graham v. Graham, 149 Wis. 602, 136 N. W. 162.

[55]Bedolfe v. Bedolfe, 71 Wash. 60, 127 Pac. 594.

[56]Schlarb v. Schlarb, 168 Iowa 364, 150 N. W. 593.

[57]Ex parte Edwards, 183 Ala. 659, 62 So. 775; Schulze v. Schulze, 149 Ga. 532, 101 S. E. 183; Doose v. Doose, 300 Ill. 134, 133 N. E. 49; Jefferies v. Alexander, 188 Ill. App. 310; Long v. Barton, 142 Ill. App. 606; Panty v. Panty (Ind. App.), 129 N. E. 283; Farr v. Farr, 190 Iowa 1005, 181 N. W. 268; Gunn v. Gunn, 205 Mich. 198, 171 N. W. 371; McAllum v. Spinks, 129 Miss. 237, 91 So. 694; In re McDonald's Estate, 268 Pa. 486, 112 Atl. 98. But see Livingston v. Livingston (Ind. App.), 121 N. E. 119. Judgment is subject to collateral attack where court never had jurisdiction. Mainzer v. Avril, 108 Misc. 230, 177 N. Y. S. 596. After remarriage decree may be attacked only for want of jurisdiction. Douglas v. State, 58 Tex. Cr. 122, 124 S. W. 933, 137 Am. St. 930.

[58]Whitford v. Whitford, 100 Ark. 63, 139 S. W. 653.

[59]Martin v. Martin, 173 Ala. 106, 55 So. 632; Ingram v. Ingram, 143 Ala. 129, 42 So. 24, 111 Am. St. 31; Sammons v. Pike, 108 Minn. 291, 120 N. W. 540, 122 N. W. 168, 23 L. R. A. (N. S.) 1254, 133 Am. St. 425 (foreign court); Thelan v. Thelan, 75 Minn. 433, 78 N. W. 108.

[60]Beavers v. Bess, 58 Ind. App. 287, 108 N. E. 266; Hinkle v. Lovelace, 204 Mo. 208, 102 S. W. 1015, 11 L. R. A. (N. S.) 730, 120 Am. St. 698, 11 Ann. Cas. 794.

[61]In re McNeill, 155 Cal. 333, 100 Pac. 1086; Miller v. Miller, 89 Kans. 151, 130 Pac. 681; Moor v. Moor (Tex. Civ. App.), 63 S. W. 347.

summons,[62] or that the decree did not embody findings of essential facts.[63] There is a direct and not a collateral attack where the purpose of the suit is to set aside a decree;[64] or to quiet title to property involved.[65] A motion in the original suit is a direct and not a collateral attack on the judgment.[66]

The person obtaining the decree is estopped to make a collateral attack on it.[67]

§ 535. **Effect of the decree.**—A complete dissolution of the marriage relation and a restoration of the parties to the status of single persons immediately follows the rendition of the final decree of divorce,[68] but not so where the decree is a mere interlocutory decree.[69] A statute authorizing the inclusion of a prohibition against remarriage has no extra-territorial effect.[70] The failure of the clerk to enter a decree at the time of its rendition by the court, does not effect rights of parties. The matter is cured by a nunc pro tunc entry.[71]

§ 536. **Conclusiveness of decrees—Res judicata.**—It is the rule that a decree by a court having jurisdiction of the parties and the subject matter is a complete bar to a subsequent suit between the same parties for the same relief. In other words the courts will refuse to re-examine the same facts on the same charge in a subsequent case between the same parties.[72] A former adjudication in another case between the parties, as to who

[62]McLeod v. McLeod, 144 Ga. 359, 87 S. E. 286; Belknap v. Belknap, 154 Iowa 213, 134 N. W. 734.

[63]Flynn v. Flynn, 171 Cal. 746, 154 Pac. 837.

[64]O'Neill v. Potvin, 13 Idaho 721, 93 Pac. 20, 257.

[65]Kwentsky v. Sirovy, 142 Iowa 385, 121 N. W. 27.

[66]Robinson v. Robinson, 149 Mo. App. 733, 129 S. W. 725.

[67]Simmonds v. Simmonds, 78 Misc. 571, 138 N. Y. S. 639.

[68]Brown v. Brown, 170 Cal. 1, 147 Pac. 1168; In re Seiler's Estate, 164 Cal. 181, 128 Pac. 334; In re Darie's Estate, 162 Cal. 51, 121 Pac. 320; Johnson v. Grand Lodge, 91 Kans. 314, 137 Pac. 1190, 50 L. R. A. (N. S.) 461.

[69]Jordan v. Missouri & K. Tel. Co., 136 Mo. App. 192, 116 S. W. 432.

[70]Dimpfel v. Wilson, 107 Md. 329, 68 Atl. 561, 13 L. R. A. (N. S.) 1180, 15 Ann. Cas. 753.

[71]Zahorka v. Geith, 129 Wis. 498, 109 N. W. 552.

[72]Krzepicki v. Krzepicki, 167 Cal. 449, 140 Pac. 13; Helpling v. Helpling, 50 Cal. App., 676, 195 Pac. 715; Civille v. Civille, 22 Cal. App. 707, 136 Pac. 503; People v. Case, 241 Ill. 279, 89 N. E. 638, 25 L. R. A. (N. S.) 578; Smith v. Smith, 101 Ill. App. 187; Julian v. Julian, 60 Ind. App. 520, 111 N. E. 196; Yeager v. Yeager, 43 Ind. App. 313, 87 N. E. 144; Hamilton v. McNeil, 150 Iowa 470, 129 N. W. 480, Ann. Cas. 1912D, 604; Baurens v. Giroux, 123 La. 879, 49 So. 605;

was at fault for the separation concludes the parties on this issue.[73]

A finding that a marriage was valid in a suit for separation is conclusive in a subsequent suit by the prevailing party to have the marriage annulled for invalidity.[74]

An adverse judgment in a former action by the plaintiff in New York for a limited divorce for wilful neglect was res judicata of a subsequent action in California for an absolute divorce on the same ground.[75] Under the Michigan law which makes the divorce decree conclusive of all claims that the wife may have against the husband's property, the wife may not bring an independent suit to enforce a postnuptial agreement.[76]

In cases where suits for divorce are brought by each of the parties but in different states and both parties take part in the trial of one of the cases, the judgment therein entered and not appealed from will operate as a bar to the prosecution of the suit in the other state.[77]

The decree is a judgment in rem with extra-territorial force and conclusive on the parties though one of them was a nonresident at the time the decree was granted.[78] The decree is not res judicata as to matters not in issue and not decided in the previous action.[79] Thus a decree granting a wife a divorce from bed and board is held not to bar a husband's suit for divorce on

Jones v. Jones, 208 Mo. App. 632, 235 S. W. 481; Wilkins v. Wilkins, 84 Nebr. 206, 120 N. W. 907, 133 Am. St. 618; Mohr v. Mohr, 81 Nebr. 499, 116 N. W. 267, 129 Am. St. 699; Whitney v. Whitney, 78 Nebr. 240, 110 N. W. 555; Wilber v. Wilber, 90 N. J. Eq. 7, 105 Atl. 664; Lee v. Lee, 38 Okla. 388, 132 Pac. 1070; Ford v. Ford, 25 Okla. 785, 108 Pac. 366, 27 L. R. A. (N. S.) 856; Crabill v. Crabill, 22 Ore. 588, 30 Pac. 320; Wallace v. Wallace, 26 S. Dak. 229, 128 N. W. 143; Shook v. Shook (Tex. Civ. App.), 145 S. W. 699; Averbuch v. Averbuch, 80 Wash. 257, 141 Pac. 701, Ann. Cas. 1916B, 873; Stay v. Stay, 53 Wash. 534, 102 Pac. 420; Patrick v. Patrick, 139 Wis. 463, 121 N. W. 130, 131 Am. St. 1067.

[73]Civille v. Civille, 22 Cal. App. 707, 136 Pac. 503; Pierce v. Pierce, 107 Wash. 125, 181 Pac. 24.

[74]Goodwin v. Goodwin, 158 App. Div. 171, 142 N. Y. S. 1102. But see In re Newlin's Estate, 231 Pa. 312, 80 Atl. 255.

[75]Krzepicki v. Krzepicki, 167 Cal. 449, 140 Pac. 13.

[76]Gunn v. Gunn, 205 Mich. 198, 171 N. W. 371.

[77]Mohr v. Mohr, 81 Nebr. 499, 116 N. W. 267, 129 Am. St. 699.

[78]Stuart v. Cole, 42 Tex. Civ. App. 478, 92 S. W. 1040.

[79]Prall v. Prall, 58 Fla. 496, 50 So. 867, 26 L. R. A. (N. S.) 577; Schermerhorn v. Schermerhorn, 197 App. Div. 284, 188 N. Y. S. 632.

the ground of adultery.[80] So, a dismissal on the merits in an action by the wife for separation for cruel treatment did not bar her subsequent action for separation for nonsupport.[81] So a suit for separation for abandonment will not conclude a subsequent suit for separation for ill treatment.[82] And so the cruelty which justifies one spouse in living apart from the other may not entitle to a divorce, so that a decree denying a wife a divorce for cruelty and misconduct will not be res judicata in the husband's subsequent action based on desertion, as against the wife's defense that she was compelled by the husband's cruelty to leave his home.[83]

Neither will a nonsuit bar a suit for acts and conduct occurring after the earlier suit was commenced.[84] Nor is it conclusive in actions against third persons, as where, for example the action by one of the parties is for alienation of affection,[85] or for the custody of a minor child of the divorced party.[86]

§ 537. **Divorced woman's right to resume her maiden name or name of former husband.**—Most courts are authorized by statute, in granting a divorce to a woman, to allow her to resume her maiden name or that of a former husband, if she prays for it in her petition. If there are no children born of the union, the court usually allows her prayer, but if there are children the court rarely allows her to resume her former name. In South Carolina, where there is no power to grant a divorce, the court refused to change the name of the wife without the consent of the husband.[87] But at common law she may assume her maiden name or any other name which does not interfere with the rights of others.[88]

§ 538. **Separate support and maintenance.**—In some states, where the wife is living apart from her husband for just cause,

[80]Foxwell v. Foxwell, 118 Md. 471, 84 Atl. 552.

[81]Wendling v. Wendling, 134 N. Y. S. 55.

[82]Schlater v. Le Blanc, 121 La. 919, 46 So. 921.

[83]Wulke v. Wulke, 140 Minn. 289, 183 N. W. 349, 3 A. L. R. 679. See also Sutermeister v. Sutermeister (Mo. App.), 209 S. W. 955.

[84]In re McNeil, 155 Cal. 333, 100 Pac. 1086.

[85]Hostetter v. Green, 159 Ky. 611, 167 S. W. 919, L. R. A. 1915C, 870; Luick v. Arends, 21 N. Dak. 614, 132 N. W. 353. See also Willey v. Howell, 168 Ky. 466, 182 S. W. 619.

[86]Wilson v. Mitchell, 48 Colo. 454, 111 Pac. 21, 30 L. R. A. (N. S.) 507.

[87]Converse v. Converse, 9 Rich. Eq. (S. Car.) 535.

[88]Linton v. Bank, 10 Fed. 894; Clark v. Clark, 19 Kans. 522; Rich v. Mayer, 7 N. Y. S. 69, 26 N. Y. St. 107.

she may petition the court for separate support and maintenance.[89] And generally, one having grounds for divorce and separation may seek separation only for there is no public policy to the contrary.[90]

§ 539. **Restrictions against marrying after divorce.**—Some states have passed statutes prohibiting the guilty party from contracting a second marriage after a divorce; in others the guilty party can not contract a second marriage for a limited time; in others not without permission from the court. But these restrictions have no extra-territorial effect, for it is a well-established principle of law that a divorce that releases one party from the marriage must free the other. There can not be a husband without a wife or a wife without a husband, and the courts have held almost unanimously that the party contracting the second marriage can not be punished for bigamy.[91]

The courts have no right to impose restrictions on the marriage of divorced parties unless given this power by statute.[92]

§ 540. **Reporting criminal offense to civil authorities.**—Some states have passed criminal statutes providing (a) That when a divorce is granted for adultery or other cause constituting a criminal offense, committed within the state and within the time prescribed by law for making complaints and finding indictments therefor, the court granting the divorce may, in its discretion, cause notice of such facts to be given by the clerk of the court to the district attorney for the county in which such an offense was found to have been committed, together with a list of the witnesses proving such offense, and any other information which the court may deem proper, and thereupon, it shall be the duty of the district attorney to cause complaint of the offense to be made before some magistrate having jurisdiction

[89]See divorce laws of the several states, infra, ch. 50.

[90]Hofman v. Hofman, 232 N. Y. 215, 133 N. E. 450.

[91]Dudley v. Dudley, 151 Iowa 142, 130 N. W. 785, 32 L. R. A. (N. S.) 1170; State v. Weatherby, 43 Maine 258, 69 Am. Dec. 59; Dimpfel v. Wilson, 107 Md. 329, 68 Atl. 561, 13 L. R. A. (N. S.) 1180, 15 Ann. Cas. 753; Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505; People v. Hovey, 5 Barb. (N. Y.) 117; Dickson v. Dickson, 1 Yerg. (Tenn.) 110, 24 Am. Dec. 444. The common law does not forbid the remarriage of divorced persons, nor does a court of equity have any such inherent power. Bishop Div. §§ 655-659; Ann. Cas. 1914A, 1173.

[92]Shelton v. Shelton, 125 Va. 381, 99 S. E. 557; Underwood v. Underwood, 83 W. Va. 272, 98 S. E. 207.

thereof, or to present the evidence thereon to the grand jury. (b) If persons divorced from the bonds of matrimony cohabit as husband and wife or live together in the same house, they shall be deemed to be guilty of adultery. (c) Whoever falsely personates another or wilfully and fraudulently procures a person to personate another, or fraudulently procures false testimony to be given, or makes a false or fraudulent return of service of process, in a suit for divorce, or any proceedings connected therewith, shall be punished by fine or imprisonment.[93]

[93]See Mass. Gen. Laws 1921, pp. 2247, 2248, §§ 40, 41, 45.

CHAPTER 36

VACATING DECREES

Section

545. General rule.
546. Motion to vacate at term of rendition.
547. Remedy where evidence insufficient to sustain decree.
548. By the court on its own motion.
549. Petition to vacate.
550. Who may bring petition.
551. False testimony.
552. Impersonation.
553. Collusion.
554. Miscellaneous grounds for or against setting aside.
555. Laches in vacating decree.
556. Decree under repealed statute.
557. Objection to decree nisi becoming absolute.
558. Decree vacated after subsequent marriage.
559. Death of either party not a bar.
560. Declaring decree of other state void not unconstitutional.
561. Effect of vacation.

§ 545. **General rule.**—The general rule is that decrees may be vacated only by the methods and on the grounds set out by statute.[1] The decree may be set aside or vacated, like the judgment of any other court, for fraud or other imposition, or whenever it appears that an innocent party, without notice, has been aggrieved by the fraud of the other party. Where the jurisdiction of the court was obtained by fraud, or misrepresentation as to domicil, the decree will be vacated.[2] This is usually accom-

[1]Laird v. Laird, 149 Minn. 104, 182 N. W. 955; Gewirtz v. Gewirtz, 189 App. Div. 483, 178 N. Y. S. 738; Scolardi v. Scolardi, 42 R. I. 456, 108 Atl. 651.

[2]Bancroft v. Bancroft, 178 Cal. 367, 173 Pac. 582; Scanlan v. Scanlan, 41 Ill. App. 449; Earle v. Earle, 91 Ind. 27; Williamson v. Williamson, 179 Iowa 489, 161 N. W. 482; Wood v. Wood, 136 Iowa 128, 113 N. W. 492, 12 L. R. A. (N. S.) 891, 125 Am. St. 223; Sampson v. Sampson, 223 Mass. 451, 112 N. E. 84; Edson v. Edson, 108 Mass. 590, 11 Am. Rep. 393; Carley v. Carley, 73 Mass. 545;

plished by an independent action where the fraud is discovered after the close of the term of court at which it is rendered.[3]

§ 546. **Motion to vacate at term of rendition.**—A motion to set aside should be made at term of rendition or within time fixed by statute,[4] and it would seem superfluous to serve process on the plaintiff.[5] Where the motion is made at the term of rendition it may be heard and determined at a later term of court.[6]

§ 547. **Remedy where evidence insufficient to sustain decree.**—The remedy of an aggrieved party when the claim is insufficiency of evidence to sustain the decree is by an appeal and not by a motion to vacate.[7]

Dorrance v. Dorrance, 257 Mo. 317, 165 S. W. 783; State v. District Court, 38 Mont. 166, 99 Pac. 291, 35 L. R. A. (N. S.) 1098, 129 Am. St. 636; Smithson v. Smithson, 37 Nebr. 535, 56 N. W. 300, 40 Am. St. 504; Wisdom v. Wisdom, 24 Nebr. 551, 39 N. W. 594, 8 Am. St. 215; Carpenter v. Carpenter, 78 N. H. 440, 101 Atl. 628, L. R. A. 1917F, 974; Adams v. Adams, 51 N. H. 388, 12 Am. Rep. 134; Nichells v. Nichells, 5 N. Dak. 125, 64 N. W. 73, 33 L. R. A. 515, 57 Am. St. 540; Wanamaker v. Wanamaker, 10 Phila. (Pa.) 466; State v. Watson, 20 R. I. 354, 39 Atl. 193, 78 Am. St. 871; Anderson v. Anderson, 97 Wash. 202, 166 Pac. 60; Graham v. Graham, 54 Wash. 70, 102 Pac. 891, 18 Ann. Cas. 999. See notes, 61 Am. Dec. 460; 54 Am. St. 220.

[3]Nation v. Nation, 206 Ala. 397, 90 So. 494; Leeker v. Leeker (Ariz.), 202 Pac. 397; Postal v. Postal (Ind. App.), 133 N. E. 17; Wood v. Wood, 136 Iowa 128, 113 N. W. 492, 12 L. R. A. (N. S.) 891, 125 Am. St. 223; Hatcher v. Hatcher, 183 Ky. 270, 209 S. W. 36; Watts v. Watts, 123 Miss. 812, 86 So. 353; Cates v. Cates, 202 Mo. App. 352, 216 S. W. 573; Berger v. Berger (R. I.), 117 Atl. 361; Johnston v. Johnston, 37 R. I. 362, 92 Atl. 983; Cobb v. Cobb, 43 S. Dak. 388, 179 N. W. 408; Pringle v. Pringle, 55 Wash. 93, 104 Pac. 135. The court may not grant relief based on a private letter addressed to him. Blundin v. Blundin, 38 Nev. 212, 147 Pac. 1083. The proceeding where the ground is a defect in the service of summons by publication is by a separate action and not by a motion in the original action. Atkinson v. Atkinson, 43 Utah 53, 134 Pac. 595, 47 L. R. A. (N. S.) 499. Not necessary to institute separate action to set aside a default decree procured by fraud. Meeker v. Meeker, 117 Wash. 410, 201 Pac. 786.

[4]Allan v. Allan, 21 Ariz. 70, 185 Pac. 539; Gato v. Christian, 112 Maine 427, 92 Atl. 489, Ann. Cas. 1917A, 592; Howell v. Howell, 89 Nebr. 243, 131 N. W. 216; Chapman v. Chapman, 70 W. Va. 522, 74 S. E. 661; Graham v. Graham, 149 Wis. 602, 136 N. W. 162.

[5]Roberts v. Roberts, 150 Ga. 757, 105 S. E. 448.

[6]Fisher v. Fisher, 74 Pa. Super. Ct. 538.

[7]Wiemer v. Wiemer, 21 N. Dak. 371, 130 N. W. 1015; Robinson v. Robinson, 77 Wash. 663, 138 Pac. 288, 51 L. R. A. (N. S.) 534; Chapman v. Chapman, 70 W. Va. 522, 74 S. E. 661.

§ 548. **By the court on its own motion.**—The court may set aside the decree on its motion at term at which decree rendered,[8] but not afterwards.[9]

§ 549. **Petition to vacate.**—The proper proceeding to vacate a decree is by petition, which should set forth specifically the grounds relied upon for vacating the decree. It should also show, if required, that it is brought within the statutory time.[10] The application must be made in good faith and not merely to obtain an increase or advantage to the applicant,[11] and must show prima facie a good defense.[12]

§ 550. **Who may bring petition.**—A petition to vacate a decree can only be brought by the innocent party who suffered by the decree. No person not a party to the original suit can bring a petition,[13] even with respect to decrees rendered in a foreign country.[14] Hence children, though sentimentally interested, have no standing to have a decree vacated.[15]

But it has been held that where vacation of the decree affects the estate of the defendant spouse, his or her personal representative, or even her heirs at law have such an interest as to enable them to institute vacation proceedings.[16] So also the personal representatives and legal heirs are proper parties defendant in a proceeding to vacate brought by the divorced wife.[17]

[8]Lanktree v. Lanktree, 42 Cal. App. 648, 183 Pac. 954; Guggenheim v. Guggenheim, 189 Ill. App. 151; Botts v. Botts, 142 Ill. App. 216; Todhunter v. De Graff, 164 Iowa 567, 146 N. W. 66; Sanders v. Sanders, 184 Ky. 119, 211 S. W. 425; Everson v. Everson, 101 Nebr. 705, 164 N. W. 717; McIntyre v. McIntyre, 9 Misc. (N. Y.) 252; Brown v. Brown, 53 Wis. 29, 9 N. W. 790. See Morris v. Morris, 60 Mo. App. 86.

[9]Delbridge v. Delbridge, 189 Iowa 1116, 179 N. W. 438.

[10]Bomsta v. Johnson, 38 Minn. 230, 36 N. W. 341; Pullman v. Pullman, 92 Wash. 120, 158 Pac. 746.

[11]Wiemer v. Wiemer, 21 N. Dak. 371, 130 N. W. 1015.

[12]Conklin v. Conklin, 148 Ga. 640, 98 S. E. 221; Messenger v. Messenger, 188 Iowa 367, 176 N. W. 260.

[13]Lockwood v. Lockwood, 19 Ariz. 215, 168 Pac. 501; Tyler v. Aspinwall, 73 Conn. 493, 47 Atl. 755, 54 L. R. A. 758; Rawlins v. Rawlins, 18 Fla. 345; Holmes v. Holmes, 63 Maine 420; Edson v. Edson, 108 Mass. 590, 11 Am. Rep. 393; Baugh v. Baugh, 37 Mich. 59, 26 Am. Rep. 495; Adams v. Adams, 51 N. H. 388, 12 Am. Rep. 134. See notes, 61 Am. Dec. 466; 125 Am. St. 242; 57 L. R. A. 599.

[14]Bater v. Bater, (1906) P. (Eng.) 209, 4 Ann. Cas. 854.

[15]Baugh v. Baugh, 37 Mich. 59, 26 Am. Rep. 495.

[16]Wood v. Wood, 136 Iowa 128, 113 N. W. 492, 12 L. R. A. (N. S.) 891, 125 Am. St. 223.

[17]Johnson v. Coleman, 23 Wis. 452, 99 Am. Dec. 193.

The court may refuse to set the decree aside for fraud on application of party guilty of the fraud.[18]

§ 551. **False testimony.**—The giving or procuring false evidence before a divorce court is sometimes held ground for vacating the decree granted upon such evidence.[19] The better rule, however, is that the perjury must relate to and be coupled with some fraud in the court, such as failure of notice, to authorize original proceedings to vacate the judgment, brought after term time.[20]

It would not be ground to set aside the decree that false testimony had been given where the applicant had ample opportunity to meet such testimony at the trial.[21]

§ 552. **Impersonation.**—If one person impersonates another, either as complainant or respondent, and thus obtains a decree, the decree will be set aside, for the court has been imposed upon by gross fraud, and the parties are criminally liable for perjury.[22]

§ 553. **Collusion.**—A decree of divorce will be vacated if it appears that there was any agreement or collusion between the parties to procure it.[23] It has been very generally held, however, that a party to the wrong is estopped from complaining about it.[24]

[18]Van Slyke v. Van Slyke, 186 Mich. 324, 152 N. W. 921.

[19]Whitcomb v. Whitcomb, 46 Iowa 437; McIntyre v. McIntyre, 30 N. Y. S. 200; Bay v. Bay, 85 Ohio St. 417, 98 N. E. 109; Nickerson v. Nickerson, 13 Wkly. N. Cas. (Pa.) 210; R. v. R., 20 Wis. 331. But see, giving general rule contra, Robinson v. Robinson, 77 Wash. 663, 138 Pac. 288, 51 L. R. A. (N. S.) 534. See also, Sudbury v. Sudbury, 179 Iowa 1039, 162 N. W. 209; Bell v. Bell, 97 Kans. 616, 156 Pac. 778; Boyd v. Boyd, 226 Mass. 542, 116 N. E. 270; Blass v. Blass, 194 Mo. App. 624, 186 S. W. 1094.

[20]Graves v. Graves, 132 Iowa 199, 109 N. W. 707, 10 L. R. A. (N. S.) 216, 10 Ann. Cas. 1104; Zeitlin v. Zeitlin, 202 Mass. 205, 88 N. E. 762, 23 L. R. A. (N. S.) 505, 132 Am. St. 490; Greene v. Greene, 2 Gray (Mass.) 361, 61 Am. Dec. 454; Colby v. Colby, 59 Minn. 432, 61 N. W. 460, 5 Am. St. 420; Robinson v. Robinson, 77 Wash. 663, 138 Pac. 288, 51 L. R. A. (N. S.) 534.

[21]Gelwicks v. Gelwicks, 160 Iowa 675, 142 N. W. 409. See also Orr v. Orr, 75 Ore. 137, 144 Pac. 753, 146 Pac. 964.

[22]Bradford v. Abend, 89 Ill. 78, 31 Am. Rep. 67; Brown v. Grove, 116 Ind. 84, 18 N. E. 387, 9 Am. St. 823. Note, 60 L. R. A. 296. See Fraud, supra, §§ 173, 355.

[23]Daniels v. Benedict, 50 Fed. 347; Danforth v. Danforth, 105 Ill. 603; Friebe v. Elder, 181 Ind. 597, 105 N. E. 151; True v. True, 6 Minn. 458; McIntyre v. McIntyre, 9 Misc. (N. C.) 252. See also, supra, p. 289, § 420. See also, however, Bancroft v. Bancroft, 178 Cal. 359, 173 Pac. 579, L. R. A. 1918F, 1029.

[24]Dow v. Blake, 148 Ill. 76, 35 N. E. 761, 39 Am. St. 156; Greene v.

§ 554. **Miscellaneous grounds for or against setting aside.**—It has been held ground for vacating a decree that coercion was used to compel the institution of the suit;[25] that the parties cohabited as man and wife after entry of the interlocutory decree;[26] that there was collusion between the parties which resulted in the suppression of material evidence which if presented, would have caused a denial of divorce;[27] that marital relations have been resumed and the offense condoned;[28] that the decree was obtained through agreement of the parties;[29] or that the decree was inadvertently entered after death of plaintiff.[30]

On the other hand, among other things it is held not ground for setting aside the decree, that the counsel of defendant was negligent;[31] that one of the parties failed to keep an agreement of remarriage after the purpose in obtaining the divorce had been accomplished;[32] that a husband was guilty of criminal intimacy where facts were known to wife and were not presented to court;[33] that the party obtaining the decree immediately thereafter left the state and remarried in another state.[34]

§ 555. **Laches in vacating decree.**—The suit to set aside the decree must be brought promptly on the discovery of the fraud. Long delay may amount to laches.[35] Acquiescence in the

Greene, 2 Gray (Mass.) 361, 61 Am. Dec. 454; Karren v. Karren, 25 Utah 87, 69 Pac. 465, 60 L. R. A. 294, 95 Am. St. 815; Robinson v. Robinson, 77 Wash. 663, 138 Pac. 288, 51 L. R. A. (N. S.) 534. See notes, 61 Am. Dec. 465; 133 Am. St. 436. Contra, Karren v. Karren, 25 Utah 87, 69 Pac. 465, 60 L. R. A. 294, 95 Am. St. 815; Friend v. Friend, 53 Mich. 543, 19 N. W. 176, 51 Am. Rep. 161. See note, 18 L. R. A. 1003.

[25]Lake v. Lake, 124 App. Div. 89, 108 N. Y. S. 964.

[26]Cary v. Cary, 144 App. Div. 846, 129 N. Y. S. 444.

[27]Winder v. Winder, 86 Nebr. 495, 125 N. W. 1095.

[28]Krussman v. Krussman, 2 Boyce (Del.) 25, 78 Atl. 642.

[29]McDonald v. McDonald, 175 Mo. App. 513, 161 S. W. 850.

[30]Dunham v. Dunham, 82 N. J. Eq. 395, 89 Atl. 281.

[31]Corney v. Corney, 97 Ark. 117, 133 S. W. 813.

[32]Henderson v. Henderson, 32 N. Dak. 520, 156 N. W. 245.

[33]Faulkner v. Faulkner, 90 Wash. 74, 155 Pac. 404.

[34]Reeves v. Reeves, 24 S. Dak. 435, 123 N. W. 869, 25 L. R. A. (N. S.) 574.

[35]Horton v. Stegmyer, 175 Fed. 756, 20 Ann. Cas. 1134; McNeil v. McNeil, 170 Fed. 289 (delay of 18 months after knowledge was fatal); Johnson v. Johnson, 182 Ala. 376, 62 So. 706; Comey v. Comey, 97 Ark. 117, 133 S. W. 813 (two years); Williams v. Williams (Cal. App.), 206 Pac. 650; Reed v. Reed, 9 Cal. App. 748, 100 Pac. 897; Barnes v. Willis, 65 Fla. 363, 61 So. 828; Leach v. Leach, 122 Ill. App. 94

decree for many years after the discovery of the fraud, the party obtaining the decree having remarried in the meantime, will bar relief.[36]

Where there has been long delay and the complaining party in the divorce proceeding has died, this fact will be considered, since there will be no opportunity for retrial.[37]

§ 556. **Decree under repealed statute.**—A decree improvidently entered, under a statute which has been repealed, may be vacated.[38]

§ 557. **Objection to decree nisi becoming absolute.**—In some states where decrees nisi are granted, either party may apply to have such a decree made absolute, and in some, like Massachusetts, it may become absolute after the lapse of a certain time without any proceedings. Unless there is some such provision, only the party in whose favor the decree has been entered can apply to have it made absolute.[39]

§ 558. **Decree vacated after subsequent marriage.**—The decree may be vacated on the grounds already mentioned, even after one or both of the parties have remarried, and although there may have been issue born of such marriage.[40]

(13 years); Tuttle v. Tuttle, 46 N. Dak. 79, 181 N. W. 888; Orr v. Orr, 75 Ore. 137, 144 Pac. 753, 146 Pac. 964; Catts v. Catts, 35 Pa. Super. Ct. 293; Faulkner v. Faulkner, 90 Wash. 74, 155 Pac. 404. But see Nation v. Nation, 206 Ala. 397, 90 So. 494.

[36]Horton v. Stegmyer, 175 Fed. 756, 20 Ann. Cas. 1134; Nicholson v. Nicholson, 113 Ind. 131, 15 N. E. 223; Holbrook v. Holbrook, 114 Mass. 568; McElrath v. McElrath, 120 Minn. 280, 139 N. W. 708, 44 L. R. A. (N. S.) 505; Colby v. Colby, 59 Minn. 432, 61 N. W. 460, 50 Am. St. 420; Singer v. Singer, 41 Barb. (N. Y.) 139; Potts v. Potts, 10 Wkly. N. Cas. (Pa.) 102; Jones v. Jones, 78 Wis. 446, 47 N. W. 728. See notes, 61 Am. Dec. 465; 5 Ann. Cas. 892; 18 Ann. Cas. 1004; Ann. Cas. 1913B, 370.

[37]Horton v. Stegmyer, 175 Fed. 756, 20 Ann. Cas. 1134; Carr v. Carr, 92 Ky. 552, 18 S. W. 453, 36 Am. St. 614; McElrath v. McElrath, 120 Minn. 380, 139 N. W. 708, 44 L. R. A. (N. S.) 505. See notes, 125 Am. St. 234, 239; 133 Am. St. 446; 57 L. R. A. 591; 5 Ann. Cas. 892; Ann. Cas. 1913B, 370.

[38]Wales v. Wales, 119 Mass. 89.

[39]Mazerat v. Godefroy, 48 La. Ann. 824, 19 So. 756; Daspit v. Ehringer, 32 La. Ann. 1174.

[40]Medina v. Medina, 22 Colo. 146, 43 Pac. 1001; Rush v. Rush, 46 Iowa 648, 26 Am. Rep. 179; Comstock v. Adams, 23 Kans. 513, 33 Am. Rep. 191; Leathers v. Stewart, 108 Maine 96, 79 Atl. 16, Ann. Cas. 1913B, 366; Holmes v. Holmes, 63 Maine 420; Bomsta v. Johnson, 38 Minn. 230, 36 N. W. 341; Simpkins v. Simpkins,

However, where there has been unnecessary delay in bringing the action, the court will give strong consideration to the rights of children and the husband of the second marriage to prevent wrong to innocent parties.[41] In such cases the court will require a very strong showing of fraud to justify the vacation of the judgment.[42] In one of the cases where libelee married after the memorandum awarding her a decree was made, but before the formal decree was rendered, the decree was vacated and entered nunc pro tunc as of the date of the memorandum.[43]

§ 559. **Death of either party not a bar.**—Where a party to a divorce suit dies before the decree is rendered, none can be entered nunc pro tunc;[44] and the death of either party is not a bar to a petition to vacate a decree of divorce, when the fraud, collusion, or lack of jurisdiction by which the decree was obtained can be clearly shown, and the divorce decree has affected[45] the prop-

14 Mont. 386, 36 Pac. 759, 43 Am. St. 641; Wisdom v. Wisdom, 24 Nebr. 551, 39 N. W. 594, 8 Am. St. 215; Robertson v. Robertson, 9 Daly (N. Y.) 44; Wortman v. Wortman, 17 Abb. Pr. (N. Y.) 66; Ailen v. Maclellan, 12 Pa. St. 328, 51 Am. Dec. 608; Herrett v. Herrett, 80 Wash. 474, 141 Pac. 1158; Graham v. Graham, 54 Wash. 70, 102 Pac. 891, 18 Ann. Cas. 999. But see Barnett v. Miller, 131 Ark. 110, 198 S. W. 873, as to plaintiff's estoppel. See notes, 61 Am. Dec. 461; 133 Am. St. 441; 19 L. R. A. 814.

[41]Karren v. Karren, 25 Utah 87, 69 Pac. 465, 60 L. R. A. 294, 95 Am. St. 815. See notes, 133 Am. St. 441, 18 Ann. Cas. 1003; Ann. Cas. 1913B, 370.

[42]Richards v. Richards, 24 Idaho 87, 132 Pac. 576; Guggenheim v. Guggenheim, 189 Ill. App. 151; Richardson v. King, 157 Iowa 287, 135 N. W. 640; Zeitlin v. Zeitlin, 202 Mass. 205, 88 N. E. 762, 23 L. R. A. (N. S.) 569, 132 Am. St. 490; Walters v. Walters (Minn.), 186 N. W. 603; Whittley v. Whittley, 60 Misc. (N. Y.) 201, 111 N. Y. S. 1078. But see Lake v. Lake, 124 App. Div. 89, 108 N. Y. S. 964. Remarriage of party will not prevent vacation for fraud. Miller v. Miller, 37 Nev. 257, 142 Pac. 218.

[43]Vigno v. Vigno, 79 N. H. 108, 106 Atl. 285.

[44]Hite v. Trust Co., 156 Cal. 765, 106 Pac. 102. See 3 A. L. R. 1421 and cases. Contra, Webber v. Webber, 83 N. Car. 280; Kinney v. Telephone Co. (Tex. Civ. App.), 201 S. W. 1180. Death of one of the parties abates the action. Bushnell v. Cooper, 289 Ill. 260, 124 N. E. 521.

[45]Vincent v. Black, 30 Idaho 636, 166 Pac. 923; Brown v. Grove, 116 Ind. 84, 18 N. E. 387, 9 Am. St. 823; Hill v. Victora, 180 Iowa 417, 161 N. W. 72; Wood v. Wood, 136 Iowa 128, 113 N. W. 492, 12 L. R. A. (N. S.) 891, 125 Am. St. 223; Lawrence v. Nelson, 113 Iowa 277, 85 N. W. 84, 57 L. R. A. 583; Leathers v. Stewart, 108 Maine 96, 79 Atl. 16, Ann. Cas. 1913B, 366; McElrath v. McElrath, 120 Minn. 380, 139 N. W. 708, 44 L. R. A. (N. S.) 505; Bomsta v. Johnson, 38 Minn. 230, 36 N. W. 341; Fidelity Ins. Co.'s Appeal, 93 Pa. St.

erty rights of either party. But ordinarily, where no property rights are at issue, death will prevent setting aside of the decree.[46]

An administrator may prosecute an application for the vacation of a decree where property rights are involved,[47] but the state is no longer an interested party.[48]

§ 560. **Declaring decree of other state void not unconstitutional.**—Where a decree is entered by a court which has no jurisdiction for lack of domicil, and the court of the state where the party was domiciled declares it void, there is not involved the provision of the Constitution of the United States relating to the giving of full faith and credit to acts of courts of other states.[49]

"It incontestably appeared, from the testimony already given, that both the defendant and his said wife, Mrs. Martha F. Armington, had been resident citizens of this state, and domiciled therein for over nine years prior to the date of the decree, and that they were both actually living in this state at the time of its entry. It did not appear, nor was any offer made to show the fact, that either had ever been domiciled, even temporarily, within the territory of Utah; and as to Mrs. Armington, it is quite clear that she never, at any time during the progress of the proceedings in said court, was outside the limits of this state, or within the territorial limits of Utah. As to Mr. Armington, the most that can be claimed from the evidence is that he temporarily left his residence in Northfield, in this state, sometime in the summer of 1876, and returned in August or September of that year. Where he was, during this period, does not affirma-

242; Boyd's Appeal, 38 Pa. St. 241; Moyer v. Koontz, 103 Wis. 22, 79 N. W. 50, 74 Am. St. 837; Johnson v. Coleman, 23 Wis. 452, 99 Am. Dec. 193. See also Masterson v. Ogden, 78 Wash. 644, 139 Pac. 654, Ann. Cas. 1914D, 885. See notes, 1 L. R. A. (N. S.) 552; 5 Ann. Cas. 892.

[46]Beavers v. Bess, 58 Ind. App. 287, 108 N. E. 266; Dennis v. Harris, 179 Iowa 121, 153 N. W. 343; Wood v. Wood, 136 Iowa 128, 113 N. W. 492, 12 L. R. A. (N. S.) 891, 125 Am. St. 223; Lawrence v. Nelson, 113 Iowa 277, 85 N. W. 84, 57 L. R. A. 583; Blair v. Blair, 96 Kans. 757, 153 Pac. 544; Gato v. Christian, 112 Maine 427, 92 Atl. 489, Ann. Cas. 1917A, 592; Richmond v. Richmond (Mo. App.), 225 S. W. 126; Givernaud v. Givernaud, 81 N J. Eq. 66, 85 Atl. 830; Dallas v. Luster, 27 N. Dak. 450, 147 N. W. 95; Clay v. Robertson, 30 Okla. 758, 120 Pac. 1102. See notes, 125 Am. St. 233; 5 Ann. Cas. 892.

[47]Wood v. Wood, 136 Iowa 128, 113 N. W. 492, 12 L. R. A. (N. S.) 891, 125 Am. St. 223.

[48]McElrath v. McElrath, 120 Minn. 380, 139 N. W. 708, 44 L. R. A. (N. S.) 505.

[49]Andrews v. Andrews, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. 237.

tively appear; but it does affirmatively appear that he has resided and practiced medicine in Northfield ever since November in that year. Upon this evidence, the court was warranted in assuming that neither of the parties ever acquired a bona fide domicil or residence in Utah, and that both were, during the conduct of these divorce proceedings, domiciled residents of this state, and subject to its laws. Upon this state of facts, the probate court of Utah, whatever may have been the extent of its jurisdiction over the subject of divorce under the local laws of that territory as respects its citizens, had no jurisdiction to adjudicate upon the marriage relation existing between these parties. To each state belongs the exclusive right and power of determining upon the status of its resident and domiciled citizens and subjects, in respect to the question of marriage and divorce, and no other state, nor its judicial tribunals, can acquire any lawful jurisdiction to interfere in such matters between any such subjects, when neither of them has become bona fide domiciled within its limits; and any judgment rendered by any such tribunal under such circumstances, is an absolute nullity."[50]

"Conceding this to be the true rule upon the subject, and that each state may therefore rightfully declare the condition of its own citizens in reference to the marriage relation, and that, consequently, when a divorce is decreed according to the local law, in the forum of the parties' domicil, it is to be regarded in all other jurisdictions as valid; still the rule applies only to the case of one actually and bona fide a resident animo manendi, and not to one temporarily there for a transient purpose, and still less to one who, in fraud of the law of his domicil, resorts thus temporarily to the foreign tribunal for the express purpose of evading the laws of his own jurisdiction, by procuring a divorce there for a cause which is not allowed in the domestic forum."[51]

"This defendant has been convicted of bigamy, and now, upon exceptions, asks that the verdict be set aside. Both the marriages were admitted. The first took place in 1857; the second was to one Minnie Kopp, in August, 1871, while the first wife was still living. The defense was, that before the second marriage the defendant had been divorced from his first wife on her application. To establish this he gave in evidence a copy of the record of a proceeding in the court of common pleas of Noble

[50]State v. Armington, 25 Minn. 29, 36.

[51]Leith v. Leith, 39 N. H. 20, 34.

County, Indiana, which contained: 1. What purported to be a complaint of Mary, the first wife, against the defendant, presented at the October term, 1870, averring her residence in Noble County, charging defendant with refusal to speak with or treat her as a wife, and finally with refusal to cohabit with her, and with abandonment; and praying for a divorce; 2. An authority from the defendant to one Goodwin, an attorney of Noble County, 'to appear for me in any court of record of said county, and answer for me, and waive process that my wife, Mary Dawell, may procure a bill of divorce'; 3. An answer by Goodwin, on behalf of defendant, admitting the wife's residence in Noble County, but denying all the other allegations of the complaint; 4. A judgment of the court, rendered on the third day of the same October term, purporting to be based on evidence, and declaring the marriage dissolved.

"This expeditious proceeding, in which the defendant, in voluntarily appearing, declares his purpose to be to enable his wife to obtain a divorce, bears upon its face such evidence of collusion as, in this state, would justify the setting aside of the decree whenever attention should be called to the facts; and we do not doubt that such would be the case in Indiana also, for the Supreme Court of that state has very carefully laid down the doctrine that divorces by collusion are not to be suffered to stand.[52] But until the decree should be set aside or reversed by the action of a competent court, it could not be treated as void on the ground here indicated.

"Now I understand the rule to be, that to give the courts of any state jurisdiction over the marriage relation between a husband and his wife, one of the parties, at least, must have a domicil within that state. Some of the judicial decisions make further requirements; but no court has ever held that any less could be demanded. It is, then, and must be, admitted on all hands, that while these parties had their residence within this state, the courts of Indiana had no authority to consider the question of divorcing them. That was a matter which pertained exclusively to the authorities of this state. Our legislation forbids plural marriages, but establishes exceedingly liberal regulations for divorce, under which parties who are wronged in their marriage relations, are enabled to have them severed, on showing cause. But we do not think it conducive to good morals, or public de-

[52]Scott v. Scott, 17 Ind. 309.

cency, that married parties should be allowed to change spouses at discretion, or that a husband who had tired of his wife, whose charms perhaps had faded in the bearing and nursing of his children, should be at liberty at any time, by going through some formal proceeding in court, to turn her out of his doors, that he might supplant her with some fresher beauty. All our legislation has been framed in the belief that the marriage tie should be indissoluble, except upon cause shown; and of the sufficiency of this cause the parties themselves are not allowed to be the judges. This is the view that obtains in this state. It may be right, or it may be wrong. There have been those within the limits of the state who thought polygamy proper, and others who have believed that marriage should be only during the good pleasure of the parties; but the prevailing sentiment has condemned these notions as licentious and demoralizing, and has forbidden, under severe penalties, their practical realization within this state. If other states or countries hold different opinions, they can embody them in their own legislation, if they see fit; but it will be conceded that they have no right to invade our jurisdiction to right any wrongs which they may suppose to exist in our laws upon this subject.

"It is clear then, that the court in Indiana had no authority to decree a divorce between these parties. Any wrong against the marriage relation between them, concerned this state, and not that; and was inquirable into by the courts of Michigan, and not by those of Indiana. But if the decree was granted without authority, why is it not absolutely and for all purposes void?

"To this it is replied, that the record shows a finding by the Indiana court that the parties resided in that state, and that this finding is conclusive upon the question of jurisdiction, except on motion in the same court to vacate the decree. That doctrine brings us to this: That although the Indiana court had no jurisdiction to divorce two of our citizens, yet, having assumed to do so, on the false statement of one or both of the parties, that they resided in Indiana, the decree is absolutely binding, unless the court sees fit to vacate it. In other words, the marriage relation between two of our citizens depends upon the discretion of a foreign court, which by law has no concern with it whatever. Such a doctrine is not only monstrous in its results, but it has, as I conceive, no support whatever in authority. It has been held invariably, that a foreign judgment is open to be assailed by evidence showing a want of jurisdiction. The only question

in dispute has been, whether the recitals in the record of the appearance of the parties could be disproved for this purpose—some cases holding that they could, others that, in the case of a judgment of a sister state, they could not. That particular question, as an abstract one, I do not discuss, because I conceive there is a difference between disproving recitals of jurisdiction of the parties and jurisdiction of the subject-matter in divorce cases, which is the point involved here. If this might not be disproved, a party seeking a divorce need only apply for it in some distant country, and finding suitable tools to aid his fraud, and the difficulty and expense attending a proceeding to exhibit the facts to the satisfaction of the same court would, in most cases, be so great as absolutely to preclude the attempt. Thus it would be easy to give to the courts of any country whose jurisprudence we recognize as that of a civilized people, the power to divorce one of our citizens, under circumstances of wrong and outrage upon the other party, and yet no practicable remedy be open to the party, wronged. And even if a practicable remedy were open to the party, if he should see fit not to pursue it, there would be none whatever for the state among whose citizens disorder and license would thus be introduced.

"But it is said that if the parties appear in the case, the question of jurisdiction is precluded. That might be so if the matter of divorce was one of private concern exclusively. But such is not the case under our laws, nor will it ever be until it comes to be understood that parties have the right to marry and unmarry at pleasure, and that if they choose to trade spouses, it is the concern of nobody but themselves. Such an understanding would require a considerable change in the existing laws of this state. As those laws now are, there are three parties to every divorce proceeding; the husband, the wife, and the state; the first two parties representing their respective interests as individuals; the state concerned to guard the morals of its citizens, by taking care that neither by collusion nor otherwise, shall divorce be allowed under such circumstances as to reduce marriage to a mere temporary arrangement of conscience or passion. The state of Indiana has recognized this fact, in requiring an appearance in divorce suits by a public officer, whose duty it should be to see that a legal case was established;[53] and though we have no similar statutory requirement in this state, we have always

[53]Burns' Ann. Stat. 1914, § 1074.

recognized the principles and the court has considered it its duty to inquire specially into collusion in every case, and to deny a divorce wherever collusion appeared, even though a satisfactory case might seem to have been prima facie established. Such being the case, suppose we admit that the parties to the marriage may be bound by their voluntary appearance in their foreign jurisdiction; how does that affect the present case? How and in what manner did the Indiana court obtain jurisdiction of the third party entitled to be heard in this proceeding; that is to say, of the state of Michigan? Has this state ever, directly or indirectly, consented that a matter of high interest to itself and no way concerning the people of Indiana, shall be tried by the tribunals of the latter state? Has it ever waived its right to govern the domestic relations of its own citizens, and consented that an inferior judicial officer of another state, in whose choice its electors have not been consulted, may exercise over them, with or without the consent of parties, a power of final control? Those who insist upon the validity and binding force of this decree, should be able to point out how and in what manner, by what written or oral consent, or through what neglect or default, this third party has lost its right to have its own concerns passed upon by its own courts, or has handed them over to a foreign authority. Nothing in this record shows such consent or such waiver, even if it were competent for the state to give it; all that appears here, is falsehood and fraud, practiced and employed upon the tribunals of another state, in order to induce them to take cognizance of a controversy which belongs to the tribunals of this state; but which, for some unexplained reason, certainly not an honest one, the parties, or the acting one of them, are unwilling to submit to the proper court.

"This third party, therefore, not having consented to the proceedings, expressly or impliedly, and the foreign tribunal having confessedly no authority over the subject-matter, unless it could obtain it by consent, there would seem to be little more to be said upon this case. As to the state, at least, the divorce must be void; and the state has very properly treated it as void, by instituting this prosecution. And the state has obviously no other remedy for the wrong done it; for, as a state, it can not appear in the foreign court to ask that the fraudulent divorce be vacated.

"Our attention has also been called to a case[53a] which is sup-

[53a] Kinnier v. Kinnier, 45 N. Y. 535.

posed to overrule a considerable number of former New York cases decided in harmony with the views I have here expressed. If it does overrule them, it is opposed to a very great weight of American authority" and a number of cases support this opinion.[54]

"But in terms it overrules only the case of Jackson v. Jackson,[55] in which the court held that the wife could not acquire a domicil separate from her husband—in which I agree that it erred—and also that the parties were not bound by a decree for alimony made between them in a case in which they had voluntarily appeared in another state,—in which particular it is, perhaps, opposed to Cheever v. Wilson, above cited. In this regard I have no occasion to question in the least, the case of Kinnier v. Kinnier. But some of the language of that case does not appear to me to have been weighed and considered with the attention which important cases usually receive in that learned court. The question arose upon demurrer to a complaint filed by one who had married a woman whose previous husband, it was alleged, had procured a divorce from her by collusion, in a state distant from that in which they resided. The purpose was to annul the second marriage. The complaint alleged that the first husband went to such distant state in order to procure a divorce for a cause which would not be recognized in the state of his residence and in order to evade the laws of that state; that the wife followed him, and by collusion the divorce was procured. The court held that this complaint did not show the divorce to have been invalid. It is said: 'The court had jurisdiction of the subject matter of the action; that is, it had jurisdiction to decree divorces according to the laws of that state: and every state has a right to determine for itself the ground upon which it will dissolve the marriage relation of those within its jurisdiction. The court had also jurisdiction of the parties by the voluntary ap-

[54]Thompson v. State, 28 Ala. 12; Parish v. Parish, 32 Ga. 653; Smith v. Smith, 4 Greene (Iowa) 266. And see Maguire v. Maguire, 7 Dana. (Ky.) 181; Hanover v. Turner, 14 Mass. 227; Barber v. Root, 10 Mass. 260; Smith v. Smith, 13 Gray (Mass.) 209; Chase v. Chase, 6 Gray (Mass.) 157; Lyon v. Lyon, 2 Gray (Mass.) 367; Shannon v. Shannon, 4 Allen (Mass.) 134; Leith v. Leith, 39 N. H. 20, 34; Kerr v. Kerr, 41 N. Y. 272; Borden v. Fitch, 15 Johns (N. Y.) 121; Pawling v. Willson, 13 Johns. (N. Y.) 192; Todd v. Kerr, 42 Barb (N. Y.) 317; McGiffert v. McGiffert, 31 Barb. (N. Y.) 69; Vischer v. Vischer, 12 Barb. (N. Y.) 640; Ditson v. Ditson, 4 R. I. 87.

[55]1 Johns. (N. Y.) 424.

pearance of the defendant.' With great respect, it appears to me there are several misconceptions in this statement. The 'subject-matter of the action' was not the question of divorce in general, but was the marriage relation between the very parties to that suit; and that subject-matter neither was, nor could be, within the jurisdiction of the court, if the parties had no domicil within the state from which the court derives its powers; for the obvious reason that the state itself having no jurisdiction over the marriage relation between such parties, could confer none upon its courts. Furthermore, it is not true, that 'every state has a right to determine for itself the ground upon which it will dissolve the marriage relation of those within its jurisdiction,' if by this is included those who are only in person within its limits, but have their residence elsewhere. Will it be seriously claimed that any state might enact a law that citizens of other states might be divorced at pleasure in its courts, by simply applying in person for the decree? Would not every other state be likely to protest, with emphasis and indignation, that any such law was an evasion of their sovereignty, and an attempt, by indirect methods, to control the domestic relations of their citizens? But if such a law could not be valid, how can it be truly said, that a court, whose authority can not possibly be broader than that of the state which created it, had 'jurisdiction of the parties by the voluntary appearance of the defendant,' when such voluntary appearance could no more bring the subject-matter of the suit within the jurisdiction of the court, than in ejectment it could bring the land from a distant state, and enable the court to pass upon the right to its possession. The fallacy which runs through this New York decision, though not distinctly expressed, is that divorce is a matter which concerns the parties only, and consequently they may carry the cause of action with them wherever they go, notwithstanding their domicil may remain unchanged. This fallacy, I trust, is sufficiently exposed in what has already been said.

"The subject-matter of a divorce suit is just as much local as the subject-matter of a suit in ejectment. It is the status of the parties, permitted, regulated and controlled by the law of their domicil, which is to be passed upon and determined; and the appearance of the parties in a foreign jurisdiction does nothing whatever towards transferring this subject-matter. It can not by any possibility be brought under the cognizance of a foreign court; and it is nothing less than an absurdity to ask of us to

recognize and give effect to a decree of divorce granted abroad by a court without authority, in evasion of our laws, and in fraud or contempt of our jurisdiction. To permit one of our own citizens who had obtained a decree of divorce abroad, to turn his wife out of doors in this state under it, would be scarcely less preposterous than to suffer a writ of possession to be executed in this state on a judgment in ejectment rendered abroad. If, however, the absurdity of the case were its worst feature, the public would be less concerned with it than they are now; but we can not shut our eyes to the fact, that these divorces are always fraudulent, are often obtained by perjury, in many cases are had secretly, and without any suspicion on the part of one party that such a proceeding is being taken, and that they tend, in defiance of our laws, to make marriage a mere provisional arrangement, which the parties may break up at will. Moreover, the foreign court has no power to make such provision for the wife and children as, in many cases, would be necessary to prevent their being thrown upon the charities of the world, and if it had, it would generally be kept in ignorance of the facts, and therefore incompetent to make such provision. Such circumstances are not exceptional; when residents of our state find its liberal divorce laws insufficient for their purposes, and resort to a foreign jurisdiction, it is generally because they seek to accomplish something which no court, fully possessed of the facts, could honestly grant, and to which, consequently, deception and fraud are essential, and in general, perjury also."[56]

"It appears by the record that the divorce was granted in a suit between two persons, neither of whom was, at the time of the proceeding, a resident of Utah, or within the boundaries of the territory, nor had previously been, but both of whom were residents and citizens of a state in the Union. Neither of the parties had placed himself or herself under the jurisdiction of Utah. Such being the case, it is well established that the court in Utah had, and could have, no jurisdiction to grant the divorce in question, and that the same is inoperative and utterly void. This is a question to be decided by the jus gentium, the law of nations, the first principles of which are, that all nations, in respect to rights, are equal, and that each is sovereign within its own territory, with jurisdiction over the persons and prop-

[56]People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260.

erty therein.[57] Hood, when the divorce in question was granted, was under a jurisdiction other than that of Utah. It is further settled that the states of the Union, as between themselves, are sovereignties. In determining this question of jurisdiction therefore, we have only to inquire what jurisdiction the state of Indiana has over the people and property within the territory of Utah; for, on this point, the states and territories are severally equal. What jurisdiction Illinois can exercise over residents and property in Indiana, Indiana can exercise over residents and property in Illinois.

"To place this matter in another light, a state may authorize divorces to be granted by legislative act. Suppose, then, that the legislature of Utah had granted this divorce (neither of the parties being citizens or inhabitants of the territory), severing a domestic relation between two citizens of, and residents in Indiana, would anyone claim that the divorce would be valid? If it would be, then it follows that the state of Indiana can confer upon her legislature power to divorce, by statutory enactment, husbands and wives, citizens and residents of Utah, or of Illinois or Ohio. And if so, what becomes of the doctrine of the sovereignty of states and nations within their own respective territories? And if the legislature of Utah can not grant divorces to residents and citizens of foreign states, it can not confer such power upon the judiciary of the state. Certainly, as a general proposition, states and nations can not exercise such extra-territorial jurisdiction. But we need not enlarge upon these established elementary principles. The case before us is too plain to admit of argument. It is shortly this: Hood desired to obtain a divorce from his wife. Neither of the parties was under the jurisdiction of Utah. The petition of Hood and the decree of divorce expressly state this fact. If he was not a citizen and resident of Utah, he was of some other state or nation. Still the court of Utah grants a divorce to a man who informs it, in his application, that he is under a jurisdiction other than that of the territory of Utah, and that he is not subject to hers. The divorce manifestly was granted in violation of the sovereignty and jurisdiction of another state, and in violation of the plainest principles of international and constitutional law. The provision in the statute of Utah, authorizing her courts to grant divorces

[57] 1 Kent Comm. 21.

to citizens of foreign states and nations, who were not, but desired to become, residents of Utah, was ultra vires, and void."[58]

§ 561. **Effect of vacation.**—The vacation of the decree renders it void ab initio and restores the parties to their previous marital rights.[59]

[58]Hood v. State, 56 Ind. 263, 26 Am. Rep. 21.

[59]Beaver v. Bess, 58 Ind. App. 287, 108 N. E. 266; Gato v. Christian, 112 Maine 427, 92 Atl. 489, Ann. Cas. 1917A, 592.

CHAPTER 37

DISMISSAL OF SUIT

Section

565. Dismissal in general.
566. General dismissal as bar to subsequent libel.
567. Dismissal without prejudice.

§ 565. **Dismissal in general.**—Where the court has jurisdiction of the parties and subject-matter, it may dismiss the libel before a hearing for any cause in its discretion, such as a resumption of cohabitation, or condonation, or an agreement between the parties to end the suit; or, after a hearing, when a good defense has been shown, such as collusion or recrimination, and such dismissal will be a bar to future actions upon a cause known at the time of bringing the libel.[1]

The suit may be dismissed for want of prosecution,[2] or where the plaintiff refuses to offer any evidence in support of the complaint.[3] The court may dismiss on his own motion where the court is without jurisdiction.[4] But a dismissal of a petition for divorce on the ground of separation because the statutory time of separation had not elapsed would not bar a suit on this ground after the statutory period had been fulfilled.[5] It is no ground for dismissal by the court that plaintiff had dismissed previous suits instituted by her.[6] As a general rule the plaintiff may dismiss at any time before entry of an interlocutory or final decree in the absence of any legal interest of the defendant or the state to the contrary.[7]

[1]Bartlett v. Bartlett, 113 Mass. 312, 18 Am. Rep. 493; Hood v. Hood, 110 Mass. 463; Lewis v. Lewis, 106 Mass. 309; Thurston v. Thurston, 99 Mass. 39; Fera v. Fera, 98 Mass. 155; Wagner v. Wagner, 36 Minn. 239, 30 N. W. 766; Ahlbom v. Ahlbom (Utah), 204 Pac. 99.

[2]Stone v. Stone, 162 Mich. 319, 127 N. W. 258.

[3]Stewart v. Stewart, 156 Cal. 651, 105 Pac. 955.

[4]Watts v. Watts, 130 Ga. 683, 61 S. E. 593; Hubner v. Hubner, 67 Ore. 557, 136 Pac. 667.

[5]Guillot v. Guillot, 42 R. I. 230, 106 Atl. 801.

[6]Jordan v. Jordan, 184 Ala. 408, 63 So. 1024.

[7]Barron v. Barron (Cal.), 96 Pac. 273; Milliman v. Milliman, 45 Colo. 291, 101 Pac. 58, 22 L. R. A. (N. S.) 999, 132 Am. St. 181; Eisenbach v. Eisenbach, 176 Mich. 354, 142 N. W.

He may not, however, discontinue after the respondent has filed a cross petition asking for a divorce from the petitioner.[8] Neither may the plaintiff dismiss his cause after its submission and particularly after the court has announced its decision.[9] He has the right to dismiss where no counterclaim or other affirmative relief is sought by defendant,[10] but not after a motion for a new trial has been overruled.[11] The denial of a motion for temporary alimony is not an implied consent by the court to the dismissal in a jurisdiction where the consent of the court to a dismissal is necessary.[12]

§ 566. **General dismissal as bar to subsequent libel.**—The general dismissal of a libel for insufficiency of proof will bar a subsequent libel.[13] But if new evidence has been discovered, or there has arisen any new ground for a libel, such a dismissal is not a bar.[14]

§ 567. **Dismissal without prejudice.**—Sometimes, for errors in the pleadings, lack of evidence, or other cause, libels are dismissed without the merits being heard and determined, or any adjudication of the issues involved. Such a dismissal is called a "dismissal without prejudice," and it is not a bar to a future libel for the same cause, as the facts have never been determined.[15]

345, Ann. Cas. 1917A, 1196; Coon v. Coon, 163 Mich. 644, 129 N. W. 12; Jones v. Jones, 59 Ore. 308, 117 Pac. 414.

[8]Borda v. Borda (R. I.), 117 Atl. 362. See also Keene v. Keene, 189 N. Y. S. 284; Borda v. Borda, 43 R. I. 384, 113 Atl. 118.

[9]Stauffer v. Stauffer (Mo. App.), 207 S. W. 240; Smith v. Smith (Ohio), 133 N. E. 792.

[10]Spencer v. Ensign, 33 Idaho 577, 196 Pac. 668.

[11]Frankenberg v. Frankenberg, 190 Ill. App. 444.

[12]Allen v. Allen, 188 Mich. 532, 155 N. W. 488.

[13]Bartlett v. Bartlett, 113 Mass. 312, 18 Am. Rep. 493.

[14]Morrison v. Morrison, 142 Mass. 361, 8 N. E. 59, 56 Am. Rep. 688; Edgerly v. Edgerly, 112 Mass. 53.

[15]Ashmead v. Ashmead, 23 Kans. 262.

CHAPTER 38

TRIAL—NEW TRIAL—APPEAL

Section

570. Trial procedure in general.
571. Time of hearing.
572. Continuances.
573. Exclusion of public from hearing.
574. Examination of witnesses by the court.
575. Questions of law and fact.
576. Reference.
577. Findings of the court.
578. Reopening case to hear additional evidence.
579. New trial.
580. Appeal.

§ 570. **Trial procedure in general.**—As a general rule where the rights of the parties are in substance protected, the proceedings in the trial of a divorce suit are largely in the discretion of the trial court, and such court is not restrained by the strict rules of procedure prevailing in other forms of action. The court represents the public and he is to be satisfied that this larger interest is protected against fraud and collusion.[1] Thus in a pro confesso suit by the wife the court may require the husband to appear and testify.[2] So, in the exercise of its discretion the court may require notice of its orders from time to time as may be necessary to a full presentation of the case.[3]

§ 571. **Time of hearing.**—Statutes fixing the time for the hearing of a divorce suit after the filing of the papers or after issue made and forbidding an earlier hearing are generally held mandatory.[4]

§ 572. **Continuances.**—The state has an interest in divorces and for this reason more liberality should be observed in granting continuances than is usual in other civil actions. This discretion,

[1]Converse v. Converse, 81 Fla. 671, 88 So. 609; Parramore v. Parramore, 61 Fla. 701, 55 So. 795.

[2]Rosecrance v. Rosecrance, 127 Mich. 322, 86 N. W. 800.

[3]Mohr v. Mohr, 81 Nebr. 499, 116 N. W. 267, 129 Am. St. 699.

[4]Beeler v. Beeler (Tex. Civ. App.), 218 S. W. 553; Barras v. Barras (Tex. Civ. App.), 217 S. W. 252.

of course, should be suitably and carefully exercised.[5] Thus, where the court in case of default believes there are facts which, if proved, would constitute a defense, it may continue the case with direction to the prosecuting attorney to investigate and produce the evidence at a future hearing.[6]

§ 573. **Exclusion of public from hearing.**—While the court may in the interest of public morals exclude immature persons from the courtroom during the hearing of a divorce case, it is doubtful whether it has the power to exclude the general public and proceed with the hearing behind closed doors.[7]

§ 574. **Examination of witnesses by the court.**—In the trial of a suit for divorce the court in the interest of the public may freely examine witnesses,[8] and may ask leading questions where a witness seems inclined to evade a disclosure.[9] Where the defendant does not appear it is the duty of the court as representative of the state, to elicit facts as to matrimonial offenses committed by plaintiff and to grant or withhold the decree accordingly.[10] The court is not precluded from examining witnesses as to essential facts by reason of their admission by the defendant in his answer.[11]

§ 575. **Questions of law and fact.**—What is a sufficient cause for divorce is a question of law.[12] And the question may also become one of law where the evidence in the case is so conclusive that reasonable minds can not differ as to the facts as shown by all the evidence.[13]

Among other things, the authorities regard the following questions as purely questions of fact: Whether defendant at the commencement of the action was a resident of the county where

[5]Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660; Gulland v. Gulland, 62 W. Va. 671, 59 S. E. 612. See also Clayton v. Clayton, 71 W. Va. 656, 77 S. E. 137. The application properly refused when the party delayed making it until the day set for hearing. Whitaker v. Whitaker (Del.), 111 Atl. 743.

[6]Patterson v. Patterson, 45 Wash. 296, 88 Pac. 196.

[7]Harkins v. Harkins (Iowa), 99 N. W. 154.

[8]Milster v. Milster 200 Mo. App. 603, 209 S. W. 620; McNabb v. McNabb (Tex. Civ. App.), 207 S. W. 129.

[9]Seeley v. Seeley, 64 N. J. Eq. 1, 53 Atl. 387.

[10]Eikenbury v. Eikenbury, 33 Ind. App. 69, 70 N. E. 837.

[11]Smith v. Smith, 10 N. Dak. 219, 86 N. W. 721.

[12]Hancock v. Hancock, 55 Fla. 680, 45 So. 1020, 15 L. R. A. (N. S.) 670.

[13]Moorhouse v. Moorhouse, 90 Ill. App. 401.

the action was brought;[14] whether the remaining away of a spouse who has left home is with the consent of the other spouse;[15] whether a request for the return of a spouse to the marital domicil was written in good faith;[16] whether defendant's treatment of plaintiff was such as to render their living together unsupportable;[17] whether the conduct alleged was such as to cause grievous mental pain;[18] whether separation was by consent;[19] whether acts of physical violence constitute cruelty;[20] whether the misconduct of the wife provoked the cruelty charged against the husband;[21] and whether the evidence showed facts amounting to a desertion.[22]

§ 576. **Reference.**—It is generally provided by statute that the court may in its discretion appoint a referee or commissioner to take and report the evidence in an action for divorce and in some jurisdictions to make findings subject to the confirmation of the trial court.[23] The consent of the parties to the appointment is generally required, but the appointment must be made by the court and not by the parties.[24] The appointment of a referee should be refused where the complaint does not contain sufficient allegations to warrant a decree of divorce.[25] The opinion of the master or referee is only advisory;[26] and the court may refuse to confirm his report.[27] Time should be given the parties to file

[14]Smith v. Smith, 136 Ga. 197, 71 S. E. 158; Walker v. Walker (Nev.), 198 Pac. 433; Michael v. Michael, 34 Tex. Civ. App. 630, 79 S. W. 74.

[15]McCord v. McCord, 140 Ga. 170, 78 S. E. 833.

[16]Bordeaux v. Bordeaux, 43 Mont. 102, 115 Pac. 25; Gordon v. Gordon, 208 Pa. 186, 57 Atl. 525.

[17]Dawson v. Dawson, 63 Tex. Civ. App. 108, 132 S. W. 379.

[18]Curl v. Curl, 130 Cal. 638, 63 Pac. 65; Mahnken v. Mahnken, 9 N. Dak. 188, 82 N. W. 870.

[19]McMillin v. McMillin, 140 Cal. 112, 73 Pac. 808.

[20]Lenning v. Lenning, 176 Ill. 180, 52 N. E. 46.

[21]Walton v. Walton, 57 Nebr. 102, 77 N. W. 392.

[22]Tipton v. Tipton, 169 Iowa 182, 151 N. W. 90, Ann. Cas. 1916C, 360.

[23]Young v. Young, 18 Minn. 90; Janvrin v. Janvrin, 57 N. H. 140; Moore v. Moore, 56 N. H. 512; Knott v. Knott (N. J. Eq.), 54 Atl. 559; Willard v. Willard, 194 App. Div. 123, 185 N. Y. S. 569; Middleton v. Middleton, 187 Pa. 612, 41 Atl. 291.

[24]Archuleta v. Archuleta, 52 Colo. 601, 123 Pac. 821; Winans v. Winans, 124 N. Y. 140, 26 N. E. 293; White v. White, 66 Misc. 592, 123 N. Y. S. 1082; Young v. Young, 38 Misc. 109, 77 N. Y. S. 94.

[25]Hancock v. Hancock, 55 Fla. 680, 45 So. 1020, 15 L. R. A. (N. S.) 670.

[26]Edgar v. Edgar, 23 Pa. Super. Ct. 220.

[27]Gorham v. Gorham, 40 App. Div. 564, 58 N. Y. S. 50; Breed v. Breed, 73 Pa. Super. Ct. 9.

exceptions to the report before the court may proceed to grant a final decree based thereon.[28] Where the court refuses to confirm the report of the referee a new trial before a new referee should be ordered.[29]

Irregularity in the appointment of referee may be waived.[30]

§ 577. **Findings of the court.**—Generally speaking a finding of the court that all the allegations contained in the complaint are true is equivalent to a finding for the plaintiff upon every issue raised by the complaint and the denials in the answer,[31] and a finding that all the allegations in the answer and cross-complaint—except those alleged in the complaint—are false, will amount to a direct finding on all the issues tendered by the affirmative allegations in the answer as well as the issues made by plaintiff's answer to the cross-complaint.[32] The findings should cover the matter in the recriminatory pleas.[33] But it has been held that a finding that defendant had committed the adultery charged amounted to a finding that there had been no condonation of the offense.[34]

Where the action is based on desertion by reason of a persistent refusal of matrimonial intercourse there should be a finding as to whether there was a just cause for such refusal.[35]

The finding must follow the language of the statute. Thus where the statute authorizes the divorce where the conduct of the husband renders it "unsafe and improper" for the wife to live with him a finding is insufficient, which merely recites that the conduct of the husband was "improper."[36]

§ 578. **Reopening case to hear additional evidence.**—In the exercise of the discretion given the courts in the consideration of divorce suits, a court may reopen such a case after both parties

[28]Seddon v. Seddon, 82 Fla. 48, 89 So. 348; Carsten v. Carsten, 90 N. J. Eq. 181, 107 Atl. 45.

[29]Bauer v. Bauer, 42 Misc. 557, 87 N. Y. S. 607.

[30]Markey v. State, 47 Fla. 38, 37 So. 53.

[31]Dracovich v. Dracovich (Cal. App.), 200 Pac. 44. See also Stampfli v. Stampfli (Cal. App.), 199 Pac. 829; Freeman v. Freeman, 238 Mass. 150, 130 N. E. 220. But see Callahan v. Callahan, 33 Idaho 241, 192 Pac. 660 (necessary to make findings on each charge of misconduct).

[32]Dracovich v. Dracovich (Cal. App.), 200 Pac. 44. See also Polakoff v. Polakoff (Cal. App.), 196 Pac. 778.

[33]Klemmer v. Klemmer (Cal. App.), 187 Pac. 85.

[34]Coonce v. Coonce, 296 Ill. 585, 130 N. E. 349.

[35]Ingraham v. Ingraham, 40 Cal. App. 578, 181 Pac. 234.

[36]Heinze v. Heinze, 107 Minn. 43, 119 N. W. 489.

have closed in order to receive additional evidence on a matter not fully brought out by either of the parties and necessary, in the opinion of the court to a fair determination of the suit.[37]

§ 579. **New trial.**—By a new trial is meant a re-examination of an issue of fact in the same court after a trial and decision.[38] Courts are generally held to have the inherent power to grant such a new trial.[39] The new trial may be granted on the ground of newly-discovered evidence as to material matter where the party making the motion shows that the failure to produce such evidence at the trial was not due to a lack of diligence on his part but not otherwise.[40] A new trial was properly granted for newly-discovered evidence, where defendant would be able to show at a new trial, that that woman with whom he was charged with having committed adultery, is in fact a virgin.[41] So, it was held proper to grant a new trial for newly-discovered evidence, on the affidavit of the prevailing party that his testimony was incorrect as to essential facts.[42] It is held that the fact that the plaintiff moved away from the state two days after the divorce was granted could not be considered as newly-discovered evidence affecting the material issue in the action for divorce for cruelty.[43]

It is held that the state has sufficient interest in a divorce case regardless of a lack of diligence in presenting the evidence for the defense to cause a decree to be set aside on motion for a new trial on a showing of deceit by the agents of the plaintiff.[44]

Where property rights are involved the new trial may be granted though the prevailing party has died since the com-

[37]Meyer v. Meyer, 187 Iowa 617, 174 N. W. 356.

[38]Texas & P. R. Co. v. Smith, 91 Ark. 362, 121 S. W. 282; Stockton Iron Co. v. Walters, 18 Cal. App. 373, 123 Pac. 240; Caldwell v. Wells, 16 Idaho 459, 101 Pac. 812.

[39]Woodward Iron Co. v. Brown, 167 Ala. 316, 52 So. 829; Carlisle v. Carlisle, 96 Mich. 128, 55 N. W. 673; Iba v. Chicago & C. R. Co., 172 Mo. App. 141, 157 S. W. 675; Ellis v. Hearn, 132 App. Div. 207, 116 N. Y. S. 977; Todd v. Orr, 44 Okla. 459, 145 Pac. 393; Linxwiler v. Linxwiler (Tex. Civ. App.), 175 S. W. 1128; Crawford v. O'Shea, 75 Wash. 33, 134 Pac. 486. But see Scolardi v. Scolardi, 42 R. I. 456, 108 Atl. 651.

[40]Smith v. Smith, 75 N. J. Eq. 5, 65 Atl. 986; Kapitola v. Kapitola, 189 App. Div. 459, 178 N. Y. S. 734; Kinsey v. Kinsey, 146 App. Div. 549, 131 N. Y. S. 151; Walden v. Walden, 113 Wash. 677, 194 Pac. 544.

[41]Shaw v. Shaw, 140 N. Y. S. 388; Walker v. Walker (R. I.), 86 Atl. 894.

[42]Kennedy v. Kennedy, 27 Nev. 152, 77 Pac. 597.

[43]Whise v. Whise, 36 Nev. 16, 131 Pac. 967, 44 L. R. A. (N. S.) 689.

[44]Beauley v. Beauley, 190 N. Y. S. 129.

mencement of the proceedings for a new trial.[45] There is authority that the new trial may be granted on one of the issues without granting it as to another.[46]

§ 580. **Appeal.**—An appellate court will generally presume that the lower court gave due consideration to the evidence adduced and where the evidence is not before it, that the findings of the lower court were supported by the evidence. All intendments are in favor of the decree as rendered.[47] Where the matter in controversy refers to the final decree or some interlocutory incident within the discretion of the trial court, the appellate court will interfere only where there is a clear case of abuse of this discretion.[48]

The appellate court is inclined to defer largely to the findings and conclusions arrived at by the trial court on the merits of the case and very generally it will not disturb these conclusions unless they lack substantial support in the evidence. And the evidence should be viewed from a standpoint that will give it the strongest weight to sustain the findings and conclusions of the trial court, especially where the evidence is conflicting.[49] The

[45]Tarbox v. Tarbox, 120 Maine 407, 115 Atl. 164.

[46]Hall v. Hall, 131 N. Car. 185, 42 S. E. 562.

[47]White v. White, 206 Ala. 231, 89 So. 579; Curl v. Curl, 130 Cal. 638, 63 Pac. 65; Dillon v. Dillon, 45 Cal. App. 191, 187 Pac. 27; Dupes v. Dupes, 43 Cal. App. 67, 184 Pac. 425; Rybakowicz v. Rybakowicz, 290 Ill. 550, 125 N. E. 370; Turner v. Turner, 26 Ind. App. 677, 60 N. E. 718; Given v. Given, 25 Pa. Super. Ct. 467; Sandall v. Sandall, 57 Utah 150, 193 Pac. 1093, 15 A. L. R. 620.

[48]Polakoff v. Polakoff, 51 Cal. App. 359, 196 Pac. 778; Wolf v. Wolf, 121 Ga. 113, 48 S. E. 691; Darman v. Darman, 38 Ind. App. 279, 78 N. E. 89; Scribner v. Scribner, 93 Minn. 195, 101 N. W. 163; Nolker v. Nolker (Mo. App.), 208 S. W. 128; Davis v. Davis (Mo. App.), 206 S. W. 580; Carmichael v. Carmichael, 101 Ore. 172, 199 Pac. 385; Smith v. Smith, 15 Pa. Super. Ct. 366; Camire v. Camire, 43 R. I. 489, 113 Atl. 748; Paine v. Paine, 43 R. I. 478, 113 Atl. 658; Dickerson v. Dickerson (Tex. Civ. App.), 207 S. W. 941; Jarrard v. Jarrard, 116 Wash. 70, 198 Pac. 741; Weidert v. Weidert, 106 Wash. 410, 180 Pac. 135.

[49]Jenkins v. Jenkins, 265 Fed. 1015; Davis v. Davis, 48 App. D. C. 362; Le May v. Le May, 205 Ala. 694, 89 So. 49; Pruitt v. Pruitt, 205 Ala. 484, 88 So. 451; Meyer v. Meyer, 184 Cal. 687, 195 Pac. 387; Davis v. Davis (Cal. App.), 207 Pac. 923; Dracovich v. Dracovich (Cal. App.), 200 Pac. 44; Daroux v. Daroux (Cal. App.), 199 Pac. 1112; Van Camp v. Van Camp, 53 Cal. App. 17, 199 Pac. 885; Stampfli v. Stampfli (Cal. App.), 199 Pac. 829; Dupes v. Dupes, 43 Cal. App. 67, 184 Pac. 425; Broderick v. Broderick, 40 Cal. App. 550, 181 Pac. 402; Ingraham v. Ingraham, 80 Fla. 75, 85 So. 666; Rivers

rule is the same as to verdicts of the jury,[50] and the findings of a referee confirmed by the court.[51]

The trial court and the jury are the exclusive judges of the credibility of the witnesses for the reason that they have the better opportunity to judge of this matter because of seeing and noting the demeanor of the witnesses at the time of their examination.[52] Here, as elsewhere, the error to work reversal must be prejudicial error. The courts will refuse to interfere where the errors pointed out are harmless and do not prejudice the complaining party as to any substantial right.[53] Thus, the error

v. Rivers, 33 Idaho 349, 194 Pac. 94; Callahan v. Callahan, 33 Idaho 241, 192 Pac. 660; Piatt v. Piatt, 32 Idaho 407, 184 Pac. 470; Eward v. Eward (Ind. App.), 125 N. E. 468; McFarlin v. McFarlin, 109 Kans. 431, 199 Pac. 472; Hammond v. Hammond (Mass.), 132 N. E. 724; Purdy v. Purdy, 238 Mass. 506, 131 N. E. 297; Freeman v. Freeman, 238 Mass. 150, 130 N. E. 220; Ellebrecht v. Ellebrecht (Mo. App.), 243 S. W. 209; Nelson v. Nelson (Mo. App.), 242 S. W. 1002; Mason v. Mason (Mo. App.), 233 S. W. 263; Welday v. Welday (Mo. App.), 232 S. W. 1042; Brant v. Brant (Mo. App.), 230 S. W. 325; Carter v. Carter (Mo. App.), 229 S. W. 231; O'Hern v. O'Hern, 206 Mo. App. 651, 228 S. W. 533; Milster v. Milster, 200 Mo. App. 603, 209 S. W. 620; Wehrenbrecht v. Wehrenbrecht, 200 Mo. App. 452, 207 S. W. 290; Walker v. Walker (Nev.), 198 Pac. 433; Stieber v. Stieber, 82 Okla. 205, 200 Pac. 141; Johnson v. Johnson, 72 Okla.—, 179 Pac. 595; Hamilton v. Hamilton, 100 Ore. 404, 196 Pac. 472; Stout v. Stout, 99 Ore. 133, 195 Pac. 153; Cox v. Cox, 98 Ore. 148, 193 Pac. 482; Wilhelm v. Wilhelm, 90 Ore. 435, 177 Pac. 57; Wark v. Wark, 73 Pa. Super. Ct. 274; Reilly v. Reilly (Tex. Civ. App.), 233 S. W. 379; Wagley v. Wagley (Tex. Civ. App.), 230 S. W. 493; Taylor v. Taylor (Vt.), 112 Atl. 355; Twohy v. Twohy, 130 Va. 557, 107 S. E. 642; McCarthy v. McCarthy, 116 Wash. 360, 199 Pac. 733; Walden v. Walden, 113 Wash. 677, 194 Pac. 544.

[50]Geisseman v. Geisseman, 34 Colo. 481, 83 Pac. 635; Stafford v. Stafford, 299 Ill. 438, 132 N. E. 452, 20 A. L. R. 827; Leffel v. Leffel, 35 Ind. 76; Creech v. Creech, 126 Mich. 267, 85 N. W. 726.

[51]Maher v. Maher, 73 Pa. Super. Ct. 327; Blind v. Blind, 71 Pa. Super. Ct. 396.

[52]Stedman v. Stedman, 179 Cal. 288, 176 Pac. 437; Dupes v. Dupes, 43 Cal. App. 67, 184 Pac. 425; Moore v. Moore, 88 Ill. 98; Gilbert v. Randazzo, 112 La. 1055, 36 So. 852; Cummings v. Cummings, 50 Mich. 305, 15 N. W. 485; Schulze v. Schulze, 83 App. Div. 375, 82 N. Y. S. 266.

[53]Daroux v. Daroux, 53 Cal. App. 223, 199 Pac. 1112; Dupes v. Dupes, 43 Cal. App. 67, 184 Pac. 425; Hockerston v. Hockerston, 41 Cal. App. 195, 182 Pac. 325; Morehouse v. Morehouse, 70 Conn. 420, 39 Atl. 516; Reynolds v. Reynolds, 151 Ga. 208, 106 S. E. 182; Dorian v. Dorian, 298 Ill. 24, 131 N. E. 129; Lenning v. Lenning, 176 Ill. 180, 52 N. E. 46; Griffith v. Griffith, 162 Ill. 368, 44 N. E. 820; Freeman v. Freeman, 238 Mass. 150, 130 N. E. 220; Lagier v. Lagier, 58 Mont. 267, 193 Pac. 392;

in the overruling of a demurrer to a complaint for abandonment was harmless where the bill was subsequently amended so as to charge adultery and the divorce was granted on that ground.[54] The appeal should be dismissed on the death of one of the parties pending the appeal.[55] The marriage of one of the parties pending the appeal will not be taken into consideration by the court.[56]

Lowenthal v. Lowenthal, 157 N. Y. 236, 51 N. E. 995.

[54]Gibson v. Gibson, 203 Ala. 466, 83 So. 478.

[55]Gloyd v. Superior Court in and for Los Angeles County, 44 Cal. App. 39, 185 Pac. 995.

[56]Womack v. Womack, 73 Ark. 281, 83 S. W. 1136; Branch v. Branch, 30 Colo. 499, 71 Pac. 632; Lagier v. Lagier, 58 Mont. 267, 193 Pac. 392.

CHAPTER 39

CUSTODY AND MAINTENANCE OF CHILDREN

Section

585. Jurisdiction of court.
586. Proceedings other than divorce.
587. Fitness of parents.
588. Custody pending divorce proceedings.
589. Grounds for award—Welfare of child.
590. Preference of children.
591. Agreement of parties as to custody.
592. Access of parents to child in custody of other spouse.
593. Nature and effect of order or decree for custody.
594. Modification of award.
595. Support of children of divorced persons in general.
596. Liability for maintenance where custody awarded but no provision for support.
597. Agreements between parties.
598. Orders fixing allowance and proceedings therefor.
599. Orders for support against nonresident father.
600. Change of amount allowed for support.
601. Termination of liability for support.

§ 585. **Jurisdiction of court.**—The provisions made by the court in a divorce case for the care and custody of the children of the parties thereto are based upon the discretion of the court as to what are the best interests of the children, and so many elements enter into its consideration that it is difficult to formulate a general rule, as each case must be determined on its own merits. Jurisdiction is usually conferred by the statutes regulating divorce in each state, and broad discretionary powers are granted for the purpose, and where the court has legal jurisdiction of the divorce case, the exercise of its discretion is conclusive unless abused.[1]

[1]Seeley v. Seeley, 30 App. D. C. 191; In re Cozza, 163 Cal. 514, 126 Pac. 161, Ann. Cas. 1914A, 214; Borgerson v. Borgerson (Cal. App.), 208 Pac. 991; Ibbetson v. Ibbetson, 52 Cal. App. 699, 199 Pac. 872; Nave v. Nave, 35 Cal. App. 27, 169 Pac. 253; Ex parte Saul, 31 Cal. App. 382, 160

The child of a divorced couple is considered a ward of the court rendering the decree of divorce[2] and this gives such court the right to determine question of the right to take child out of state.[3] The power of the courts as to custody is purely statutory.[4] The function belongs to the court and the verdict of a jury on the question is only advisory.[5]

It is not a violation of the federal Constitution to award the mother custody of the child without personal service on the father.[6] This is true even though the child is forcibly brought into the state by the mother for the purpose of giving jurisdiction.[7]

The child is not a necessary party to the proceeding[8] but the pleading should contain a special prayer for custody,[9] and this

Pac. 695; Simmons v. Simmons, 22 Cal. App. 448, 134 Pac. 791; Baker v. Baker, 4 Boyce (Del.) 438, 89 Atl. 131; Watts v. Watts, 151 Ga. 322, 106 S. E. 730; Miles v. Miles, 149 Ga. 47, 99 S. E. 120; Zachry v. Zachry, 140 Ga. 479, 79 S. E. 115; Donaldson v. Donaldson, 31 Idaho 180, 170 Pac. 94; Cowls v. Cowls, 3 Gilman (Ill.) 435, 44 Am. Dec. 708; Logan v. Logan, 90 Ind. 107; Bush v. Bush, 37 Ind. 164; Slatery v. Slatery, 139 Iowa 419, 116 N. W. 608; Hill v. Hill, 49 Md. 450, 33 Am. Rep. 271; Spratt v. Spratt (Minn.), 187 N. W. 227; White v. White, 77 N. H. 26, 86 Atl. 353; Flack v. Flack, 180 N. Car. 594, 105 S. E. 268; Rice v. Rice, 21 Tex. 58; Moore v. Moore (Tex. Civ. App.), 213 S. W. 949; Buckminster v. Buckminster, 38 Vt. 248, 88 Am. Dec. 652; Downing v. Downing, 108 Wash. 12, 182 Pac. 561; Norman v. Norman, 88 W. Va. 640, 107 S. E. 407; Jenkins v. Jenkins, 173 Wis. 592, 181 N. W. 826. The discretion must be a judicial discretion and not based on outside investigation. Cohn v. Scott, 231 Ill. 556, 83 N. E. 191, 121 Am. St. 342. See note, 41 L. R. A. (N. S.) 597.

[2]In re Krauthoff, 191 Mo. App. 149, 177 S. W. 1112; Hertzen v. Hertzen (Ore.), 208 Pac. 580. The court granting the divorce has jurisdiction though child is forcibly removed from the state. White v. White, 77 N. H. 26, 86 Atl. 353.

[3]Morrill v. Morrill, 83 Conn. 479, 77 Atl. 1; In re Krauthoff, 191 Mo. App. 149, 177 S. W. 1112; Wald v. Wald, 168 Mo. App. 377, 151 S. W. 786; Ex parte Ellerd, 71 Tex. Cr. 285, 158 S. W. 1145, Ann. Cas. 1916D, 361.

[4]Salta v. Salta (N. H.), 116 Atl. 438; Addams v. State (Ohio St.), 135 N. E. 667.

[5]Cureton v. Cureton, 132 Ga. 745, 65 S. E. 65; Johnson v. Johnson, 131 Ga. 606, 62 S. E. 1044; Stafford v. Stafford, 299 Ill. 438, 132 N. E. 452, 20 A. L. R. 827; Kentz v. Kentz (Tex. Civ. App.), 209 S. W. 200.

[6]Kenner v. Kenner, 139 Tenn. 211, 201 S. W. 779, L. R. A. 1918E, 587.

[7]White v. White, 77 N. H. 26, 86 Atl. 353.

[8]Kenner v. Kenner, 139 Tenn. 211, 700, 201 S. W. 779, 202 S. W. 723.

[9]Wells v. Wells, 11 App. D. C. 392; Vine v. Vine, 12 Cal. App. 458, 107 Pac. 702 (mention of children in court not sustained may be enough); Porter v. Porter, 190 Iowa 1126, 181 N. W. 393; Mitchell v. Mitchell, 28 Nev. 110, 79 Pac. 50.

is frequently made necessary by statute.[10]

Where divorce is denied there is confusion in the decisions as to whether custody of the children can be decreed to either party.[11] In some jurisdictions the court may proceed with the decree for custody of children on entry of the interlocutory decree without waiting until entry of final decree of divorce.[12] As a general rule the jurisdiction of the court will continue throughout minority of children of divorced persons,[13] and it has the power at all times to enforce its orders for custody of children.[14]

§ 586. **Proceedings other than divorce.**—It is now generally established that a court under its equity powers has authority to decree care and custody of the child to the mother even though she does not petition for divorce, where she establishes her right to separation.[15]

And even where separation is not decreed but the facts warrant such a decree in favor of the wife, the court may award such custody to her.[16] Where, however, the allegations in the petition for separation are not sustained the court has no power to award her exclusive custody of the children.[17]

§ 587. **Fitness of parents.**—Under most modern statutes the father and mother if not unsuitable, are equally entitled to the custody of the children.[18] The court should award custody to

[10]Thomas v. Thomas, 250 Ill. 354, 95 N. E. 345, 35 L. R. A. (N. S.) 1158, Ann. Cas. 1912B, 344; Austin's Estate, 173 Mich. 47, 138 N. W. 237, Ann. Cas. 1914D, 749.

[11]That there is jurisdiction see Horton v. Horton, 75 Ark. 22, 86 S. W. 824, 5 Ann. Cas. 91; Bensen v. Bensen, 20 Cal. App. 462, 129 Pac. 596; Ex parte Cooper, 86 Kans. 573, 121 Pac. 334; Workman v. Workman, 191 Ky. 124, 229 S. W. 379. See notes, 35 L. R. A. (N. S.) 1158; Ann. Cas. 1912B, 350. That there is no jurisdiction see Thomas v. Thomas, 250 Ill. 354, 95 N. E. 345, 35 L. R. A. (N. S.) 1158, Ann. Cas. 1912B, 344; Murray v. Murray, 134 Md. 653, 107 Atl. 550; Redding v. Redding (N. J. Eq.), 85 Atl. 712; Lesser v. Lesser, 114 Misc. 701, 188 N. Y. S. 12. See note, 5 Ann. Cas. 91.

[12]Pereira v. Pereira, 156 Cal. 1, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. 107.

[13]Willson v. Willson, 84 Wash. 240, 146 Pac. 615.

[14]Karr v. Rust, 217 Ill. App. 555; Flack v. Flack, 180 N. Car. 594, 105 S. E. 268; Dyer v. Dyer, 65 Wash. 535, 118 Pac. 634. See also Early v. Early, 261 Fed. 1003.

[15]Jacobs v. Jacobs, 136 Minn. 190, 161 N. W. 525, L. R. A. 1917D, 971.

[16]Allers v. Allers, 194 App. Div. 96, 185 N. Y. S. 440.

[17]Towson v. Towson, 258 Fed. 517.

[18]Newby v. Newby (Cal. App.), 202 Pac. 891; Spratt v. Spratt (Minn.), 187 N. W. 227; Delle v. Delle, 112 Wash. 512, 192 Pac. 966. But see Page v. Page, 166 N. Car. 90, 81 S. E. 1060.

one of the parents unless both are unfit or unable properly to care for the children.[19]

Where the children are of tender years, other things being equal, the mother is preferred as their custodian, and this more especially in the case of female children,[20] and this though she may have been guilty of delinquencies in the past but there is no evidence that she was delinquent at the time of determining the matter by the court.[21] This has been held the rule in cases where the mother was fit and her delinquency consisted in a remarriage in violation of the decree of divorce.[22] The question is always to be determined by fitness of the parents. Where the mother is morally unfit to raise the child, then custody should be withheld from her and given to the father unless he is disqualified for the same reason.[23] The father may lose the right of custody by his

[19]Piatt v. Piatt, 32 Idaho 407, 184 Pac. 470; Stafford v. Stafford, 299 Ill. 438, 132 N. E. 452, 20 A. L. R. 827; Tines v. Tines (Mo. App.), 216 S. W. 563; Buseman v. Buseman, 83 W. Va. 496, 98 S. E. 574.

[20]Anderson v. Anderson, 165 Ala. 181, 51 So. 619; McFadden v. McFadden, 22 Ariz. 246, 196 Pac. 452; Meffert v. Meffert, 118 Ark. 582, 177 S. W. 1; Wann v. Wann, 85 Ark. 471, 108 S. W. 1052; In re Cozza, 163 Cal. 514, 126 Pac. 161, Ann. Cas. 1914A, 214; Brown v. Brown, 132 Ga. 712, 64 S. E. 1092, 131 Am. St. 229; Hines v. Hines, 192 Iowa 569, 185 N. W. 91; Cline v. Cline, 183 Iowa 1255, 166 N. W. 698; In re Hickey, 85 Kans. 556, 118 Pac. 56, 41 L. R. A. (N. S.) 564; Stephens v. Stephens, 194 Ky. 180, 238 S. W. 380; Riggins v. Riggins, 191 Ky. 22, 228 S. W. 1030; Hoffman v. Hoffman, 190 Ky. 13, 226 S. W. 119; Caudill v. Caudill, 172 Ky. 460, 189 S. W. 431; Wills v. Wills, 168 Ky. 35, 181 S. W. 619; Shallcross v. Shallcross, 135 Ky. 418, 122 S. W. 223; Chandler v. Chandler, 149 La. 427, 89 So. 312; Baurens v. Giroux, 123 La. 879, 49 So. 605; Haskell v. Haskell, 152 Mass. 16, 24 N. E. 859; Hazelton v. Hazelton, 162 Mich. 192, 127 N. W. 297; Messenger v. Messenger, 56 Mo. 329; Martin v. Martin (Mo. App.), 238 S. W. 525; Fisher v. Fisher (Mo. App.), 207 S. W. 261; Zerega v. Zerega (Mo. App.), 200 S. W. 700; Boxa v. Boxa, 92 Nebr. 78, 137 N. W. 986; Power v. Power, 66 N. J. Eq. 320, 58 Atl. 192, 105 Am. St. 653; Barnes v. Long, 54 Ore. 548, 104 Pac. 296, 25 L. R. A. (N. S.) 172, 21 Ann. Cas. 465; Smith v. Frates, 107 Wash. 13, 180 Pac. 880; Freeland v. Freeland, 92 Wash. 482, 159 Pac. 698; Guerin v. Guerin, 45 Wash. 486, 88 Pac. 928; Gallagher v. Gallagher, 174 Wis. 32, 182 N. W. 323; Jenkins v. Jenkins, 173 Wis. 592, 181 N. W. 826. See note, 41 L. R. A. (N. S.) 597.

[21]Harmon v. Harmon, 111 Kans. 786, 208 Pac. 647; Crabtree v. Crabtree, 154 Ark. 401, 242 S. W. 804; Sorge v. Sorge, 112 Wash. 131, 191 Pac. 817; Twohig v. Twohig, 176 Wis. 275, 186 N. W. 592.

[22]Vickers v. Faubion (Tex. Civ. App.), 224 S. W. 803; Jensen v. Jensen, 168 Wis. 502, 170 N. W. 735.

[23]Burton v. Burton, 184 Ky. 268, 211 S. W. 869; Pangle v. Pangle, 134 Md. 166, 106 Atl. 337. Goodspeed v.

conduct towards the child or its mother, and the custody may be awarded the mother in a divorce case, based on his bad conduct and unfitness,[24] as where this unfitness is shown by his cruel treatment of the mother,[25] or his adultery,[26] or where the decree is against him for habitual drunkenness,[27] or on the ground of non-support.[28] The courts are inclined to award the custody to the innocent party on granting a divorce.[29] Where all things are equal the right of father is superior under the common law.[30] The court will be sustained in giving custody to the father in cases where he is the better qualified for rearing the child by reason of affection, means, and needed facilities.[31] He should be given the custody in cases where he is fit and the mother is shown to be of unchaste character,[32] or where the mother will rear them among immoral surroundings,[33] or where the mother voluntarily parted with the child and the father continued to keep it,[34] or

Goodspeed, 204 Mich. 44, 170 N. W. 90; Bakley v. Bakley (N. J.), 111 Atl. 307; O'Neil v. O'Neil, 112 Wash. 160, 191 Pac. 849; Smith v. Frates, 107 Wash. 13, 180 Pac. 880.

[24]Green v. Green, 52 Iowa 403, 3 N. W. 429; McBride v. McBride, 1 Bush. (Ky.) 15; State v. Smith, 6 Greenl. (Maine) 462, 20 Am. Dec. 324; Jackson v. Jackson, 8 Ore. 402; Lyle v. Lyle, 86 Tenn. 372, 6 S. W. 878; Wells v. Wells, 99 Wash. 492, 169 Pac. 970, L. R. A. 1918C, 291; Welch v. Welch, 33 Wis. 534.

[25]Moore v. Moore, 192 Iowa 394, 184 N. W. 732; Schnuck v. Schnuck, 163 Ky. 133, 173 S. W. 347; Pope v. Pope, 161 Ky. 104, 170 S. W. 504; Rieden v. Rieden, 206 Mich. 550, 173 N. W. 362; Hauber v. Hauber, 170 Mo. App. 71, 156 S. W. 54; Folkenberg v. Folkenberg, 58 Ore. 267, 114 Pac. 99; Hebden v. Hebden, 111 Wash. 699, 191 Pac. 391; Norman v. Norman, 88 W. Va. 640, 107 S. E. 407.

[26]McNeir v. McNeir, 76 Misc. 661, 129 N. Y. S. 481.

[27]Anderson v. Anderson, 152 Ky. 773, 154 S. W. 1.

[28]Seigmund v. Seigmund, 46 Wash. 572, 90 Pac. 913.

[29]Caldwell v. Caldwell, 141 Iowa 192, 119 N. W. 599. But see Austin v. Austin, 173 Mich. 47, 138 N. W. 237, Ann. Cas. 1914D, 749.

[30]Baker v. Durham, 95 Ark. 355, 129 S. W. 789; Kennedy v. Kennedy (Mo. App.), 182 S. W. 100 (boy 12 years old); Brenneman v. Hildebrandt, 137 Mo. App. 82, 119 S. W. 452; Denny v. Denny, 118 Va. 79, 86 S. E. 835.

[31]Burton v. Burton, 184 Ky. 268, 211 S. W. 869; Duncan v. Duncan, 119 Miss. 271, 80 So. 697; Tines v. Tines (Mo. App.), 216 S. W. 563; Boles v. Boles, 60 Mont. 411, 199 Pac. 912; Buseman v. Buseman, 83 W. Va. 496, 98 S. E. 574.

[32]Cohn v. Scott, 231 Ill. 556, 83 N. E. 191, 121 Am. St. 342; Moyer v. Moyer, 75 N. J. Eq. 439, 72 Atl. 965 (divorce granted for adultery of wife); Cozard v. Cozard, 48 Wash. 124, 92 Pac. 935 (divorce granted for adultery of wife).

[33]Blid v. Blid, 82 Nebr. 294, 117 N. W. 700.

[34]Rose v. Rose, 90 Ark. 16, 117 S. W. 752. See also Hayden v. Hayden, 74 Kans. 725, 88 Pac. 257.

where the wife abandons the home,[35] or where the mother's treatment of them has been such as to endanger their health and injure their disposition.[36]

So, a parent may be awarded custody in preference to a third person, on the death of the custodian, provided he or she is shown to be fit and competent.[37] It may be that the court will conclude that neither party is fit to have the custody of the children, and they may in such case be placed in the care and custody of third persons, who may or may not be relatives.[38] But it is the general rule that unless incompetent or unfit the parent will be preferred to the grandparents.[39]

§ 588. **Custody pending divorce proceedings.**—Courts have authority, in their discretion, to make such orders and decrees for the care and custody of children while the divorce proceedings are pending, as they may consider expedient, although, as a rule, the custody of the children will not be changed pending the suit unless there appears to be good cause for the same.[40]

The court may make orders with regard to custody while an appeal is pending from the divorce decree.[41] An appeal will not lie from the order for the custody of children pending the suit for divorce.[42]

[35]Ullman v. Ullman, 151 App. Div. 419, 135 N. Y. S. 1080.

[36]Penn v. Penn, 37 Okla. 650, 133 Pac. 207.

[37]People v. Gorham (Colo.), 203 Pac. 661; Stafford v. Stafford, 299 Ill. 438, 132 N. E. 452, 20 A. L. R. 827; In re Crews, 106 Kans. 438, 186 Pac. 498; Chumos v. Chumos, 105 Kans. 374, 184 Pac. 736.

[38]Piatt v. Piatt, 32 Idaho 407, 184 Pac. 470; Keesling v. Keesling, 42 Ind. App. 361, 85 N. E. 837 (grandparents); Collins v. Collins, 76 Kans. 93, 90 Pac. 809; Adams v. Adams, 1 Duv. (Ky.) 167; Lambert v. Lambert, 16 Ore. 485, 19 Pac. 459; Rice v. Rice, 21 Tex. 58; Ex parte Ellerd, 71 Tex. Cr. 285, 158 S. W. 1145; Jaques v. Jaques, 58 Utah 265, 198 Pac. 770. Properly awarded to sister of father where mother unchaste. Bottom v. Bottom, 143 Ky. 666, 137 S. W. 198.

[39]Baker v. Durham, 95 Ark. 355, 129 S. W. 789.

[40]Pereira v. Pereira, 156 Cal. 1, 103 Pac. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. 107; Jones v. Jones (Cal. App.), 192 Pac. 867; Gilpin v. Gilpin, 12 Colo. 504, 21 Pac. 612; Foss v. Foss, 100 Ill. 576; Satterwhite v. Satterwhite, 144 La. 308, 80 So. 547; Day v. Day, 4 Misc. 235, 24 N. Y. S. 873, 53 N. Y. St. 638; Scoggins v. Scoggins, 80 N. Car. 318; Goodman v. Goodman (Tex. Civ. App.), 224 S. W. 207. See however Page v. Page, 166 N. Car. 90, 81 S. E. 1060 (holding that the court should not award the custody of a child, pending an appeal from a judgment in a divorce suit, to a parent who lives out of the state).

[41]Early v. Early, 261 Fed. 1003.

[42]Goodman v. Goodman (Tex. Civ App.), 224 S. W. 207.

In fixing alimony pendente lite the court may consider the fact that the wife is supporting the minor.[43]

It would seem that the court is without power to enter an order allowing the custodian to take the child out of the jurisdiction of the court pending the divorce hearing.[44]

§ 589. **Grounds for award—Welfare of child.**—The court, in decreeing the care and custody of the children to either the father or mother, should, and usually does, consult the interests and feelings of the children, rather than the desires of the parents.[45] The end to be sought is the best interest of the child. Its welfare is paramount to the rights and privileges of either of the parents.[46] This issue is to be decided from all the facts of which the court has obtained knowledge in a competent manner.[47] In deciding this question the court will take into consideration everything that pertains to the interest of the children, the property of the parents, the expectations of either parent, the relative educational, social, and moral advantages, and the care and love

[43]Hood v. Hood, 138 Md. 355, 113 Atl. 895, 15 A. L. R. 774.

[44]State v. District Court, 58 Mont. 316, 195 Pac. 549.

[45]Shehan v. Shehan, 152 Ky. 191, 153 S. W. 243; Dimmitt v. Dimmitt, 167 Mo. App. 94, 150 S. W. 1107; Welch v. Baker, 83 N. J. Eq. 330, 90 Atl. 1122; Ex parte Madson, 25 Wyo 338, 169 Pac. 336.

[46]Snow v. Snow, 280 Fed. 1013; Seeley v. Seeley, 30 App. D. C. 191; Beyerle v. Beyerle, 155 Cal. 266, 100 Pac. 702; Pearson v. Pearson, 179 Ill. App. 127; Smith v. Smith, 155 Ill. App. 14; Keesling v. Keesling, 42 Ind. App. 361, 85 N. E. 837; Ladd v. Ladd, 188 Iowa 351, 176 N. W. 211; Burton v. Burton, 184 Ky. 268, 211 S. W. 869; Colson v. Colson, 153 Ky. 68, 154 S. W. 380; Shehan v. Shehan, 152 Ky. 191, 153 S. W. 243; Davis v. Davis, 140 Ky. 526, 131 S. W. 266; Pangle v. Pangle, 134 Md. 166, 106 Atl. 337; Arix v. Arix, 212 Mich. 438, 180 N. W. 463; Eberhart v. Eberhart, 149 Minn. 192, 183 N. W. 140; Wandersee v. Wandersee, 132 Minn. 321, 156 N. W. 348; Duncan v. Duncan, 119 Miss. 271, 80 So. 697; Kaplun v. Kaplun (Mo. App.), 227 S. W. 894; Knepper v. Knepper, 139 Mo. App. 493, 122 S. W. 1117; Hammond v. Hammond, 103 Nebr. 860, 174 N. W. 865; Chamberlin v. Chamberlin, 194 App. Div. 470, 185 N. Y. S. 98; People ex rel. Multer v. Multer, 107 Misc. 58, 175 N. Y. S. 526; Morris v. Morris, 81 Okla. 222, 198 Pac. 70; Johnson v. Johnson, 102 Ore. 407, 202 Pac. 722; Merges v. Merges, 94 Ore. 246, 186 Pac. 36; McKissick v. McKissick, 93 Ore. 644, 174 Pac. 721, 184 Pac. 272; Holm v. Holm, 44 Utah 242, 139 Pac. 937; Barnard v. Barnard (Va.), 111 S. E. 227; McClain v. McClain, 115 Wash. 237, 197 Pac. 5, 202 Pac. 173; Ericson v. Ericson, 114 Wash. 485, 195 Pac. 234; Sorge v. Sorge, 112 Wash. 131, 191 Pac. 817; Smith v. Frates, 107 Wash. 13, 180 Pac. 880; Pierce v. Pierce, 52 Wash. 679, 101 Pac. 358; Jenkins v. Jenkins, 173 Wis. 592, 181 N. W. 826.

[47]Lefebvre v. Lefebvre, 48 Cal. App. 483, 192 Pac. 76.

which may be expected to be given them.[48] Children are not taken from one parent as a punishment for guilt or given to the other as a reward.[49]

The poverty of the mother is not always a good reason for refusing to give her custody of child where she is otherwise qualified to properly care for the child.[50]

Where a divorce is granted on the ground of adultery, the custody of the children is generally given to the innocent party.[51] But this rule does not always follow, as the interests or preference of the children may appear to be otherwise.[52]

§ 590. **Preference of children.**—If a minor child is of sufficient age and discretion to have an intelligent opinion of its own, and expresses a preference as to which parent it prefers to have the custody, the court will generally approve the preference,[53]

[48]Hernandez v. Thomas, 50 Fla. 522, 39 So. 641, 2 L. R. A. (N. S.) 203, 111 Am. St. 137, 7 Ann. Cas. 446; Cohn v. Scott, 231 Ill. 556, 83 N. E. 191, 121 Am. St. 342; Cowls v. Cowls, 3 Gilman (Ill.) 435, 44 Am. Dec. 708; Kline v. Kline, 57 Iowa 386, 10 N. W. 825, 42 Am. Rep. 47; In re Hickey, 85 Kans. 556, 118 Pac. 56, 41 L. R. A. (N. S.) 564; In re Bort, 25 Kans. 308, 37 Am. Rep. 255; Leplace v. Briere (La.), 92 So. 881; Hill v. Hill, 49 Md. 450, 33 Am. Rep. 271; Power v. Power, 66 N. J. Eq. 320, 58 Atl. 192, 105 Am. St. 653; In re Alderman, 157 N. Car. 507, 73 S. E. 126, 39 L. R. A. (N. S.) 988; McKim v. McKim, 12 R. I. 462, 34 Am. Rep. 694; Phillips v. Phillips (Tex. Civ. App.), 203 S. W. 77; Kentzler v. Kentzler, 3 Wash. 166, 28 Pac. 370, 28 Am. St. 21; Dawson v. Dawson, 57 W. Va. 520, 50 S. E. 613, 110 Am. St. 800; Cariens v. Cariens, 50 W. Va. 113, 40 S. E. 335, 55 L. R. A. 930. See notes, 65 Am. Dec. 356; 41 L. R. A. (N. S.) 603; 13 Eng. Rul. Cas. 56.

[49]Wand v. Wand, 14 Cal. 512; Miner v. Miner, 11 Ill. 43; Cowles v. Cowles, 3 Gilman (Ill.) 435, 44 Am. Dec. 708; Shine v. Shine (Mo. App.), 189 S. W. 403; Kenner v. Kenner, 139 Tenn. 700, 202 S. W. 723.

[50]Reitman v. Reitman, 168 Ky. 830, 183 S. W. 215; Gustin v. Gustin, 59 Ore. 226, 116 Pac. 1072; McKay v. McKay, 77 Ore. 14, 149 Pac. 1032.

[51]Kremelberg v. Kremelberg, 52 Md. 553; Arix v. Arix, 212 Mich. 438, 180 N. W. 463; Duncan v. Duncan, 119 Miss. 271, 80 So. 697; Small v. Small, 28 Nebr. 843, 45 N. W. 248; Uhlmann v. Uhlmann, 17 Abb. N. Cas. (N. Y.) 263.

[52]Anonymous, 55 Ala. 428; Reeves v. Reeves, 75 Ind. 342; Irwin v. Irwin, 96 Ky. 318, 28 S. W. 664, 30 S. W. 417.

[53]Williams v. Williams, 23 Fla. 324, 2 So. 768; Pope v. Pope, 161 Ky. 104, 170 S. W. 504; Shallcross v. Shallcross, 135 Ky. 418, 122 S. W. 223; Horning v. Horning, 107 Mich. 587, 65 N. W. 555; Von Bernuth v. Von Bernuth, 76 N. J. Eq. 200, 74 Atl. 252; English v. English, 32 N. J. Eq. 738; Johnson v. Johnson (Tex. Civ. App.), 102 S. W. 943; Dorsey v. Dorsey, 52 Utah 73, 172 Pac. 722. But see Stafford v. Stafford, 299 Ill. App. 438, 132 N. E. 452.

and make an award accordingly, always having in mind the welfare of the child.[54]

§ 591. **Agreement of parties as to custody.**—The court is not bound or controlled in the exercise of its discretion by any agreement between the parties to a divorce suit for the care or custody of the children; such agreements can not take away from the court the right to determine this question solely in the light of the welfare of the child.[55] The court may, however, approve of dispositions of the children made by good faith, stipulation and agreements between the parties where the provisions are fair and reasonable.[56] It is held that the party to whom custody is awarded may waive the exclusive right in favor of the other former spouse.[57]

§ 592. **Access of parent to child in custody of other spouse.**—The decree giving custody of the child should provide for access to the child by the other parent at seasonable and proper times unless there are extreme grounds for refusal,[58] as where, by reason of drunken habits the parent is unfit to associate with

[54]Burton v. Burton, 184 Ky. 268, 211 S. W. 869.

[55]Anderson v. Anderson (Cal. App.), 204 Pac. 426; Johnson v. Terry, 34 Conn. 259; Bailey v. Bailey, 157 Ill. App. 74; Carpenter v. Carpenter, 171 Mich. 572, 137 N. W. 250; Spratt v. Spratt (Minn.), 185 N. W. 509; Chamberlin v. Chamberlin, 193 App. Div. 784, 184 N. Y. S. 464; Cook v. Cook, 1 Barb. (N. Y.) 639; Buseman v. Buseman, 83 W. Va. 496, 98 S. E. 574. See note, 15 L. R. A. (N. S.) 746.

[56]Slattery v. Slattery, 139 Iowa 419, 116 N. W. 608.

[57]Speer v. Sykes, 102 Tex. 451, 119 S. W. 86, 132 Am. St. 896.

[58]McFadden v. McFadden, 22 Ariz. 246, 196 Pac. 452; Atkinson v. Atkinson, 169 Ark. 629, 178 S. W. 375; Haley v. Haley, 44 Ark. 429; Zimmerman v. Zimmerman, 242 Ill. 552, 90 N. E. 192; Burge v. Burge, 88 Ill. 164; Miner v. Miner, 11 Ill. 43; Hillenbrand v. Hillenbrand, 211 Ill. App. 624; In re Bort, 25 Kans. 308, 37 Am. Rep. 255; Burton v. Burton, 184 Ky. 268, 211 S. W. 869 (wife given right to visit child for a week at a time at quarterly intervals); Schnuck v. Schnuck, 163 Ky. 133, 173 S. W. 347; Hill v. Hill, 49 Md. 450, 33 Am. Rep. 271; Eberhart v. Eberhart (Minn.), 189 N. W. 592; Wilkins v. Wilkins, 84 Nebr. 206, 120 N. W. 907, 133 Am. St. 618; Powers v. Powers, 164 App. Div. 533, 150 N. Y. S. 213; Page v. Page, 161 N. Car. 170, 76 S. E. 619; Random v. Random, 41 N. Dak. 163, 170 N. W. 313; Hamilton v. Hamilton, 100 Ore. 404, 196 Pac. 472; Ex parte Ellerd, 71 Tex. Cr. 285, 158 S. W. 1145, Ann. Cas. 1916D, 361; McClaim v. McClaim (Wash.), 202 Pac. 173; Delle v. Delle, 112 Wash. 512, 192 Pac. 966; Sampson v. Sampson, 112 Wash. 1, 191 Pac. 840; Bedolfe v. Bedolfe, 71 Wash. 60, 127 Pac. 594.

the child.[59] This right would exist though nothing were said about the matter in the decree.[60] The court may withdraw custody from parent where the custodian makes visitation difficult and disagreeable.[61]

The decree may provide for alternate custody by the parents.[62]

§ 593. **Nature and effect of order or decree for custody.**—The decree of award is decisive upon the rights of the parents as long as it continues in force.[63] But it is to be remembered that it is temporary and under the control of the court and subject to modification.[64] The decree is not conclusive in habeas corpus proceedings involving the question of the unfitness of the parent arising since the decree.[65]

The order may be enforced by contempt proceedings.[66]

The decree of award of custody does not prevent the appointment of a guardian of the minor's estate by the proper court.[67]

§ 594. **Modification of award.**—Decrees for custody are generally regarded as temporary and are rarely made final but the court retains the power to modify them for cause shown, at any subsequent time, and where it once had jurisdiction of the parties and children, it may make a modification of its decree, even if the children are out of its jurisdiction.[68] The decree remains

[59]Shallcross v. Shallcross, 135 Ky. 418, 122 S. W. 223.

[60]Eaton v. Eaton (Mo. App.), 237 S. W. 896; Phipps v. Phipps, 168 Mo. App. 697, 154 S. W. 825.

[61]Davis v. Davis, 140 Ky. 526, 131 S. W. 266; Dimmitt v. Dimmitt, 167 Mo. App. 94, 150 S. W. 1107; Bedolfe v. Bedolfe, 71 Wash. 60, 127 Pac. 594.

[62]Barnard v. Barnard (Va.), 111 S. E. 227.

[63]Ex parte Cooper, 86 Kans. 573, 121 Pac. 334; Stone v. Duffy, 219 Mass. 178, 106 N. E. 595.

[64]Laplace v. Briere (La.), 92 So. 881; Wilkins v. Wilkins, 84 Nebr. 206, 120 N. W. 907, 133 Am. St. 618.

[65]Milner v. Gatlin, 143 Ga. 816, 85 S. E. 1045, L. R. A. 1916B, 977; Barlow v. Barlow, 141 Ga. 535, 81 S. E. 433, 52 L. R. A. (N. S.) 683; Hollenbeck v. Glover, 128 Ga. 52, 57 S. E. 108.

[66]Ex parte Cooper, 86 Kans. 573, 121 Pac. 334; Dixon v. Dixon, 76 N. J. Eq. 364, 74 Atl. 995.

[67]Stone v. Duffy, 219 Mass. 178, 106 N. E. 595.

[68]Beyerle v. Beyerle, 155 Cal. 266, 100 Pac. 702; Russell v. Russell, 20 Cal. App. 457, 129 Pac. 467; Wilson v. Mitchell, 48 Colo. 454, 111 Pac. 21, 30 L. R. A. (N. S.) 507; Morrill v. Morrill, 83 Conn. 479, 77 Atl. 1; Meadows v. Meadows, 78 Fla. 576, 83 So. 392; Stafford v. Stafford, 299 Ill. 438, 132 N. E. 452, 20 A. L. R. 827; Karr v. Rust, 217 Ill. App. 555; McDonald v. Short (Ind.), 130 N. E. 536; Cox v. Cox, 25 Ind. 303; Mitvalsky v. Mitvalsky, 191 Iowa 8, 179 N. W. 520; Andrews v. Andrews, 15 Iowa 423; Combs v. Combs, 99 Kans.

open and subject to modification until the children are of age.[69] The matter rests largely in the sound discretion of the court and will be interfered with, only in cases of clear abuse of such discretion.[70]

The question is not to be submitted to a referee.[71]

The modification must be based upon some change in circumstances,[72] or on the wishes of the children,[73] and always for their

626, 162 Pac. 273; Stratton v. Stratton, 73 Maine 481; Pangle v. Pangle, 134 Md. 166, 106 Atl. 337; Perkins v. Perkins, 225 Mass. 392, 114 N. E. 713; Oliver v. Oliver, 151 Mass. 349, 24 N. E. 51; Kaplun v. Kaplun (Mo. App.), 227 S. W. 894; State v. District Court, 46 Mont. 425, 128 Pac. 590, Ann. Cas. 1916B, 256; Hammond v. Hammond, 103 Nebr. 860, 174 N. W. 865; Salta v. Salta (N. H.), 116 Atl. 438; Rogers v. Rogers, 51 Ohio St. 1, 36 N. E. 310; Hoffman v. Hoffman, 15 Ohio St. 427; Morris v. Morris, 81 Okla. 222, 198 Pac. 70. See also Stewart v. Stewart, 32 Idaho 180, 180 Pac. 165; In re Alderman, 157 N. Car. 507, 73 S. E. 126, 39 L. R. A. (N. S.) 988. Contra, Williams v. Williams, 13 Ind. 523. Repeated attempts to change custody without grave reasons should be discouraged as detrimental to the child. Snow v. Snow, 280 Fed. 1013. Right to modify should be reserved in decree in order to permit motion after term and after court has lost jurisdiction. Sweeney v. Sweeney, 42 Nev. 431, 179 Pac. 638. Mother does not lose right to move for change by having stipulated for custody by third person. Curtis v. Curtis, 46 Wash. 664, 91 Pac. 188.

[69]Julian v. Julian, 60 Ind. App. 520, 111 N. E. 196; Ex parte Petitt, 84 Kans. 637, 114 Pac. 1071; Shallcross v. Shallcross, 135 Ky. 418, 122 S. W. 223; Stone v. Stone, 161 Mich. 565, 126 N. W. 710; Griffin v. Griffin, 154 Mich. 536, 118 N. W. 1; In re Krauthoff, 191 Mo. App. 149, 177 S. W. 1112; Phipps v. Phipps, 168 Mo. App. 697, 154 S. W. 825; Wald v. Wald, 168 Mo. App. 377, 151 S. W. 786.

[70]Lefebvre v. Lefebvre, 48 Cal. App. 483, 192 Pac. 76; Barish v. Barish, 190 Iowa 493, 180 N. W. 724; Novotny v. Novotny (Minn.), 189 N. W. 258; Kaplun v. Kaplun (Mo. App.), 227 S. W. 894; Jaques v. Jaques, 58 Utah 265, 198 Pac. 770; Calvert v. Calvert, 52 Utah 598, 176 Pac. 731; Gates v. Gates, 87 W. Va. 603, 105 S. E. 815.

[71]Nations v. Nations, 201 Mo. App. 639, 213 S. W. 511.

[72]Hayes v Hayes, 192 Ala. 280, 68 So. 351; Meffert v. Meffert, 118 Ark. 582, 177 S. W. 1; Ladd v. Ladd, 188 Iowa 351, 176 N. W. 211; Kinney v. Kinney, 150 Iowa 225, 129 N. W. 826; Duvall v. Duvall, 147 Ky. 426, 144 S. W. 78; State v. Trahan, 125 La. 312, 51 So. 216; Spratt v. Spratt (Minn.), 187 N. W. 297; Marshall v. Marshall (Mo. App.), 236 S. W. 378; Sabourin v. Sabourin (Mo. App.), 213 S. W. 490; Griffin v. Griffin, 95 Ore. 78, 187 Pac. 598; Merges v. Merges, 94 Ore. 246, 186 Pac. 36; McKay v. McKay, 77 Ore. 14, 149 Pac. 1032; Vickers v. Faubion (Tex. Civ. App.), 224 S. W. 803; Hall v. Whipple (Tex. Civ. App.), 145 S. W. 308; Beers v. Beers, 74 Wash. 458, 133 Pac. 605; Hodges v. Boggs, 90 W. Va. 404, 110 S. E. 823; Cariens v. Cariens, 50 W. Va. 113, 40 S. E. 335, 55 L. R. A. 930; Yates v. Yates, 157 Wis. 219, 147 N. W. 60; Lessig v. Lessig, 136 Wis. 403, 117 N. W. 792.

[73]Hullinger v. Hullinger, 133 Iowa

good, for that is the sole guide in all cases of custodianship.[74] Broadly stated the controlling considerations are a change of circumstances, the conduct of the custodial party, the morals of the parents, their financial condition, the age of the children and the devotion of either parent to the best interests of the children.[75] It is generally ground for modification that the custodial parent has attempted to wean the affections of the child from the other parent by abusive and slanderous statements;[76] accordingly a decree may be modified to give father custody at certain times instead of opportunity to see children where mother and her people were seeking to destroy affection for father who was kind and affectionate to children.[77] The case for modification is very clear where the custodial parent becomes insane,[78] or dies.[79] In the latter case the other parent becomes entitled to custody unless unfitness is shown in a contest therefor.[80]

The petition for change of custody must be supported by strong evidence showing that the welfare of the child would be benefited by the change.[81] The burden of proof on this issue is on the

269, 110 N. W. 470; Buritt v. Buritt, 53 Misc. 24, 102 N. Y. S. 475.

[74]Beyerle v. Beyerle, 155 Cal. 266, 100 Pac. 702; Farrell v. Farrell, 190 Iowa 919, 181 N. W. 12; Barish v. Barish, 190 Iowa 493, 180 N. W. 724; Shehan v. Shehan, 152 Ky. 191, 153 S. W. 243; Stone v. Duffy, 219 Mass. 178, 106 N. E. 595; Dailey v. Dailey, 166 Mich. 170, 131 N. W. 526 (abuse of child); Sabourin v. Sabourin (Mo. App.), 213 S. W. 490; Tatum v. Davis, 144 Mo. App. 125, 128 S. W. 766; Davis v. Davis, 150 N. Y. S. 636; Sanders v. Sanders, 167 N. Car. 317, 83 S. E. 489; Addams v. State (Ohio St.), 135 N. E. 667; McKissick v. McKissick, 93 Ore. 644, 174 Pac. 721, 184 Pac. 272; Matthews v. Matthews, 60 Ore. 451, 119 Pac. 766; Dyer v. Dyer, 65 Wash. 535, 118 Pac. 634; Curtis v. Curtis, 46 Wash. 664, 91 Pac. 188; Chappell v. Chappell, 45 Wash. 652, 89 Pac. 166. Not for the benefit of children who were well cared for in father's home to give custody to their mother who had no home but hoped to rent a house and establish a home. Delle v. Delle, 112 Wash. 512, 192 Pac. 960.

[75]Griffin v. Griffin, 95 Ore. 78, 187 Pac. 598. See also Julian v. Julian, 60 Ind. App. 520, 111 N. E. 196; Keesling v. Keesling, 42 Ind. App. 361, 85 N. E. 837. Children not to be taken from mother and given to father who has no home, and who intends that they shall live with his father and step-mother, both elderly people. Stanfield v. Stanfield, 22 Okla. 574, 98 Pac. 334.

[76]Kaplun v. Kaplun (Mo. App.), 227 S. W. 894.

[77]Johnson v. Johnson, 102 Ore. 407, 202 Pac. 722.

[78]Morin v. Morin, 66 Wash. 312, 119 Pac. 745, 37 L. R. A. (N. S.) 585.

[79]Purdy v. Ernst, 93 Kans. 157, 143 Pac. 429.

[80]Wilson v. Mitchell, 48 Colo. 454, 111 Pac. 21, 30 L. R. A. (N. S.) 507; People v. Hoxie, 175 Ill. App. 563; Clarke v. Lyon, 82 Nebr. 625, 118 N. W. 472, 20 L. R. A. (N. S.) 171.

[81]Jackson v. Jackson, 151 Ark. 9, 235 S. W. 47; Keys v. Keys, 211

petitioner.[82] Pleadings for this purpose may be amended to make them more definite.[83] It is necessary to show that the change of circumstances occurred after the rendition of the original decree of custody.[84] This may occur by reason of the remarriage of the custodian and the conditions thereby created are not beneficial to the child.[85] So a change to the mother may be authorized where her reform is satisfactorily established and the father has given custody to third person who made mother's visits very unpleasant.[86] The application for the change may be made by a third person where the custodian becomes unfitted and the other parent does not move for a change.[87]

Right to custody may be raised by habeas corpus proceeding.[88] Very generally, however, it is required that the matter be considered in the original and not in a collateral proceeding,[89] and on notice,[90] except where the matter is brought up before the

Mich. 279, 178 N. W. 641; Thorp v. Thorp, 46 N. Dak. 113, 180 N. W. 26; Morris v. Morris, 81 Okla. 222, 198 Pac. 70; Bokelkamp v. Bokelkamp, 106 Wash. 697, 180 Pac. 136; Boger v. Boger, 86 W. Va. 590, 104 S. E. 49; Buseman v. Buseman, 83 W. Va. 496, 98 S. E. 574.

[82]Nelson v. Nelson, 146 Ark. 362, 225 S. W. 619; Merges v. Merges, 94 Ore. 246, 186 Pac. 36; McKissick v. McKissick, 93 Ore. 644, 174 Pac. 721, 184 Pac. 272.

[83]Ericson v. Ericson, 114 Wash. 485, 195 Pac. 234.

[84]Church v. Church, 270 Fed. 359; Heavrin v. Spicer, 265 Fed. 977; Boyd v. Boyd, 70 Colo. 561, 203 Pac. 655; Eaton v. Eaton (Mo. App.), 237 S. W. 896; Earling v. Earling, 117 Wash. 584, 201 Pac. 908; Groves v. Barto, 109 Wash. 112, 186 Pac. 300; Gates v. Gates, 87 W. Va. 603, 105 S. E. 815. Not ground for change that mother given custody of child had become the housekeeper of a widower but there was nothing to show existence of improper relations. Reitmann v. Reitmann, 168 Ky. 830, 183 S. W. 215.

[85]Van Syckle v. Van Syckle, 168 App. Div. 924, 152 N. Y. S. 1047.

[86]Lindquist v. Lindquist, 148 Iowa 259, 126 N. W. 1109. Order denying a mother's petition for custody should provide that it should be without prejudice to her to apply for privilege touching the children based on her future good conduct. Bakley v. Bakley (N. J. Eq.), 65 Atl. 440.

[87]Stone v. Duffy, 219 Mass. 178, 106 N. E. 595.

[88]Milner v. Gatlin, 143 Ga. 816, 85 S. E. 1045, L. R. A. 1916B, 977.

[89]Nations v. Nations, 201 Mo. App. 639, 213 S. W. 511; Hertzen v. Hertzen (Ore.), 208 Pac. 580; Milner v. Gatlin (Tex. Civ. App.), 211 S. W. 617; Fullington v. Fullington, 106 Wash. 239, 179 Pac. 843.

[90]Morrill v. Morrill, 83 Conn. 479, 77 Atl. 1; Benjamin v. Benjamin, 78 Fla. 14, 82 So. 597; Blachly v. Blachly, 169 Iowa 489, 151 N. W. 447; Purdy v. Ernst, 93 Kans. 157, 143 Pac. 429; Jack v. Jack (Mo.), 243 S. W. 314; Brenneman v. Hildebrandt, 137 Mo. App. 82, 119 S. W. 452; Griffin v. Griffin, 95 Ore. 78, 187 Pac. 598; Mack v. Mack, 91 Ore.

close of the term at which the decree is rendered.[91] The court may consider the testimony given at the trial of the divorce,[92] and it is held that he may question the child privately as to his views.[93] It is not always required that the court should make formal findings of fact in support of the modification of the order.[94] The order on the motion for modification is generally held reviewable.[95]

The fact that the wife given custody of the child remarries and removes from the state has been held not such contempt of court as to prevent her from being heard on a motion by the former husband for a modification of the order.[96] Similarly, where the court reserves the right to make a permanent order on the application of either party, it is held that a parent does not lose her right to make the application by remarriage without the permission of the court.[97] Neither the parties by agreement nor the court in the original divorce decree may make a provision that custody will be lost by remarriage that would be controlling on a subsequent hearing.[98]

§ 595. **Support of children of divorced persons in general.**— Where no award is made as to the custody of children, the liability of the father to support his minor children still continues.[1] The

514, 179 Pac. 557; Kentz v. Kentz (Tex. Civ. App.), 209 S. W. 200. But see Shallcross v. Shallcross, 135 Ky. 418, 122 S. W. 223.

[91]Kentz v. Kentz (Tex. Civ. App.), 209 S. W. 200. See also Vickers v. Faubion (Tex. Civ. App.), 224 S. W. 803.

[92]Simmons v. Simmons, 22 Cal. App. 448, 134 Pac. 791.

[93]Daniels v. Daniels, 145 Iowa 422, 124 N. W. 169.

[94]Simmons v. Simmons, 22 Cal. App. 448, 134 Pac. 791; Dyer v. Dyer, 65 Wash. 535, 118 Pac. 634.

[95]Ladd v. Ladd, 188 Iowa 351, 176 N. W. 211; McKissick v. McKissick, 93 Ore. 644, 174 Pac. 721, 184 Pac. 272; Johnston v. Johnston, 116 Wash. 322, 199 Pac. 737.

[96]Ex parte Vaughn, 205 Ala. 296, 87 So. 792.

[97]Farrell v. Farrell, 190 Iowa 919, 181 N. W. 12.

[98]Delle v. Delle, 112 Wash. 512, 192 Pac. 966.

[1]Pacific Gold Dredging Co. v. Industrial Accident Commission, 184 Cal. 462, 194 Pac. 1, 13 A. L. R. 725; Maddox v. Paterson, 80 Ga. 719, 6 So. 581; Rowell v. Rowell, 97 Kans. 16, 154 Pac. 243, Ann. Cas. 1918C, 936; Gilley v. Gilley, 79 Maine 292, 9 Atl. 623, 1 Am. St. 307; Miller v. Miller, 64 Maine 484; Foss v. Hartwell, 168 Mass. 66, 46 N. E. 411, 37 L. R. A. 589, 60 Am. St. 366; Brow v. Brightman, 136 Mass. 187; Jacobs v. Jacobs, 136 Minn. 190, 161 N. W. 525, L. R. A. 1917D, 971; Spencer v. Spencer, 97 Minn. 56, 105 N. W. 483, 2 L. R. A. (N. S.) 851, 114 Am. St. 695, 7 Ann. Cas. 901; Geary v. Geary, 102 Nebr. 511, 167 N. W. 778, 20 A. L. R. 809; Earle v. Earle, 158 App. Div. 552, 143 N. Y. S. 841; Sanders v. Sanders, 167 N. Car. 319, 83 S. E. 490; Pretzinger v. Pretzin-

legal obligation of a father to support his minor children may not be evaded by his securing a divorce from a nonresident wife upon constructive service, particularly where it appeared that he, in effect, had abandoned her and the child.[2]

§ 596. **Liability for maintenance where custody awarded but no provision for support.**—Where the decree does not fix the allowance the father is generally held liable when the custody is given to a third person,[3] or to the mother,[4] and this obligation may be enforced by suit by the custodian for moneys necessarily expended for such support.[5]

ger, 45 Ohio St. 452, 15 N. E. 471, 4 Am. St. 542; Smith v. Blanton (Tex. Civ. App.), 240 S. W. 651; Buckminster v. Buckminster, 38 Vt. 248, 88 Am. Dec. 652; Schoennauer v. Schoennauer, 77 Wash. 132, 137 Pac. 325; Ditmar v. Ditmar, 27 Wash. 13, 67 Pac. 353, 91 Am. St. 817; Zilley v. Dunwiddie, 98 Wis. 428, 74 N. W. 126, 40 L. R. A. 579, 67 Am. St. 820. The liability of either parent to support the minor children is not affected by the divorce. In re Application for Support, 164 Iowa 208, 145 N. W. 467. See note, 38 L. R. A. (N. S.) 511.

[2]Schoennauer v. Schoennauer, 77 Wash. 132, 137 Pac. 325.

[3]McCarthy v. Hinman, 35 Conn. 538; Stanton v. Willson, 3 Day (Conn.) 37, 3 Am. Dec. 255.

[4]Lampson v. Lampson, 171 Cal. 332, 153 Pac. 238; People v. Schlott, 162 Cal. 347, 122 Pac. 846; Graham v. Graham, 388 Colo. 453, 88 Pac. 852, 8 L. R. A. (N. S.) 1270, 12 Ann. Cas. 137; Hall v. Hall, 141 Ga. 361, 80 S. E. 992; Western & A. R. Co. v. Williams, 22 Ga. App. 192, 95 S. E. 738; Panther Creek Mines v. Industrial Commission, 206 Ill. 565, 130 N. E. 321; Spade v. State, 44 Ind. App. 529, 89 N. E. 604; Boozel v. Boozel, 193 Iowa 78, 185 N. W. 85; Kinney v. Kinney, 150 Iowa 225, 129 N. W. 826; Griffin v. Griffin, 173 Ky. 636, 191 S. W. 458; Lorson v. Madere, 149 La. 95, 88 So. 701; Boggs v. Boggs, 138 Md. 422, 114 Atl. 474; Spratt v. Spratt (Minn.), 187 N. W. 227; Jacobs v. Jacobs, 136 Minn. 190, 161 N. W. 525, L. R. A. 1917D, 971; Viertel v. Viertel, 212 Mo. 562, 111 S. W. 579; Kershner v. Kershner, 202 Mo. App. 238, 216 S. W. 547; Winner v. Schucart, 202 Mo. App. 176, 215 S. W. 905; Bennett v. Robinson, 180 Mo. App. 56, 165 S. W 856; Rutledge v. Rutledge, 177 Mo. App. 469, 119 S. W. 489; White v. White, 154 App. Div. 250, 138 N. Y. S. 1082; Sanders v. Sanders, 167 N. Car. 319, 83 S. E. 490; Industrial Commission v. Drake (Ohio St.), 134 N. E. 465; Bondies v. Bondies, 40 Okla. 164, 136 Pac. 1089; State v. Langford, 90 Ore. 251, 176 Pac. 197; Graham v. Graham, 140 Tenn. 328, 204 S. W. 987; Evans v. Evans, 125 Tenn. 112, 140 S. W. 745, Ann. Cas. 1913C, 294; Gully v. Gully (Tex.), 231 S. W. 97; Cawley v. Cawley (Utah), 202 Pac. 10; Wheeler v. Lowell, 91 Vt. 278, 100 Atl. 39.

[5]Desch v. Desch, 55 Colo. 79, 132 Pac. 60; Hall v. Hall, 141 Ga. 361, 80 S. E. 992; Brown v. Brown, 132 Ga. 712, 64 S. E. 1092, 131 Am. St. 229; Rowell v. Rowell, 97 Kans. 16, 154 Pac. 243, Ann. Cas. 1918C, 936; Riggs v. Riggs, 91 Kans. 593, 138 Pac. 628, Ann. Cas. 1915D, 809; Wills v. Wills, 168 Ky. 35, 181 S. W. 619; Hardy v. Collins, 136 La. 467,

The wife may sue though she has remarried and the remarriage terminates her right to alimony.[6] In some jurisdictions, however, it is required that the mother apply to the court for a modification of the decree that will cover the point.[7]

The fact that the father offered to take the children and support them is no defense to the action of the mother to whom custody is given.[8] The mother can not by any act on her part forfeit or abandon the claims of her children for support by their father.[9]

A third person voluntarily contributing to support has no such right of action against the father. This would be the case where the volunteer was the maternal grandfather of the child.[10] In some jurisdictions the burden of support is placed on the parent made custodian of the children and who is able to do so.[11] Other jurisdictions place the burden equally on the two parents.[12] In New Hampshire the mother is not entitled to any allowance where she was found the guilty party in the divorce proceedings.[13]

§ 597. **Agreements between parties.**—The court is not bound by agreements between the parties as to the amount,[14] but may

67 So. 333; McGaw v. O'Beirne, 126 La. 584, 52 So. 775; State v. Seghers, 124 La. 115, 49 So. 998; Alvey v. Hartwig, 106 Md. 254, 67 Atl. 132, 11 L. R. A. (N. S.) 678, 14 Ann. Cas. 250; La Rue v. Kempf, 186 Mo. App. 57, 171 S. W. 588; Bennett v. Robinson, 180 Mo. App. 56, 165 S. W. 856; White v. White, 169 Mo. App. 40, 154 S. W. 872; Sipple v. Laclede Gaslight Co., 125 Mo. App. 81, 102 S. W. 608; Young v. Young, 28 Ohio Cir. Ct. 179; Hilleware v. Hilleware, 104 Wash. 361, 176 Pac. 330; State v. Coolidge, 72 Wash. 42, 129 Pac. 1088; Poland v. Poland, 63 Wash. 597, 116 Pac. 2. Where the decree directs payment for maintenance to a third person, this gives the third person no right to sue on default. The right of action belongs to the mother. Hunt v. Monroe, 32 Utah 428, 91 Pac. 269, 11 L. R. A. (N. S.) 249.

[6]Johnson v. Latty, 210 Fed. 961.

[7]Stone v. Duffy, 219 Mass. 178, 106 N. E. 595.

[8]La Rue v. Kempf, 186 Mo. App. 57, 171 S. W. 588.

[9]Evans v. Evans, 154 Cal. 644, 98 Pac. 1044.

[10]Bondies v. Porter, 40 Okla. 89, 136 Pac. 417.

[11]Ex parte Perry, 37 Cal. App. 189, 174 Pac. 105; Earle v. Earle, 158 App. Div. 552, 143 N. Y. S. 841.

[12]Gibbons v. Gibbons, 75 Ore. 500, 147 Pac. 530; Hector v. Hector, 51 Wash. 434, 99 Pac. 13. See also Boozel v. Boozel, 193 Iowa 78, 185 N. W. 85.

[13]Salta v. Salta (N. H.), 116 Atl. 438.

[14]Jaffe v. Jaffe (Iowa), 182 N. W. 784; Boggs v. Boggs, 138 Md. 422, 114 Atl. 474; Kerr v. Kerr, 236 Mass. 353, 128 N. E. 409; Connett v. Connett, 81 Nebr. 777, 116 N. W. 658; Cain v. Cain, 188 App. Div. 780, 177 N. Y. S. 178; Horn v. Horn, 80 Okla. 60, 194 Pac. 102. Where the father makes provision for the support of the child which is accepted by the

adopt them in case they sufficiently provide for support.[15] It is allowed the parties to stipulate for payment for support of children to continue after the death of the father.[16]

§ 598. **Orders fixing allowance and proceedings therefor.**—It is not necessary that the petition for divorce should pray for the allowance for support of the children,[17] for the court may make such an order pending the divorce proceeding,[18] or he may leave the question open for further consideration.[19] The allowance should be sufficient to support the children and not disproportionate to the income of the father,[20] and bear some relation

mother as satisfactory, he is no longer liable in an action by her for the support furnished by her. La Rue v. Kempf, 186 Mo. App. 57, 171 S. W. 588.

[15]Smith v. Blanton (Tex. Civ. App.), 240 S. W. 651.

[16]Stone v. Bayley, 75 Wash. 184, 134 Pac. 820, 48 L. R. A. (N. S.) 429.

[17]Pleasanton v. Pleasanton, 7 Boyce (Del.) 292, 105 Atl. 836.

[18]Adams v. Adams, 150 Ga. 346, 103 S. E. 812.

[19]Harlan v. Harlan, 154 Cal. 341, 98 Pac. 32; Hill v. Hill, 196 Mass. 509, 82 N. E. 690; Camp v. Camp, 158 Mich. 221, 122 N. W. 521; Miller v. Miller, 67 Ore. 359, 136 Pac. 15.

[20]Johnson v. Johnson, 131 Ga. 606, 62 S. E. 1044; Francis v. Francis, 108 Kans. 220, 194 Pac. 641; Rogers v. Rogers, 214 Mich. 516, 183 N. W. 30; Cardoff v. Cardoff (Minn.), 189 N. W. 124; Ziesel v. Ziesel (N. J.), 115 Atl. 435. Child entitled to support according to its station in life. Earle v. Earle, 158 App. Div. 552, 143 N. Y. S. 841. $8,400 yearly not excessive for support of wife and three daughters. Rosenwasser v. Rosenwasser, 117 Misc. 123, 190 N. Y. S. 774; $3,600 a year not excessive where husband worth $300,000. Twohy v. Twohy, 130 Va. 557, 107 S. E. 642; $750 a year for support of somewhat defective son proper where husband possessed of some $20,000 or $25,000. Demrick v. Demrick, 214 Mich. 295, 183 N. W. 29; divorced husband capable of earning $100 properly charged with $30 a month for support of two children. Boozel v. Boozel, 193 Iowa 78, 185 N. W. 85; $100 a month for support of four children not excessive where husband's income is $300 a month. Fisher v. Fisher (Mo. App.), 207 S. W. 261; allowance of $50 a month proper where father worth $30,000. Barish v. Barish, 190 Iowa 493, 180 N. W. 724; $50 a month where father of boy of 9 earns $50 a week. Bear v. Bear (Mo. App.), 241 S. W. 955; $20 a month for support of each child until it reaches 16 years of age not excessive where father owns $100,000 worth of real estate. Shaffer v. Shaffer (Iowa), 181 N. W. 261; $15 a month for support of child not excessive where husband earns $135 a month. Nelson v. Nelson, 193 Iowa 463, 186 N. W. 904; $15 a month proper where father earned $200 a month. McKee v. McKee, 191 Ky. 669, 231 S. W. 213; allowance of $10 a week proper where husband worth over $100,000. Young v. Young, 206 Mich. 254, 172 N. W. 414; $8 a week where father earned $16 a week not excessive. Hoffman v. Hoffman, 190 Ky. 13, 226 S. W. 119.

to his station in life.[21]

The amounts awarded for alimony and for maintenance of the children should be separated into distinct items and not included in one sum.[22]

The court has a very broad discretion in the matter of the amount and its order on the subject will be disturbed only in case of plain abuse.[23] The order for support may be enforced in the court granting such order.[24] The court may require some assurance that the money turned over for maintenance shall not be misapplied.[25]

§ 599. **Orders for support against nonresident father.**—No order of support can be made against a nonresident father,[26] but once a valid order is made the father can not escape liability by leaving the jurisdiction.[27]

§ 600. **Change of amount allowed for support.**—The allowance order as heretofore noted, is subject to modification at any future time upon proper reason being shown,[28] such as a change

[21]Young v. Young, 28 Ohio Cir. Ct. 179; Evans v. Evans, 125 Tenn. 112, 140 S. W. 745, Ann. Cas. 1913C, 294.

[22]Connett v. Connett, 81 Nebr. 777, 116 N. W. 658.

[23]Simmons v. Simmons, 22 Cal. App. 448, 134 Pac. 791; Kelly v. Kelly, 105 Kans. 72, 181 Pac. 561; Earle v. Earle, 158 App. Div. 552, 143 N. Y. S. 841; Dyer v. Dyer, 65 Wash. 535, 118 Pac. 634. Under Ohio constitution the court of appeals has no jurisdiction of an appeal from the order. West v. West, 100 Ohio St. 33, 124 N. E. 888.

[24]Kelly v. Kelly, 105 Kans. 72, 181 Pac. 561; Hill v. Hill, 196 Mass. 509, 82 N. E. 690 (may attach land belonging to father); Sanders v. Sanders, 167 N. Car. 317, 83 S. E. 489 (lien on real estate of father); Horn v. Horn, 80 Okla. 60, 194 Pac. 102. May be enforced by contempt proceedings. Lorson v. Madere, 149 La. 95, 88 So. 701.

[25]Harlan v. Harlan, 154 Cal. 341, 98 Pac. 32 (execution may be directed); Ex parte Grove, 83 Kans. 238, 109 Pac. 1087 (attachment against the person); Mansfield v. Hill, 56 Ore. 400, 107 Pac. 471, 108 Pac. 1007 (enforcible against estate of father after his death). Court may make allowance for support of lien on the property of the father under the laws of Washington. Stone v. Bayley, 75 Wash. 184, 134 Pac. 820, 48 L. R. A. (N. S.) 429.

[26]Kell v. Kell, 179 Iowa 647, 161 N. W. 634.

[27]White v. White, 65 N. J. Eq. 741, 55 Atl. 739; Roundy v. Roundy, 59 Utah 166, 202 Pac. 211.

[28]Harlan v. Harlan, 154 Cal. 341, 98 Pac. 32; Malvich v. Malvich (Cal. App.), 196 Pac. 784; Harris v. Harris, 65 Fla. 50, 61 So. 122; Julian v. Julian, 60 Ind. App. 520, 111 N. E. 196; Jaffe v. Jaffe (Iowa), 182 N. W. 784 (reduced where husband unable to make payments); Barish v. Barish, 190 Iowa 493, 180 N. W. 724; Mitvalsky v. Mitvalsky, 191 Iowa 8, 179 N. W. 520 (increase because of

of circumstances,[29] the burden of proof of which is on the applicant for modification.[30] The right to apply for the modification is not affected by any agreements between the parents.[31]

§ 601. **Termination of liability for support.**—The duty of support terminates when the children reach their majority.[32]

It has been held that the duty to furnish means for the support of the children came to an end where the children were legally adopted by the second husband of the wife.[33]

It has also been held that order was not automatically modified by the marriage of an infant daughter for whose support an allowance was made to the former wife.[34]

Where the children leave the father with whom they have been placed by the court, to go with the mother, she may not recover the expenses for keeping the children. In such a case she is a mere volunteer.[35]

reduced purchasing power of money); Engelman v. Engelman, 213 Mich. 86, 181 N. W. 33 (increased where health of child had become impaired); Connett v. Connett, 81 Nebr. 777, 116 N. W. 658; White v. White, 154 App. Div. 250, 138 N. Y. S. 1082; Hansen v. Hansen, 103 Ore. 17, 198 Pac. 207, 203 Pac. 613; Gadsby v. Gadsby, 65 Ore. 309, 131 Pac. 1022; Marks v. Marks, 22 S. Dak. 453, 118 N. W. 694; Sandall v. Sandall, 57 Utah 150, 193 Pac. 1093 (increase of allowance because of higher cost of living). But see Gilbert v. Gilbert, 151 Ga. 520, 107 S. E. 490.

[29]Schlarb v. Schlarb, 168 Iowa 364, 150 N. W. 593; Kinney v. Kinney, 150 Iowa 225, 129 N. W. 826; Peitzman v. Peitzman, 147 Iowa 704, 125 N. W. 218; Youde v. Youde, 136 Iowa 719, 114 N. W. 190; Plummer v. Plummer (Tex. Civ. App.), 154 S. W. 597; Harris v. Harris, 71 Wash. 307, 128 Pac. 673. On change of custody to mother court may continue provision as to support of children by father. Evans v. Evans, 154 Cal. 644, 98 Pac. 1044.

[30]Brice v. Brice, 50 Mont. 388, 147 Pac. 164; Grego v. Schneider (Tex. Civ. App.), 154 S. W. 361.

[31]Kershner v. Kershner, 202 Mo. App. 238, 216 S. W. 547.

[32]Tremper v. Tremper, 39 Cal. App. 62, 177 Pac. 868; Piatt v. Piatt, 32 Idaho 407, 184 Pac. 470; Emery v. Emery, 104 Kans. 679, 180 Pac. 451; Mack v. Mack, 91 Ore. 514, 179 Pac. 557.

[33]Gross v. Gross, 110 Misc. 278, 179 N. Y. S. 900. See also Sorge v. Sorge, 112 Wash. 131, 191 Pac. 817.

[34]Warren v. Warren, 92 N. J. L. 334, 112 Atl. 729.

[35]Nelson v. Nelson, 146 Ark. 362, 225 S. W. 619.

CHAPTER 40

EFFECT OF DIVORCE OR ANNULMENT

Section

605. Limited divorce in general.
606. Absolute divorce in general.
607. Rights of husband.
608. Rights of wife.
609. Divorce affecting wife's right to insurance upon her husband's life.
610. Rights in property.
611. Marriage settlement.
612. Effect of divorce on homestead right.
613. Effect of nullity decree on legitimacy of children.
614. Alienation of affections and criminal conversation.

§ 605. **Limited divorce in general.**—A limited divorce in some matters suspends the relation of marriage and, so far as the right to cohabit is concerned, destroys the relation.[1] It may also terminate the duty of the husband to support the wife.[2] It may be observed generally that the a mensa divorce operates the same as a vinculo divorce on the after acquired property of the parties and their personal rights. The essential difference is that neither party has a right to marry again during the life of the other.[3]

A woman thus divorced may acquire a separate domicil even to the extent of becoming a citizen of another state under the diversity of citizenship rule enabling her to sue her husband in the federal courts.[4]

The property rights growing out of the marriage are not affected except by express statutory provision and each party may still inherit from the other.[5]

[1]Evans v. Evans, 43 Minn. 31, 44 N. W. 524, 7 L. R. A. 448; People v. Cullen, 153 N. Y. 629, 47 N. E. 894, 44 L. R. A. 420; Van Cleaf v. Burns, 118 N. Y. 549, 23 N. E. 881, 16 Am. St. 782. See note, 65 Am. Dec. 360.

[2]Chapman v. Parsons, 66 W. Va. 307, 66 S. E. 461, 24 L. R. A. (N. S.) 1015, 135 Am. St. 1033, 19 Ann. Cas. 453.

[3]Chapman v. Chapman, 70 W. Va. 522, 74 S. E. 661.

[4]Barber v. Barber, 21 How. (U. S.) 582, 16 L. ed. 226; Dixon v. Dixon, 107 Misc. 666, 177 N. Y. S. 63.

[5]Smodt v. Lecatt, 1 Stew. (Ala.)

§ 606. **Absolute divorce in general.**—An absolute divorce puts an end to the marriage ties, rights and liabilities. Duties are merged in the decree and ended.[6]

All disabilities are removed and one spouse may sue the other as if no marriage had ever existed.[7] They become as strangers to each other.[8] Right of administration of deceased's estate vanishes,[9] as does the right to dower, courtesy and the husband's right to reduce choses of the wife to possession.[10]

But a divorce has no retroactive effect. It will act only in the future.[11] The decree, however, is held not to affect a contract of separation between the parties not passed upon by the courts.[12]

§ 607. **Rights of husband.**—The right in his wife's estate that a husband had by the courtesy would seem to be abolished by an absolute divorce under modern statutes, except that the court may decree to the husband such property as may be necessary for the support of the minor children of such marriage.[13] But where

590; Dean v. Richmond, 5 Pick. (Mass.) 461; Kriger v. Day, 2 Pick. (Mass.) 316; Ames v. Chew, 5 Metc. (Mass.) 320; Clark v. Clark, 6 Watts & Serg. (Pa.) 85.

[6]Wagner v. Treesh, 71 Ind. App. 551, 125 N. E. 242; Gilley v. Gilley, 79 Maine 292, 9 Atl. 623, 1 Am. St. 307; Monroe County Sav. Bank v. Yeoman, 195 N. Y. S. 531; Pretzinger v. Pretzinger, 45 Ohio St. 452, 15 N. E. 471, 4 Am. St. 542; Zilley v. Dunwiddie, 98 Wis. 428, 74 N. W. 126, 40 L. R. A. 579, 67 Am. St. 820.

[7]Carey v. Mackey, 82 Maine 516, 20 Atl. 84, 9 L. R. A. 113, 17 Am. St. 500; Carlton v. Carlton, 72 Maine 115, 39 Am. Rep. 307; Webster v. Webster, 58 Maine 139, 4 Am. Rep. 253. See notes, 65 Am. Dec 359; 73 Am. St. 269.

[8]Bishop v. Prudential Ins. Co., 217 Ill. App. 112.

[9]Clarke v. Lott, 11 Ill. 105.

[10]Barrett v. Failing, 111 U. S. 523, 28 L. ed. 505, 4 Sup. Ct. 598; Given v. Marr, 27 Maine 212; Hood v. Hood, 110 Mass. 463; Lakin v. Lakin, 84 Mass. 45; Barber v. Root, 10 Mass. 260; Calame v. Calame, 24 N. J. Eq. 440; Reynolds v. Reynolds, 24 Wend. (N. Y.) 193; Bryan v. Batcheller, 6 R. I. 543, 78 Am. Dec. 454. See also Whitley v. Meador, 137 Tenn. 163, 192 S. W. 718, L. R. A. 1917D, 736, estate by entirety becomes estate in common; Chase v McKenzie, 81 Ore. 429, 159 Pac. 1025.

[11]Reed v. Reed, 109 Md. 690, 72 Atl. 414, 130 Am. St. 552; Alt v. Banholzer, 39 Minn. 511, 40 N. W. 830, 12 Am. St. 681 (will not cure failure of wife to join in deed); Doyle v. Rolwing, 165 Mo. 231, 65 S. W. 315, 55 L. R. A. 332, 88 Am. St. 416; Alsup v. Jordan, 69 Tex. 300, 6 S. W. 831, 5 Am. St. 53 (statute of limitations against wife).

[12]Santmyer v. Santmyer, 48 App. D. C. 310.

[13]Arthur v. Israel, 15 Colo. 147, 25 Pac. 81, 10 L. R. A. 693, 22 Am. St. 381; Durland v. Durland, 67 Kans. 734, 74 Pac. 274, 63 L. R. A. 959; Howard v. Strode, 242 Mo. 210, 146 S. W. 792, Ann. Cas. 1913C, 1057; In re Ensign, 103 N. Y. 284, 8 N. E.

real estate of the wife has been conveyed in trust for her benefit during life, with a life interest in the husband, should he survive, it was held that he lost no right in such settlement by an absolute divorce, and he would be entitled to the life estate if he survived.[14] All personal property of the wife already reduced to possession, in absence of a statute, belongs to the husband absolutely,[15] but whatever choses in action have not been reduced to possession belong to the wife.[16] A wife may sue her divorced husband on a promissory note given her by him.[17]

§ 608. **Rights of wife.**—The rights of a divorced wife are generally regulated by statute. When the statute grants the wife dower after divorce "as if the husband were dead," it is construed to mean dower in the lands whereof the husband was seized at any time during coverture and not those remaining in his hands at the time of the decree. In Massachusetts, dower is not awarded by a divorce court, but the wife must proceed by writ of entry.[18] After an absolute divorce the wife may, in some jurisdictions, maintain suits to enforce contracts made with the husband during marriage and based on a money consideration.[19]

§ 609. **Divorce affecting wife's right to insurance upon her husband's life.**—Where a married woman is named as a beneficiary in a policy of insurance on the life of her husband, she is entitled to the proceeds of the policy, notwithstanding a divorce having been obtained by her before his death.[20]

544, 57 Am. Rep. 717; Edgar v. Richardson, 33 Ohio St. 581, 31 Am. Rep. 571. See notes, 65 Am. Dec. 357; 12 Am. St. 91.

[14]Wise v. Wise, 67 Ind. App. 647, 119 N. E. 501; Corbett v. Corbett, 101 Kans. 1, 165 Pac. 815; Pruett v. Pruett, 178 Ky. 802, 199 S. W. 1073; Babcock v. Smith, 39 Mass. 61; Gobble v. Orrell, 163 N. Car. 489, 79 S. E. 957. See note, 65 Am. Dec. 358.

[15]Browning v. Headley, 2 Rob. (Va.) 340, 40 Am. Dec. 755.

[16]See notes, 65 Am. Dec. 359; 11 L. R. A. 790.

[17]Webster v. Webster, 58 Maine 139, 4 Am. Rep. 253.

[18]Carter v. Carter, 283 Ill. 324, 119 N. E. 269; Davol v. Howland, 14 Mass. 219; Smith v. Smith, 13 Mass. 231; Roder v. Roder, 168 Wis. 283, 169 N. W. 307 (wife's misconduct may be considered).

[19]Elliott v. Northern Trust Co., 178 Ill. App. 439; Townsend v. Huntzinger, 41 Ind. App. 223, 83 N. E. 619; Taylor v. Taylor, 54 Ore. 560, 103 Pac. 524.

[20]Connecticut Mut. Life Ins. Co., v. Schaefer, 94 U. S. 457, 24 L. ed. 251; Courtois v. Grand Lodge A. O. U. W., 135 Cal. 552, 67 Pac. 970, 87 Am. St. 137; Phoenix Mut. Life Ins. Co. v. Dunham, 46 Conn. 79, 33 Am. Rep. 14; White v. Brotherhood of American Yeomen, 124 Iowa 293, 99

In a Massachusetts case[21] a benefit association was sued to determine the beneficiary of a deceased member, his divorced wife having originally been designated as the beneficiary. The language of the agreement of association stated that benefits would be paid to "the families of deceased members, or their heirs," and also "to the widow of the designator," on the death of the heirs or legal assignees. It was held that the divorced wife was not a member of the family and was not the widow under such a designation of legal beneficiary.[22]

But where a certificate of benefit is required to be made payable to a wife but neither the statute nor the laws of the organization require that she should have that status at the death of the assured, the wife takes though divorced.[23]

Where the rights of a wife are defined as those of a surviving wife an absolute divorce cuts off her interest.[24] So a divorced wife is not "an heir" under mutual benefit policy and can not partake of the insurance.[25] This rule does not apply to a limited divorce, however, since she is still the "widow" of the husband.[26]

§ 610. **Rights in property.**—Generally speaking, after a divorce husband and wife are placed on substantially an equal footing as far as property rights are concerned; both can sue or be sued, or dispose of their property by will or otherwise as they see fit, without consulting the other; except that before the decree is made absolute neither can give a clear title to real estate without the signature of the other.[27]

N. W. 1071, 66 L. R. A. 164, 104 Am. St. 323, 2 Ann. Cas. 350; Wallace v. Mutual Ben. Life Ins. Co., 97 Minn. 27, 106 N. W. 84, 3 L. R. A. (N. S.) 478; Blum v. New York Life Ins. Co., 197 Mo. 513, 95 S. W. 317, 8 L. R. A. (N. S.) 923, 7 Ann. Cas. 1021; Overhiser v. Overhiser, 63 Ohio St. 77, 57 N. E. 965, 50 L. R. A. 552, 81 Am. St. 612. See notes, 128 Am. St. 316; 39 L. R. A. (N. S.) 370; 41 L. R. A. (N. S.) 125; Ann. Cas. 1913D, 685.

[21]Tyler v. Odd Fellows Mut. Relief Assn., 145 Mass. 134, 13 N. E. 360.

[22]Green v. Green, 147 Ky. 608, 144 S. W. 1073, 39 L. R. A. (N. S.) 370, Ann. Cas. 1913D, 683; Rolater v. Rolater (Tex.), 198 S. W. 391. See notes, 52 Am. St. 571; 128 Am. St. 316; 50 L. R. A. 553; 2 L. R. A. (N. S.) 655; 3 L. R. A. (N. S.) 479; 2 Ann. Cas. 352; Ann. Cas. 1913D, 687.

[23]Courtois v. Grand Lodge, A. O. U. W., 135 Cal. 552, 67 Pac. 970, 87 Am. St. 137; White v. Brotherhood of American Yeomen, 124 Iowa 293, 99 N. W. 1071, 66 L. R. A. 164, 104 Am. St. 323, 2 Ann. Cas. 350. See notes, 3 L. R. A. (N. S.) 479; 39 L. R. A. (N. S.) 371; 2 Ann. Cas. 353; Ann. Cas. 1913D, 687.

[24]See notes, 128 Am. St. 316; 3 L. R. A. (N. S.) 480.

[25]Schonfield v. Turner, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189.

[26]See notes, 50 L. R. A. 554; 3 L. R. A. (N. S.) 480; 2 Ann. Cas. 352.

[27]De La Rama v. De La Rama, 241

An estate by the entireties is converted into a tenancy in common by an absolute divorce granted the parties[28] and this is generally held to be the case with community property not disposed of by the divorce decree,[29] unless a subsequent action is brought to determine such rights.[30]

Where the decree leaves the title to land undisturbed, this is held in effect to adjudge the title in the party who holds it.[31]

A Missouri statute forfeits the rights of the guilty party to all property rights arising under the marriage.[32] A husband divorced for his fault may forfeit his right to joint occupancy of premises under a deed granting an estate for life to the wife with remainder to the children, but this will not deprive the children of their rights under the deed.[33]

Where land is conveyed to wife as alimony the income to be devoted to maintenance of children until they come of age, this

U. S. 154, 60 L. ed. 932, 36 Sup. Ct. 518; Kelly v. Kelly, 89 Kans. 889, 132 Pac. 981; Walker v. Walker, 41 Nev. 4, 164 Pac. 653, 169 Pac. 459; Melchers v. Bertolido, 118 Misc. 196, 192 N. Y. S. 781. Rosholt v. Mehus, 3 N. Dak. 513, 57 N. W. 783, 23 L. R. A. 239; Overhiser v. Overhiser, 63 Ohio St. 77, 57 N. E. 965, 50 L. R. A. 552, 81 Am. St. 612. (Where the decree does not point out the individual articles of each of the parties, then each is entitled to the possession of his or her property.) Cole v. Cole, 139 Iowa 609, 117 N. W. 988. The wife has no equitable title in lands she has voluntarily and without undue influence conveyed to her husband. Reed v. Reed, 109 Md. 690, 72 Atl. 414, 130 Am. St. 552.

[28]Maitlen v. Barley, 174 Ind. 620, 92 N. E. 738; Sharp v. Baker, 51 Ind. App. 547, 96 N. E. 627; Meyers v. East End Loan & Savings Ass'n. of Baltimore City (Md.), 116 Atl. 453; Reed v. Reed, 109 Md. 690, 72 Atl. 414, 130 Am. St. 552; State ex rel. Roll v. Ellison (Mo.), 233 S. W. 1065; Funk v. Funk (Mo. App.), 223 S. W. 780; Melchers v. Bertolido, 118 Misc. 196, 192 N. Y. S. 781; Mardt v. Scharmach, 65 Misc. 124, 119 N. Y. S. 449; Moore v. Greenville Banking & Trust Co., 178 N. Car. 118, 100 S. E. 269.

[29]Brown v. Brown, 170 Cal. 1, 147 Pac. 1168; Tabler v. Peverill, 4 Cal. App. 671, 88 Pac. 994; Roemer v. Traylor, 60 Tex. Civ. App. 437, 128 S. W. 685; Schneider v. Biberger, 76 Wash. 504, 136 Pac. 701; Graves v. Graves, 48 Wash. 664, 98 Pac. 481; Ambrose v. Ambrose, 46 Wash. 463, 90 Pac. 588, 11 L. R. A. (N. S.) 103.

[30]Percy v. Percy (Cal.), 207 Pac. 369; Minium v. Minium, 53 Cal. App. 55, 199 Pac. 1104.

[31]See also Cooper v. Olson, 170 Iowa 141, 150 N. W. 1028; Roberts v. Playle, 150 Iowa 279, 129 N. W. 945.

[32]Wade v. Wade (Mo. App.), 229 S. W. 432.

[33]Baker v. Baker, 191 Ky. 325, 230 S. W. 293.

has been held to give her the right to contract for its conveyance on the youngest child reaching its majority.[34]

The Maine statute giving a wife divorced by her husband's fault a one-third interest in his lands is held to refer to all lands of which he became seized during coverture, unless she has barred her right thereto, and is not limited merely to lands held by him at the time of the divorce.[35]

It would seem that a husband could not recover from his former wife property transferred to her by him in fraud of his creditors.[36]

Alimony cannot, either before or after payment thereof, be subjected to the debts of a wife existing prior to the allowance of the alimony.[37]

§ 611. **Marriage settlement.**—The provisions contained in a deed of marriage settlement are not affected by the general rule of law governing absolute divorce, and in the absence of any provisions to that effect in the settlement, the husband's rights in the property of his wife are not affected.[38]

§ 612. **Effect of divorce on homestead right.**—It has been held that where a married woman left the home of herself and husband, and remained away nearly three years before claiming any homestead interest in the property, and the husband remained in constant occupancy of the land keeping his home thereon, such absence alone will not constitute an abandonment by the wife of her homestead rights. In divorce proceedings it is competent for the court to assign the homestead to the innocent party, either absolutely or for a limited period; but, where the decree in the divorce proceedings is silent upon the question, the homestead will, upon the dissolution of the marriage, remain in the possession of the party holding the legal title thereto, discharged from all homestead rights or claims of the other party.[39]

[34]Greenwood v. Greenwood, 96 Kans. 591, 152 Pac. 657.

[35]Leavitt v. Tasker, 107 Maine 33, 76 Atl. 953.

[36]Coleman v. Coleman, 147 Ky. 383, 144 S. W. 1, 39 L. R. A. (N. S.) 193.

[37]Fickel v. Granger, 83 Ohio St. 101, 93 N. E. 527, 32 L. R. A. (N. S.) 270, 21 Ann. Cas. 1347.

[38]Emerson v. Emerson, 120 Md. 584, 87 Atl. 1033; Babcock v. Smith, 39 Mass. 61.

[39]Rosholt v. Mehus, 3 N. Dak. 513, 57 N. W. 783, 23 L. R. A. 239; Thompson v. Thompson (Okla.), 173 Pac. 1037; Smith v. Smith (Tex.), 200 S. W. 1129.

§ 613. **Effect of nullity decree on legitimacy of children.**— Except where made otherwise by statute, a decree of nullity of an absolutely void marriage invalidates the marriage ab initio and makes the children born of the marriage illegitimate.[40] But a decree nullifying a voidable marriage leaves the children legitimate.[41] Statutes usually provide for the legitimacy of the offspring.[42]

§ 614. **Alienation of affections and criminal conversation.**— A divorce will not generally affect a husband's right to bring suit for prior alienation of affection,[43] or for criminal conversation.[44] So also a wife has the same right, especially where the injury complained of brought on the divorce.[45] Such a divorce may be pleaded, however, in mitigation of damages.[46]

A statute which declares that the guilty party shall "forfeit all rights and claims under and by virtue of the marriage." does not bar the right to sue for alienation of affections or criminal conversation.[47] The decree of divorce has been held to be conclusive on the question of the guilt of the parties under such a statute.[48]

[40]Jones v. Brinsmade, 183 N. Y. 258, 76 N. E. 22, 3 L. R. A. (N. S.) 192, 111 Am. St. 746, 5 Ann. Cas. 378; Price v. Price, 124 N. Y. 589, 27 N. E. 383, 12 L. R. A. 359.

[41]Park v. Barron, 20 Ga. 702, 65 Am. Dec. 641.

[42]See note, 40 L. R. A. 746.

[43]DeFord v. Johnson, 251 Mo. 244, 158 S. W. 29, 46 L. R. A. (N. S.) 1083, Ann. Cas. 1915A, 344. See note, Ann. Cas. 1912D, 619.

[44]Michael v. Dunkle, 84 Ind. 544, 43 Am. Rep. 100; Dickerman v. Graves, 6 Cush. (Mass.) 308, 53 Am. Dec. 41. See notes, 65 Am. Dec. 359; 46 L. R. A. (N. S.) 1083; Ann. Cas. 1912D, 619.

[45]Keen v. Keen, 49 Ore. 362, 90 Pac. 147, 10 L. R. A. (N. S.) 504, 14 Ann. Cas. 45; Beach v. Brown, 20 Wash. 266, 55 Pac. 46, 43 L. R. A. 114, 72 Am. St. 98. See notes, 4 L. R. A. (N. S.) 645; 46 L. R. A. (N. S.) 1083.

[46]McNamara v. McAllister, 150 Iowa 243, 130 N. W. 26, 34 L. R. A. (N. S.) 436, Ann. Cas. 1912B, 463. See note, 46 L. R. A. (N. S.) 1085.

[47]DeFord v. Johnson, 251 Mo. 244, 158 S. W. 29, 46 L. R. A. (N. S.) 1083, Ann. Cas. 1915A, 344. Contra, Hamilton v. McNeill, 150 Iowa 470, 129 N. W. 480, Ann. Cas. 1912D, 604.

[48]Hamilton v. McNeill, 150 Iowa 470, 129 N. W. 480, Ann. Cas. 1912D, 604.

CHAPTER 41

FOREIGN DIVORCES

Section

620. Recognition of foreign divorces in general—Full faith and credit clause.
621. Conclusiveness of foreign decrees in general—Res judicata.
622. Conclusiveness of foreign decrees—Alimony.
623. Conclusiveness of foreign decrees—Custody and support of children.
624. Necessity of jurisdiction.
625. Personal service outside of state.
626. Review and decision on question of domicil and fraud.
627. Nonresident state may refuse relief.
628. Validity of a divorce granted in a foreign country.
629. Rabbinical divorces granted in foreign countries.
630. Marriage under foreign divorce.
631. Prohibition of remarriage.

§ 620. **Recognition of foreign divorces in general—Full faith and credit clause.**—A divorce rendered by a court which had jurisdiction of the subject-matter and parties will be fully recognized in another state even when granted for a cause which is not recognized in such other state.[1] The law regarding the effect of foreign divorces is not always uniform in the different states. This lack of uniformity is largely the result of differences of opinion over the credit to be given judgments of foreign courts which are not such as fall within our federal constitutional provision requiring full faith and credit to be given to judgments of sister states.

[1]Harding v. Harding, 198 U. S. 317, 49 L. ed. 1066, 25 Sup. Ct. 679; Cheever v. Wilson, 9 Wall. (U. S.) 108, 19 L. ed. 604; Barber v. Barber, 21 How. (U. S.) 582, 16 L. ed. 226; Armstrong v. Carson, 2 Dall. (U. S.) 302, 1 L. ed. 391; Davis v. Davis, 29 App. (D. C.) 258, 9 L. R. A. (N. S.) 1071; McLaughlin v. McLaughlin, 202 Ala. 16, 79 So. 354; Housley v. Wagners, 25 Ga. App. 474, 103 S. E. 880; Hardin v. Hardin, 168 Ind. 352, 81 N. E. 60; Carter v. Carter, 89 Kans. 367, 131 Pac. 561; State ex rel. Johnson v. Johnson, 149 La. 89, 88 So. 698; Zavaglia v. Notarbartolo,

The decision in the Haddock case[2] fixed the law in that respect and held that a judgment of divorce obtained by a husband in a state other than that of the matrimonial domicil, the last state of matrimonial residence, against the wife still living in such state, and without personal service was not a judgment within the full faith and credit clause.

The effect of this decision is that the validity of a divorce procured without personal service depends upon whether or not the divorce was procured in the state of matrimonial domicil,[3] except that, of course, there is nothing to prevent another state from recognizing the validity of such a divorce through the law of comity, unless contrary to public policy and morality.[4]

It is said that all of the states,[5] except Georgia, New York, North Carolina, Pennsylvania and South Carolina recognize such

137 La. 722, 69 So. 152, Ann. Cas. 1916B, 924; Succession of Benton, 106 La. 494, 31 So. 123, 59 L. R. A. 135; Clark v. Clark, 62 Mass. (8 Cush.) 385; Gummison v. Johnson, 149 Minn. 329, 183 N. W. 515; Kern v. Field, 68 Minn. 317, 71 N. W. 393, 64 Am. St. 479; Freund v. Freund, 72 N. J. Eq. 934, 73 Atl. 1117; Pearson v. Pearson, 230 N. Y. 141, 129 N. E. 349; Stewart v. Stewart, 198 App. Div. 337, 190 N. Y. S. 369; Hatch v. Hatch, 187 N. Y. S. 568; Ball v. Cross, 190 App. Div. 711, 180 N. Y. S. 434; Rupp v. Rupp, 156 App. Div. 389, 141 N. Y. S. 484; Strauss v. Strauss, 122 App. Div. 729, 107 N. Y. S. 842; Richards v. Richards, 87 Misc. (N. Y.) 134, 149 N. Y. S. 1028; In re Alderman, 157 N. Car. 507, 73 S. E. 126, 39 L. R. A. (N. S.) 988; Spaulding v. Spaulding, 11 Ohio App. 143; Spradling v. Spradling, 74 Okla. ——, 181 Pac. 148; Dawson v. Della Torre, 116 S. Car. 338, 108 S. E. 101; Caples v. Buell (Tex. Civ. App.), 234 S. W. 429. But see Vickers v. Faubion (Tex. Civ. App.), 224 S. W. 803.

[2]Haddock v. Haddock, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. 525, affg. 178 N. Y. 557, 70 N. E. 1099.

[3]Thompson v. Thompson, 226 U. S. 551, 57 L. ed. 347, 33 Sup. Ct. 129; Atherton v. Atherton, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. 544. See also Peterson v. Peterson, 35 Idaho 470, 207 Pac. 425; Corvin v. Commonwealth, 131 Va. 649, 108 S. E. 651.

[4]Haddock v. Haddock, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. 525; Gildersleeve v. Gildersleeve, 88 Conn. 689, 92 Atl. 684, Ann. Cas. 1916B, 920; Parmalee v. Hutchins, 238 Mass. 561, 131 N. E. 443; Cache v. Cache, 12 Ohio App. 140.

[5]Miller v. Miller, 89 Kans. 151, 130 Pac. 681; McCormick v. McCormick, 82 Kans. 31, 107 Pac. 546; Howard v. Strode, 242 Mo. 210, 146 S. W. 792, Ann. Cas. 1913C, 1057; Buckley v. Buckley, 50 Wash. 213, 96 Pac. 1079, 126 Am. St. 900; Cook v. Cook, 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706. See generally Howey v. Howey (Mo.), 240 S. W. 450; State v. District Court, 46 Mont. 425, 128 Pac. 590, Ann. Cas. 1916B, 256; Flower v. Flower, 42 N. J. Eq. 152, 7 Atl. 669; Doughty v. Doughty, 28 N. J. Eq. 581; Caswell v. Caswell, 84 W. Va. 575, 100 S. E.

a divorce as a matter of comity.[6] The theory is that the evils of recognition are less than those resulting from nonrecognition.[7]

§ 621. **Conclusiveness of foreign decrees in general—Res judicata.**—The foreign decree is conclusive when the granting court had jurisdiction of the person and subject matter of the action.[8] It is, however, conclusive only as to the matters passed upon by the court. For example a decree of a foreign court granting a divorce a mensa et thoro will not bar an action by the defendant in the domestic court for an absolute divorce. In such a case the former decree does not affect the status of the parties as to the continuing existence of the marriage ties.[9] So, in Idaho it is held that the dissolution of the marital community in a foreign jurisdiction at the suit of the wife would not divest her of her interest in the community property, where the validity of the divorce proceedings were not challenged by the husband in proceedings afterwards brought by her to establish her interest in such community property.[10] The refusal of a decree a mensa et thoro sought on the ground of cruelty is held res judicata on that issue in another jurisdiction.[11] In the absence of the entire record, a statement in a foreign decree that it was based on legal

482. The courts of Georgia on the grounds of comity recognize the validity of a Kansas divorce rendered on service by publication, a copy of which was sent to the Georgia spouse who failed to appear and on the faith of which decree a remarriage was consummated. Joyner v. Joyner, 131 Ga. 217, 62 S. E. 182, 18 L. R. A. (N. S.) 647, 127 Am. St. 220.

[6]Solomon v. Solomon, 140 Ga. 379, 78 S. E. 1079; Matthews v. Matthews, 139 Ga. 123, 76 S. E. 855; Joyner v. Joyner, 131 Ga. 217, 62 S. E. 182, 18 L. R. A. (N. S.) 647, 127 Am. St. 220; Ball v. Cross, 231 N. Y. 329, 132 N. E. 106; Baylis v. Baylis, 207 N. Y. 446, 101 N. E. 176; People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274; Wolf v. Wolf, 109 Misc. 366, 178 N. Y. S. 726; Pearson v. Pearson, 104 Misc. 675, 173 N. Y. S. 563; Barber v. Barber, 89 Misc. 519, 151 N. Y. S. 1064; Harris v. Harris, 115 N. Car. 587, 20 S. E. 187, 44 Am. St. 471; In re Grossman's Estate, 263 Pa. 139, 143, 106 Atl. 86, 88; Colvin v. Reed, 55 Pa. St. 375. See learned article by Robert J. Peaslee in 28 Harvard Law Review 457, 459.

[7]Gildersleeve v. Gildersleeve, 88 Conn. 689, 92 Atl. 684, Ann. Cas. 1916B, 920.

[8]Curnen v. Curnen, 155 App. Div. 536, 140 N. Y. S. 805; Hall v. Hall, 139 App. Div. 120, 123 N. Y. S. 1056; French v. French, 74 Misc. 626, 131 N. Y. S. 1053.

[9]Butts v. Butts, 152 Ark. 399, 238 S. W. 600. See also Richards v. Richards, 87 Misc. 134, 149 N. Y. S. 1028.

[10]Peterson v. Peterson, 35 Idaho 470, 207 Pac. 425.

[11]Towson v. Towson, 126 Va. 640, 102 S. E. 48. See also Zavaglia v. Notarbartolo, 137 La. 722, 69 So. 152, Ann. Cas. 1916B, 924.

service by publication will ordinarily make a prima facie case to that effect.[12]

And generally speaking the judgment of a court of record of another state in a divorce case, is presumed to have been authorized by law, provided jurisdiction of the subject matter may be assumed.[13]

§ 622. **Conclusiveness of foreign decrees—Alimony.**—The provisions for alimony in a foreign decree may be enforced in the courts of other states,[14] although the mode of procedure to enforce its collection may not be the same in both states.[15]

The rule as announced by the supreme court of the United States is that a decree for the future payment of alimony is, as to instalments past due and unpaid within the protection of the full faith and credit clause of the constitution, provided that no modification of the decree was made prior to the maturity of such instalments, unless by the law of the state in which the decree was rendered its enforcement is so completely within the discretion of the courts of that state that they may annul or modify the decree even as to overdue and unsatisfied instalments.[16] It is essential, however, that the court should have

[12]Howard v. Strode, 242 Mo. 210, 146 S. W. 792, Ann. Cas. 1913C, 1057.

[13]In re Hancock's Estate, 156 Cal. 804, 106 Pac. 58, 134 Am. St. 177.

[14]Britton v. Chamberlain, 234 Ill. 246, 84 N. E. 895; Rogers v. Rogers, 49 Ind. App. 506, 89 N. E. 901; Matson v. Matson, 186 Iowa 607, 173 N. W. 127; Winner v. Schucart, 202 Mo. App. 176, 215 S. W. 905; Van Horn v. Van Horn, 197 App. Div. 935, 188 N. Y. S. 98; Levine v. Levine, 95 Ore. 94, 187 Pac. 609.

[15]Sistare v. Sistare, 218 U. S. 1, 54 L. ed. 905, 30 Sup. Ct. 682, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061. See also, Cotter v. Cotter, 225 Fed. 471.

[16]Sistare v. Sistare, 218 U. S. 1, 54 L. ed. 905, 30 Sup. Ct. 682, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061. See also McGregor v. McGregor, 52 Colo. 292, 122 Pac. 390; Cureton v. Cureton, 132 Ga. 745, 65 S. E. 65; Wells v. Wells, 209 Mass. 282, 95 N. E. 845, 35 L. R. A. (N. S.) 561; Mayer v. Mayer, 154 Mich. 386, 117 N. W. 890, 19 L. R. A. (N. S.) 245, 129 Am. St. 477; Tehsman v. Tehsman (N. J.), 114 Atl. 320; Bolton v. Bolton, 86 N. J. L. 69, 89 Atl. 1014; Williamson v. Williamson, 169 App. Div. 597, 155 N. Y. S. 423; Patton v. Patton, 67 Misc. 404, 123 N. Y. S. 329; Campbell v. Campbell, 28 Okla. 838, 115 Pac. 1111; Bleuer v. Bleuer, 27 Okla. 25, 110 Pac. 736; Hewett v. Hewett (R. I.), 116 Atl. 883. The fact that the alimony judgment could be modified under a statute of the state where the divorce was decreed may not be urged as a defense to the action to enforce in the absence of allegations that it had in fact been altered. Werner v. Pelletier, 148 App. Div. 137, 131 N. Y. S. 1010.

jurisdiction to award alimony;[17] and that the decree is a final and not a mere interlocutory order or decree.[18] The action may not be based on an interlocutory order.[19] The provision of the laws of Maine that upon remarriage a new trial may be had as to alimony is held not to render the judgment of alimony interlocutory and not within the scope of the full faith and credit clause of the constitution.[20] The remedies for the enforcement will be those of the jurisdiction where the relief is sought.[21]

It would seem that a suit for alimony could not be maintained in another jurisdiction where the decree of divorce in a sister state did not award alimony and made no mention of it. The divorce works a complete severance of the marital relations and a suit for alimony would be an anomaly in such a case.[22] Where, however, the foreign decree for the husband is based on constructive service only it is held not to bar a proceeding by the wife for alimony.[23]

The court granting the decree may not vest the party securing the decree with an interest in the land of defendant in another state.[24] But an action may lie for partition of property where a foreign decree makes no attempt to do so.[25]

§ 623. **Conclusiveness of foreign decrees—Custody and support of children.**—The foreign court does not have jurisdiction exclusive of the courts of other states to determine the right to the custody of children of the divorced couple after conditions

[17]Cotter v. Cotter, 225 Fed. 471; In re McMullin, 19 Cal. App. 481, 126 Pac. 368; McCoy v. McCoy, 191 Iowa 983, 183 N. W. 377; Downs v. Downs, 123 Ky. 405, 96 S. W. 536. See also Valiquet v. Valiquet, 177 Fed. 994.

[18]Hunt v. Monroe, 32 Utah 428, 91 Pac. 269, 11 L. R. A. (N. S.) 249.

[19]Rowe v. Rowe, 76 Ore. 491, 149 Pac. 533; Ogg v. Ogg (Tex. Civ. App.), 165 S. W. 912; Van Horn v. Van Horn, 48 Wash. 388, 93 Pac. 670, 125 Am. St. 940; Henry v. Henry, 74 W. Va. 563, 82 S. E. 522, L. R. A. 1916B, 1024.

[20]Taylor v. Stone, 218 Mass. 248, 105 N. E. 890.

[21]White v. White, 233 Mass. 39, 123 N. E. 389.

[22]Brown v. Brown, 24 Ga. App. 512, 101 S. E. 315; McCormick v. McCormick, 82 Kans. 31, 107 Pac. 546. But see Darnell v. Darnell, 212 Ill. App. 601 (court reserved question of alimony for determination by itself or any court.)

[23]Davis v. Davis, 70 Colo. 37, 197 Pac. 241. See also Spradling v. Spradling, 74 Okla. ——, 181 Pac. 148.

[24]Bodie v. Bates, 95 Nebr. 757, 146 N. W. 1002, L. R. A. 1915E, 421. See also De Graffenreid v. De Graffenreid, 147 App. Div. 825, 132 N. Y. S. 1107.

[25]Buckley v. Buckley, 50 Wash. 213, 96 Pac. 1079, 126 Am. St. 900.

have changed subsequent to the entry of the decree fixing the matter of custody. The court of the local jurisdiction will act for the best interest of the child.[26] But the court will ordinarily deny such relief where it is not shown that there has been a change of circumstances.[27]

The custodial decree where court has jurisdiction of subject matter and parties is within full faith and credit clause as to matters existing at the time of its entry and is enforcible in a sister state.[28] The decree is competent on question of the fitness of the custodian.[29] It is subject to attack on the ground that it was obtained by fraud.[30] The order of allowance for the support of children to be enforcible in a sister state must be equivalent to a final decree.[31]

§ 624. **Necessity of jurisdiction.**—It is to be observed that the decisions apply only to decrees entered by courts of competent jurisdiction,[32] having jurisdiction of the parties, and where the decree was obtained without fraud.[33]

The state of matrimonial domicil has jurisdiction to grant a divorce on constructive notice alone.[34]

[26]Seeley v. Seeley, 30 App. D. C. 191; Milner v. Gatlin, 139 Ga. 109, 76 S. E. 860; Woodall v. Alexander, 107 Kans. 632, 193 Pac. 185; In re Leete, 205 Mo. App. 225, 223 S. W. 962; Mylius v. Cargill, 19 N. Mex. 278, 142 Pac. 918, L. R. A. 1915B, 154, Ann. Cas. 1916B, 941; Ex parte Alderman, 157 N. Car. 507, 73 S. E. 126, 39 L. R. A. (N. S.) 988; Levine v. Levine, 95 Ore. 94, 187 Pac. 609; Griffin v. Griffin, 95 Ore. 78, 187 Pac. 598; Vickers v. Faubion (Tex. Civ. App.), 224 S. W. 803; Ex parte Boyd (Tex. Civ. App.), 157 S. W. 254. See also Clarke v. Lyon, 82 Nebr. 625, 118 N. W. 472, 20 L. R. A. (N. S.) 171; Ex parte Stewart, 77 Misc. 524, 137 N. Y. S. 202.

[27]Brown v. Brown, 24 Ga. App. 512, 101 S. E. 315.

[28]Morrill v. Morrill, 83 Conn. 479, 77 Atl. 1; Hardin v. Hardin, 168 Ind. 352, 81 N. E. 60; Gould v. Gibson, 180 Mo. App. 477, 166 S. W. 648; Anderson v. Anderson, 74 W. Va. 124, 81 S. E. 706. Decree not res judicata where service by publication. Matthews v. Matthews, 139 Ga. 123, 76 S. E. 855.

[29]Pinney v. Sulzen, 91 Kans. 407, 137 Pac. 987, Ann. Cas. 1915C, 649.

[30]Milner v. Gatlin, 143 Ga. 816, 85 S. E. 1045, L. R. A. 1916B, 977.

[31]Rowe v. Rowe, 76 Ore. 491, 149 Pac. 533.

[32]Jones v. Bartlett (Tex.), 189 S. W. 1107; Deyette v. Deyette, 92 Vt. 305, 104 Atl. 232.

[33]Adams v. Adams, 51 N. H. 388, 12 Am. Rep. 134; Singer v. Singer, 41 Barb. (N. Y.) 139; Boyd's Appeal, 38 Pa. St. 241.

[34]Atherton v. Atherton, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. 544; Goolsby v. State, 24 Ga. App. 330, 100 S. E. 788; Harry v. Dodge, 66 Misc. 302, 123 N. Y. S. 37; Callahan v. Callahan, 65 Misc. 172, 121 N. Y. S. 39.

A recital of due service in the decree will not cure a defect in the service by publication.[35] A defect in the order of publication, if immaterial, may, however, be corrected by amendment.[36] Some states take jurisdiction where the plaintiff acquires residence even though it is not a matrimonial residence, but such decrees are binding in other states only by the law of comity.[37] Where there is no personal service but the defendant appears and defends, the court has jurisdiction for all purposes,[38] and the party may not thereafter raise the question of jurisdiction.[39]

The decree may be attacked on the ground of a want of jurisdiction of the court to grant the decree,[40] as where the court was without authority because of invalid or insufficient process.[41] One who attacks the foreign divorce on the ground of a lack of service of process has the burden of proof on such issue.[42]

§ 625. **Personal service outside of state.**—Where the defendant is personally served in his state of residence, a very strong case of jurisdiction is presented because the defendant cannot claim fraud and such service is generally recognized by all states, even those refusing comity where service is by publication only.[43] Even service by mail has been upheld.[44] One who has obtained a

[35]Silvey v. Silvey, 192 Mo. App. 179, 180 S. W. 107.

[36]Caswell v. Caswell, 84 W. Va. 575, 100 S. E. 482.

[37]Mathews v. Mathews, 139 Ga. 123, 76 S. E. 855; Howard v. Strode, 242 Mo. 210, 146 S. W. 792, 799, Ann. Cas. 1913C, 1057; Shafer v. Ritchie, 49 Utah 111, 162 Pac. 618; Buckley v. Buckley, 50 Wash. 213, 96 Pac. 1079 (by comity). See also Miller v. Miller, 89 Kans. 151, 130 Pac. 681.

[38]Morrill v. Morrill, 83 Conn. 479, 77 Atl. 1; Langewald v. Langewald, 234 Mass. 269, 125 N. E. 566; Guggenheim v. Wahl, 203 N. Y. 390, 96 N. E. 726, Ann. Cas. 1913B, 201; Pearson v. Pearson, 176 N. Y. S. 626; Guggenheim v. Wahl, 138 App. Div. 269, 122 N. Y. S. 941; Gilbert v. Gilbert, 83 Ohio St. 265, 94 N. E. 421, 35 L. R. A. (N. S.) 521.

[39]Bledsoe v. Seaman, 77 Kans. 679, 95 Pac. 576.

[40]Walker v. Walker, 125 Md. 649, 94 Atl. 346, Ann. Cas. 1916B, 934; Richmond v. Sangster (Tex. Civ. App.), 217 S. W. 723.

[41]In re Pusey's Estate, 180 Cal. 368, 181 Pac. 648.

[42]Paul v. Paul, 41 S. Dak. 383, 170 N. W. 658.

[43]Gildersleeve v. Gildersleeve, 88 Conn. 689, 92 Atl. 684; Gould v. Gould, 194 N. Y. S. 745; Post v. Post, 149 App. Div. 452, 133 N. Y. S. 1057, affg. judgment, 71 Misc. 44, 129 N. Y. S. 745; Benham v. Benham, 69 Misc. 442, 125 N. Y. S. 923. See however Gebhard v. Gebhard, 25 Misc. 1, 54 N. Y. S. 406.

[44]Moody v. Soper, 117 Misc. 439, 191 N. Y. S. 425. See also Parmelee v. Hutchins, 238 Mass. 561, 131 N. E. 443.

divorce on service by publication is estopped to afterwards question the validity of the decree on this ground.[45]

§ 626. **Review and decision on question of domicil and fraud.** —The question of domicil and consequent jurisdiction may be reviewed by the courts of the state of residence of the defendant.[46] A decree obtained through fraud may be reviewed and set at naught anywhere and at any time, and the court reviewing the decree may inquire into all of the circumstances in order that it may determine if there was fraud or not. No court can enter a valid decree when the party does not have a bona fide residence within the state, with the intention of remaining within the state.[47] If a decree is obtained while one has a temporary residence within the state, a residence obtained for the express purpose of obtaining a divorce, the decree will be fraudulent and void.[48] This would not be the case where the party though

[45]In re Sheedy's Estate, 178 N. Y. S. 863; Gibson v. Gibson, 81 Misc. (N. Y.) 508, 143 N. Y. S. 37.

[46]German Savings and Loan Soc. v. Dormitzer, 192 U. S. 125, 48 L. ed. 373, 24 Sup. Ct. 221, affg. 23 Wash. 132, 62 Pac. 862 (although record shows domicil); McGrew v. Mutual Life Ins. Co., 132 Cal. 85, 64 Pac. 103, 84 Am. St. 20; Gildersleeve v. Gildersleeve, 88 Conn. 689, 92 Atl. 684, Ann. Cas. 1916B, 920; Ackerman v. Ackerman, 200 N. Y. 72, 93 N. E. 192; Berney v. Adriance, 157 App. Div. 628, 142 N. Y. S. 748; Starbuck v. Starbuck, 62 App. Div. 437, 71 N. Y. S. 104, 10 Ann. Cas. 146, reversed, 173 N. Y. 503, 66 N. E. 193, 93 Am. St. 631; Gouch v. Gouch, 69 Misc. 436, 127 N. Y. S. 476; Halter v. Van Camp, 64 Misc. 366, 118 N. Y. S. 545; Gooch v. Gooch, 38 Okla. 300, 133 Pac. 242, 47 L. R. A. (N. S.) 480; State v. Westmorland, 76 S. Car. 145, 56 S. E. 673, 8 L. R. A. (N. S.) 842; Toncray v. Toncray, 123 Tenn. 476, 131 S. W. 977, 34 L. R. A. (N. S.) 1106, Ann. Cas. 1912C, 284; Hicks v. Hicks, 69 Wash. 627, 125 Pac. 945.

[47]Davis v. Davis, 70 Colo. 37, 197 Pac. 241; Kenner v. Kenner, 139 Tenn. 211, 201 S. W. 779 (see also same case in 202 S. W. 723, where a petition for rehearing was denied); Richmond v. Sangster (Tex. Civ. App.), 217 S. W. 723. See also Corvin v. Commonwealth, 131 Va. 649, 108 S. E. 651. A foreign divorce decree is not subject to collateral attack for fraud. Hicks v. Hicks, 69 Wash. 627, 125 Pac. 945.

[48]Andrews v. Andrews, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. 237; Ferry v. Troy Laundry Co., 238 Fed. 867; Parker v. Parker, 222 Fed. 186; Bruguiere v. Bruguiere, 172 Cal. 199, 155 Pac. 988, Ann. Cas. 1917E, 122; Anthony v. Tarpley, 45 Cal. App. 72, 187 Pac. 779; Pettis v. Pettis, 91 Conn. 608, 101 Atl. 13; Gildersleeve v. Gildersleeve, 88 Conn. 689, 92 Atl. 684, Ann. Cas. 1916B, 920; Walker v. Walker, 125 Md. 649, 94 Atl. 346, Ann. Cas. 1916B, 934; Wagoner v. Wagoner, 287 Mo. 567, 229 S. W. 1064; Jung v. Jung, 85 N. J. Eq. 372, 96 Atl. 499; Baylis v. Baylis, 207 N. Y. 446, 101 N. E. 176; Knill v. Knill, 195 N. Y. S. 398; Richmond v. Sangster (Tex. Civ. App.), 217 S. W. 723.

going to the foreign state for the purpose of obtaining a divorce, intended to remain there and make it his home.[49]

But a decree of divorce fairly obtained is valid, and may be enforced anywhere. In Massachusetts, it has been held that where a husband, whose wife is living apart from him, without justifiable cause, removes from Massachusetts to another state and acquires a domicil there, without the purpose of obtaining a divorce, and afterwards obtains a decree of divorce in that state, according to the laws thereof, and after notice to her by leaving a summons at her abode in Massachusetts and by publication in a newspaper in the other state, the courts of that state have jurisdiction of the cause and of both the parties, and the decree of divorce is valid and effectual in Massachusetts as to all persons, although the wife was never in the other state, had no settlement there derived from her parents or ancestors, never appeared in the suit there, had no knowledge or information that he contemplated going to that state, or that he had left Massachusetts, till after he had filed his libel for divorce, and was never provided by him with a home or support in the other state, or requested or furnished with means by him to go to that state, and was without such means.[50] A Massachusetts statutory provision is held not to violate the federal constitution which makes of no force in that state a divorce of a citizen therein who obtains a divorce in another state for a cause which occurred in Massachusetts, or for a cause which would not authorize a divorce in that state.[51] But where a man lived with his wife in Pennsylvania, removed to St. Louis, Mo., and, claiming to have become a citizen of Missouri, obtained a divorce there, the Pennsylvania court held that such a decree was void in Pennsylvania as to the wife, the Missouri court never having jurisdiction over her.[52]

No full faith and credit where the complainant deceived the court as to her bona fides in acquiring residence. Blondin v. Brooks, 83 Vt. 472, 76 Atl. 184.

[49]Carling v. Carling, 78 N. J. Eq. 42, 81 Atl. 565.

[50]Burlen v. Shannon, 115 Mass. 438. See also Barber v. Barber, 21 How. (U. S.) 582, 16 L. ed. 226; Thompson v. State, 28 Ala. 12; Harding v. Alden, 9 Maine 140, 23 Am. Dec. 549; Perkins v. Perkins, 225 Mass. 82, 113 N. E. 841; Chapman v. Chapman, 224 Mass. 427, 113 N. E. 359; Taylor v. Stowe, 218 Mass. 248, 105 N. E. 890; Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Holmes v. Holmes, 57 Barb. (N. Y.) 305; Thoms v. King, 95 Tenn. 60, 31 S. W. 983.

[51]Langewald v. Langewald, 234 Mass. 269, 125 N. E. 566.

[52]Philadelphia v. Wetherby, 15 Phila. (Pa.) 403. See also Matthews

A fraudulent divorce is not validated by the failure of the other party to go to the state of rendition and there attack it for fraud.[53]

§ 627. **Nonresident state may refuse relief.**—Although a state will protect its own residents against unlawful foreign divorces it may refuse aid to a nonresident.[54]

§ 628. **Validity of a divorce granted in a foreign country.**—The courts of this country will indulge a presumption of the regularity of a divorce judgment rendered by the highest French court,[55] and this more especially where the court has jurisdiction and the divorce is granted on a ground recognized by the law of this country.[56]

But a divorce granted in a foreign country against a man who has become a permanent resident of the United States, without actual or attempted service of notice, without any appearance in his behalf, and without the existence of any facts which according to the laws of the United States would give jurisdiction, will not be recognized as valid in the United States.[57]

§ 629. **Rabbinical divorces granted in foreign countries.**—A divorce valid under the laws of the country in which it is obtained will be recognized as valid in this country,[58] and this will apply to the case of divorces granted by rabbis given authority to divorce Jewish citizens under the laws of Russia. The authority of the rabbi in this respect gives him functions closely resembling those of the ecclesiastical courts of England which had this jurisdiction.[59]

v. Matthews, 139 Ga. 123, 76 S. E. 855; Thompson v. Thompson, 89 N. J. Eq. 70, 103 Atl. 856; Doughty v. Doughty, 28 N. J. Eq. 581; O'Dea v. O'Dea, 101 N. Y. 23, 4 N. E. 110; Campbell v. Campbell, 90 Hun 233, 35 N. Y. S. 280; Phelps v. Baker, 60 Barb. (N. Y.) 107; McGiffert v. McGiffert, 31 Barb. (N. Y.) 69, 17 How. Prac. 18; Love v. Love, 10 Phila. (Pa.) 453; Commonwealth v. Steiger, 12 Pa. Co. Ct. 334.

[53]Richmond v. Sangster (Tex. Civ. App.), 217 S. W. 723.

[54]Percival v. Percival, 186 N. Y. 587, affg. 106 App. Div. 111, 94 N. Y. S. 909; Kaufman v. Kaufman, 160 N. Y. S. 19.

[55]Gould v. Gould, 192 N. Y. S. 572.

[56]Gould v. Gould, 194 N. Y. S. 745.

[57]St. Sure v. Lindsfelt, 82 Wis. 346, 52 N. W. 308, 19 L. R. A. 515, 33 Am. St. 50. See also La Framboise v. Day, 136 Minn. 239, 161 N. W. 529, L. R. A. 1917D, 571; Knoll v. Knoll, 104 Wash. 110, 176 Pac. 22.

[58]Miller v. Miller, 70 Misc. 368, 128 N. Y. S. 787.

[59]Saperstone v. Saperstone, 73

The divorce paper is termed a "get," which is thus defined and described: "A bill of divorce among the Jews. Like the Ketulva, or marriage contract, this document is drawn up in the Aramaic language, uniformly worded and carefully written by a proper scribe. The orthodox form must contain twelve full and equal lines (neither more nor less to agree with the numerical value in Hebrew of the letter G. T. After certain preliminary ceremonies and questioning by the rabbi, particularly as to whether both parties agree to the divorce, the husband hands the 'get' to his wife in the presence of ten witnesses. In the 'get' is contained the date, the names and surnames of husband and wife and of their fathers, and also the name of the city and its location (whether near a river or sea.) After the first lines, containing the date, it runs: I, N., son of N., of the city of N., situated on the river N., set thee free, my wife, N., daughter of N., of the city of N., etc. Thou art set free and art at liberty to marry any man whom thou mayest choose. This document from me is a letter of divorcement and liberty according to the law of Moses and Israel."[60] Such a divorce can have no force where granted by a rabbi in this country to residents of this country nor when it fails to satisfy the Russian requirements. Validity was denied to a divorce of this character where one of the parties was in the United States, with the intent to remain here, and the other party was in Russia at the time of the rabbinical proceeding. Very plainly the Russian rabbi had no jurisdiction over the spouse in America.[61]

§ 630. **Marriage under foreign divorce.**—Where there is an absolute divorce, the prohibition under penalty of the remarriage of the guilty party is now considered largely to be of local application, and outside the jurisdiction of that state of no effect. If there is an absolute divorce, the guilty party may remarry in any other jurisdiction and the marriage will be held valid, even though the purpose is the evading of the local law.[62] But the

Misc. 631, 131 N. Y. S. 241; Miller v. Miller, 70 Misc. 368, 128 N. Y. S. 787; Leshinsky v. Leshinsky, 5 Misc. 495, 25 N. Y. S. 841.

[60]Shilman v. Shilman, 105 Misc. 461, 174 N. Y. S. 385.

[61]Saperstone v. Saperstone, 73 Misc. 631, 131 N. Y. S. 241. See also Miller v. Miller, 70 Misc. 368, 128 N. Y. S. 787.

[62]Fuller v. Fuller, 40 Ala. 301; Phillips v. Madrid, 83 Maine 205, 22 Atl. 114, 12 L. R. A. 862, 23 Am. St. 770; Clark v. Clark, 62 Mass. 385; Thorp v. Thorp, 90 N. Y. 602, 43 Am. Rep. 189.

divorce must be a valid and absolute decree or it will have no effect.[63]

Where the divorce is void and both of the parties have remarried, a divorce may be had by the innocent party in order to legitimize issue of the second marriage.[64]

§ 631. **Prohibition of remarriage.**—While every state has the right to enact laws and regulations governing marriage and divorce in its own boundaries, it can not enact laws prohibiting remarriage which would extend beyond such boundaries. These laws have no extra-territorial force.[65] And this is more especially the case where such laws do not make the marriage invalid.[66] Accordingly, a marriage in Iowa to a woman less than a year after the granting of an unconditional divorce in Illinois, was valid, though it would be absolutely void if entered into in Illinois.[67]

It is the law of the state of marriage that controls where there is a conflict between the laws of that state and the state of the divorce decree as to the time limited for remarriage.[68] Neither can the guilty party who remarries without the state without permission of the court be indicted for polygamy.[69] But the laws of the state in which the decree is granted may make invalid a remarriage within the state within the forbidden period,[70] and

[63]Barber v. Barber, 21 How. (U. S.) 582, 16 L. ed. 226; Ball v. Cross, 231 N. Y. 329, 132 N. E. 106.

[64]Kelsey v. Kelsey, 190 N. Y. S. 52.

[65]Fordham v. Marrero, 273 Fed. 61; Loth v. Loth, 54 Colo. 200, 129 Pac. 827; Farrell v. Farrell, 190 Iowa 919, 181 N. W. 12; West Cambridge v. Lexington, 18 Mass. 506; Van Voorhis v. Brintnell, 86 N. Y. 18, 40 Am. Rep. 505; Vickers v. Faubion (Tex. Civ. App.), 224 S. W. 803; Wingo v. Rudder (Tex. Civ. App.), 120 S .W. 1073. But see Lincoln v. Riley, 217 Ill. App. 571; Gardner v. Gardner, 232 Mass. 253, 122 N. E. 308; 42 Am. Law Rev. 607, citing Dimpfel v. Wilson, 107 Md. 329, 68 Atl. 561.

[66]Horton v. Horton, 22 Ariz. 490, 198 Pac. 1105; Ex parte Crane, 170 Mich. 651, 136 N. W. 587, 40 L. R. A. (N. S.) 765, Ann. Cas. 1914A, 1173; Hoagland v. Hoagland, 27 Wyo. 178, 193 Pac. 843.

[67]Webster v. Modern Woodmen, 192 Iowa 1376, 186 N. W. 659.

[68]People v. Woodley, 22 Cal. App. 674, 136 Pac. 312; Dudley v. Dudley, 151 Iowa 142, 130 N. W. 785, 32 L. R. A. (N. S.) 1170; Goodwin v. Goodwin, 158 App. Div. 171, 142 N. Y. S. 1102. See also Lee v. Lee, 150 Iowa 611, 130 N. W. 128.

[69]Commonwealth v. Lane, 113 Mass. 458, 18 Am. Rep. 509. But see State v. Snyder, 98 W. Va. 96, 108 S. E. 588.

[70]In re Elliott's Estate, 165 Cal. 339, 132 Pac. 439; Hooper v. Hooper, 67 Ore. 187, 135 Pac. 205, 525; State v. Sartwell, 81 Vt. 22, 69 Atl.

even where the remarriage occurs without the state and the parties return to the state after the remarriage.[71] It would seem clear that a marriage within the statutory period outside the state would be invalid where decree of divorce has been vacated.[72] The Colorado courts hold the view that a marriage without the state within the time when remarriage within the state was forbidden becomes valid from the expiration of the statutory time though the party returned to the state immediately after the remarriage.[73]

151, 130 Am. St. 1017. In Minnesota the marriage is voidable but not void. State v. Yoder, 113 Minn. 503, 130 N. W. 10, L. R. A. 1916C, 686.

[71]People v. Prouty, 262 Ill. 218, 104 N. E. 387, 51 L. R. A. (N. S.) 1140, Ann. Cas. 1915B, 155; Wilson v. Cook, 256 Ill. 460, 100 N. E. 222, 43 L. R. A. (N. S.) 365; Nehring v. Nehring, 164 Ill. App. 527; Pierce v. Pierce, 58 Wash. 622, 109 Pac. 45; Lanham v. Lanham, 136 Wis. 360, 117 N. W. 787, 17 L. R. A. (N. S.) 804, 128 Am. St. 1085. In Washington the law is construed not to invalidate the marriage where the parties have made a good faith domicil in the sister state. State v. Fenn, 47 Wash. 561, 92 Pac. 417, 17 L. R. A. (N. S.) 800.

[72]Griswold v. Griswold, 23 Colo. App. 365, 129 Pac. 560.

[73]Mock v. Chaney, 36 Colo. 60, 87 Pac. 538.

CHAPTER 42

SEPARATE MAINTENANCE WITHOUT DIVORCE

Section

635. In general.
636. Jurisdiction of equity to decree maintenance.
637. Necessity of valid marriage.
638. Necessity of separation—Effect of living under one roof.
639. Matters operative as a bar in general.
640. Agreements and settlements as bar to action.
641. Causes for granting separate maintenance in general.
642. Causes for separate maintenance—Desertion by husband.
643. Causes justifying the wife in leaving husband—Constructive desertion—Cruel treatment—Adultery.
644. Necessity of wife's freedom from fault.
645. Effect of wife's unchastity on her right to maintenance.
646. Effect of offer to resume marital relation.
647. Effect of condonation on right to maintenance.
648. Right of nonresident wife to maintain action—Venue.
649. Application of statutes of limitations.
650. Pleading.
651. Evidence.
652. Reference to find facts necessary to determination of amount.
653. The allowance and its incidents in general.
654. Injunction against conveyance or incumbrance of property.
655. Termination of right to separate maintenance.

§ 635. **In general.**—Separate maintenance is the allowance granted a wife for the support of herself and children while living separate and apart from her husband without fault of her own and is decreed in an action brought solely for that purpose and not for divorce. The right is based on the fundamental duty of the husband to support his wife while the marriage relation exists. The duty continues though the wife may have ample grounds for divorce which she declines to enforce. One of the courts has well observed: "There is not much to commend an

alleged principle of equity which would hold that the wife with her family of one or more children to support, must be driven to going into a court for a divorce when such a proceeding is abhorrent to her, or in case of her refusing so to do, being compelled to submit to deprivation of the rights which equity and humanity clearly give her."[1] The decree for separate maintenance does not alter the marital status, except to give legal sanction to the wife's living apart from her husband,[2] and hence the right of dower may not be barred by a decree for separate maintenance.[3] Neither does the grant of a decree for separate maintenance bar a later suit by the wife for divorce on account of abandonment.[4] Nor is it such a proceeding as will authorize the court to make an equitable division of the property of the husband as would be proper if the proceeding was one for divorce.[5]

§ 636. **Jurisdiction of equity to decree maintenance.**—Where the statutes fail to give the wife the right to proceed for this relief, then the courts, by the great weight of authority, sanction a resort to equity. The common law provides no remedy, for there the wife can not sue the husband.[6]

[1]Earle v. Earle, 27 Nebr. 277, 43 N. W. 118, 20 Am. St. 667.

[2]Decker v. Decker, 56 Mont. 338, 185 Pac. 168.

[3]In re Spohr's Estate, 197 Ill. App. 348.

[4]Tehsman v. Tehsman (N. J. Ch.), 117 Atl. 34.

[5]Durham v. Durham (Ohio St.), 135 N. E. 280.

[6]Favoring the Jurisdiction. Auld v. Auld, 4 Cranch, C. C. 84, Fed. Cas. No. 649; Shaw v. Shaw, 2 App. D. C. 204; Tolman v. Tolman, 1 App. D. C. 299; Tutwiler v. Tutwiler, 205 Ala. 283, 87 So. 852; Spafford v. Spafford, 199 Ala. 300, 74 So. 354, L. R. A. 1917D, 773; Jones v. Jones, 174 Ala. 461, 57 So. 376; Clisby v. Clisby, 160 Ala. 572, 49 So. 445, 135 Am. St. Rep. 110; Brady v. Brady, 144 Ala. 414, 39 So. 237; Pearce v. Pearce, 132 Ala. 221, 31 So. 85, 90 Am. St. 901; Brindley v. Brindley, 121 Ala. 429, 25 So. 751; Brindley v. Brindley, 115 Ala. 474, 22 So. 448; Murray v. Murray, 84 Ala. 363, 4 So. 239; Hinds v. Hinds, 80 Ala. 225; Kinsey v. Kinsey, 37 Ala. 393; Wray v. Wray, 33 Ala. 187; Mims v. Mims, 33 Ala. 98; Glover v. Glover, 18 Ala. 367; Glover v. Glover, 16 Ala. 440; Harmon v. Harmon, 152 Ark. 129, 237 S. W. 1096; Savage v. Savage, 143 Ark. 388, 220 S. W. 459; Livingston v. Superior Court, 117 Cal. 633, 49 Pac. 836, 38 L. R. A. 175; Hagle v. Hagle, 68 Cal. 588, 9 Pac. 842; Galland v. Galland, 38 Cal. 265; Fahey v. Fahey, 43 Colo. 354, 96 Pac. 251, 18 L. R. A. (N. S.) 1147, 127 Am. St. Rep. 118; Austin v. Austin, 42 Colo. 130, 94 Pac. 309; In re Popejoy, 26 Colo. 32, 55 Pac. 1083, 77 Am. St. 222; Daniels v. Daniels, 9 Colo. 133, 10 Pac. 657; Dye v. Dye, 9 Colo. App. 320, 48 Pac. 313; Hanscom v. Hanscom, 6 Colo. App. 97, 39 Pac. 885; Dole v. Gear, 14 Hawaiian Rep. 554; Simonton v. Simonton, 33 Idaho 255, 193

Pac. 386; Shipley v. Shipley, 187 Iowa 1295, 175 N. W. 51; Shors v. Shors, 133 Iowa 22, 110 N. W. 16; Simpson v. Simpson, 91 Iowa 235, 59 N. W. 22; Platner v. Platner, 66 Iowa 378, 23 N. W. 764; Farber v. Farber, 64 Iowa 362, 20 N. W. 472; Finn v. Finn, 62 Iowa 482, 17 N. W. 739; McFarland v. McFarland, 51 Iowa 565, 2 N. W. 269; Whitcomb v. Whitcomb, 46 Iowa 437; Graves v. Graves, 36 Iowa 310, 14 Am. Rep. 525; George v. George, 190 Ky. 706, 228 S. W. 408; Napier v. Napier, 187 Ky. 722, 220 S. W. 735; Williamson v. Williamson, 183 Ky. 435, 209 S. W. 503, 3 A. L. R. 799; Kelly v. Kelly, 183 Ky. 172, 209 S. W. 335; Davis v. Davis, 86 Ky. 32, 4 S. W. 22; Hulett v. Hulett, 80 Ky. 364, 4 Ky. L. 193; Lockridge v. Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52; Butler v. Butler, 4 Litt. (Ky.) 201; Hubbard v. Hubbard, 131 Md. 291, 101 Atl. 772; Walker v. Walker, 125 Md. 649, 94 Atl. 346; Govane's Case, 2 Bland's Ch. (Md.) 570; Lynthecumb's case, (1738) 2 Bland's Ch. (Md.) 568; Scott's Case (1746) 2 Bland's Ch. (Md.) 568; Macnamara's Case (1707) 2 Bland's Ch. (Md.) 566; Fornshill v. Murray, 1 Bland's Ch. (Md.) 479, 18 Am. Dec. 344; Codd v. Codd (1727) 1 Bland's Ch. (Md.) 101; Jamison v. Jamison, 4 Md. Ch. 289; Robertson v. Robertson, 138 Minn. 290, 164 N. W. 980; Jacobs v. Jacobs, 136 Minn. 190, 161 N. W. 525, L. R. A. 1917D, 971; Stephen v. Stephen, 102 Minn. 301, 113 N. W. 913; Baier v. Baier, 91 Minn. 165, 97 N. W. 671; Verner v. Verner, 62 Miss. 260; Garland v. Garland, 50 Miss. 694; Edgerton v. Edgerton, 12 Mont. 122, 29 Pac. 966, 16 L. R. A. 94, 33 Am. St. 557; Hoon v. Hoon, 82 Nebr. 688, 118 N. W. 563; Sample v. Sample, 82 Nebr. 37, 116 N. W. 953; Brewer v. Brewer, 79 Nebr. 726, 113 N. W. 161, 13 L. R. A. (N. S.) 222; Rhoades v. Rhoades, 78 Nebr. 495, 111 N. W. 122, 126 Am. St. 611; Price v. Price, 75 Nebr. 552, 106 N. W. 657; Eldred v. Eldred, 62 Nebr. 613, 87 N. W. 340; Cochran v. Cochran, 42 Nebr. 612, 60 N. W. 942; Earle v. Earle, 27 Nebr. 277, 43 N. W. 118, 20 Am. St. 667; Hilton v. Second Judicial Dist. Ct., 43 Nev. 128, 183 Pac. 317; Crews v. Crews, 175 N. Car. 168, 95 S. E. 149; Spiller v. Spiller, 2 N. Car. 482; Anonymous, 2 N. Car. (1 Hayw.) 347; Knight v. Knight, 1 N. Car. 163, 3 N. Car. (2 Hayw.) 101, Tayl. 120; Hagert v. Hagert, 22 N. Dak. 290, 133 N. W. 1035, 38 L. R. A. (N. S.) 966, Ann. Cas. 1914B, 925; Woods v. Waddle, 44 Ohio St. 449, 8 N. E. 297; Levin v. Levin, 68 S. Car. 123, 46 S. E. 945; Smith v. Smith, 51 S. Car. 379, 29 S. E. 227; Briggs v. Briggs, 24 S. Car. 377; Christopher v. Christopher, 18 S. Car. 600; Thompson v. Thompson, 10 Rich. Eq. (S. Car.) 416; Hair v. Hair, 10 Rich. Eq. (S. Car.) 163 (obiter); Prince v. Prince, 1 Rich Eq. (S. Car.) 282; Rhame v. Rhame, 1 McCord Eq. (S. Car.) 197, 16 Am. Dec. 597 (obiter); Mattison v. Mattison, 1 Strobh. Eq. (S. Car.) 387, 47 Am. Dec. 541; Taylor v. Taylor, 4 Desaus. Eq. (S. Car.) 167; Devall v. Devall, 4 Desaus. Eq. (S. Car.) 79; Prather v. Prather, 4 Desaus. Eq. (S. Car.) 33; Jelineau v. Jelineau, 2 Desaus. Eq. (S. Car.) 45; Wells v. Wells, 27 S. Dak. 257, 130 N. W. 780; Milliron v. Milliron, 9 S. Dak. 181, 68 N. W. 286, 62 Am. St. Rep. 863; Bueter v. Bueter, 1 S. Dak. 94, 45 N. W. 208, 8 L. R. A. 562; Cureton v. Cureton, 117 Tenn. 103, 96 S. W. 608; Nicely v. Nicely, 3 Head. (Tenn.) 184; Francis v. Francis, 31 Gratt. (Va.) 283; Latham v. Latham,

The courts of law have in some cases made a circuitous but clumsy effort to enforce this duty by the use of the fiction that a wife living apart from her husband by reason of his fault, is his agent for the purpose of binding him to third parties for necessaries furnished to her.[7] "Support of the wife" says

30 Gratt (Va.) 307; Almond v. Almond, 4 Rand. (Va.) 662, 15 Am. Dec. 781 (obiter); Purcell v. Purcell, 4 Hen. & M. (Va.) 507; Kelley v. Bausman, 98 Wash. 686, 168 Pac. 181; Herrett v. Herrett, 60 Wash. 607, 111 Pac. 867; State ex rel. Lloyd v. Superior Ct., 55 Wash. 347, 104 Pac. 771, 25 L. R. A. (N. S.) 387; Bond v. Bond, 45 Wash. 511, 88 Pac. 943; Schonborn v. Schonborn, 27 Wash. 421, 67 Pac. 987; Branscheid v. Branscheid, 27 Wash. 368, 67 Pac. 812; Kimble v. Kimble, 17 Wash. 75, 49 Pac. 216; Lang v. Lang, 70 W. Va. 205, 73 S. E. 716, 38 L. R. A. (N. S.) 950, Ann. Cas. 1913D, 1129. In Almond v. Almond, 4 Rand. (Va.) 662, 15 Am. Dec. 781, the Chancellor said: "Suppose a husband to turn his wife out of doors, or to treat her so cruelly that she cannot possibly live with him; suppose him to persevere in refusing to take her back or to provide a cent to feed or clothe her. Surely, in a civilized country, there must be some tribunal to which she may resort. She cannot be out of the protection of the law,—an outcast, dependent upon the charity of the world, while her husband may have thousands, and she may have brought him all. I would, in such cases, unquestionably stretch out the arm of chancery, to save and protect her." In Purcell v. Purcell, 4 Hen. & M. (Va.) 507, the Chancellor said: "I hold that in every well regulated government, there must exist somewhere a power of affording a remedy where the law affords none, and this peculiarly belongs to the court of equity; and as husband and wife are considered as one person in law, it is evident that in this case the law can afford no remedy; which is universally admitted to be a sufficient ground to give this court jurisdiction." In Kimble v. Kimble, 17 Wash. 75, 49 Pac. 216, the court said: "When we enter the domain of the affections, strange as it may seem, we find that affection frequently survives neglect, cruel treatment, and abandonment. In such a case, the wife does not desire a divorce from her husband. That is the one thing she shrinks from. She believes that the alienation of the affections of her husband is temporary, and hopes in time to win him back to a resumption of the marriage relations. But in the meantime she must live."

[7]In Lynde v. Lynde, 64 N. J. Eq. 736, 52 Atl. 694, 58 L. R. A. 471, 97 Am. St. 692. But that agency of the wife was not the ground of the common law jurisdiction, and that the obligation of the husband was, is shown in view of the rule that agency may be terminated by notice, yet in such actions where the husband had given the notice that he would not be responsible for his wife's contracts for necessaries, he was still held to be so. Edgerton v. Edgerton, 12 Mont. 122, 29 Pac. 966, 16 L. R. A. 94, 33 Am. St. 557, citing Schuler on Domestic Relations, § 66; Sykes v. Halsted, 3 N. Y. S. (1 Sand.) 483; 1 Bishop on Mar. & Div. 572.

the Supreme Court of Mississippi, "is the legal duty of the husband. The wife has a right to demand it, but as a remedy when this right is denied, is not full and adequate to compel it at law, equity ought to enforce it. In abandoning a wife without a cause and refusing to support her, the husband violates a legal duty and commits a breach of contract which entitles the wife to redress either by divorce or the enforcement of the marriage contract by compelling restitution of conjugal rights to the extent of maintenance. If she chooses the latter, she should not be starved into the former for that would force her to abandon the marriage contract against her will."[8] It is not to be overlooked, however, that many strong courts have denied the wife the right to resort to equity to compel the performance of this basic obligation where there is no statute conferring the right. This view is the one sanctioned by the rules of the old ecclesiastical courts of England.[9]

[8]Garland v. Garland, 50 Miss. 694. In Graves v. Graves, 36 Iowa 310, 14 Am. Rep. 525, it was said: "The wrongful conduct of the husband may be such as would form a sufficient ground for her divorce; yet an affectionate, devoted and hopeful wife may still not desire a divorce, by reason of her belief that she may reclaim him, and make him worthy of her love, notwithstanding his faults. But, during the period of forbearance and efforts of reclamation she is entitled to and must have her maintenance. It seems to us that upon well-settled equity principles, as well as upon the consideration of public policy, the action may be maintained without asking a divorce or other relief." In Baier v. Baier, 91 Minn. 165, 97 N. W. 671, the court used this language: "It is, however, said that the wife has an adequate remedy by an action for divorce, absolute or limited, in which the court has the unquestioned right as an incident to the divorce action, to rule her alimony. But there may be reasons why she does not wish a divorce, either absolute or limited, the sufficiency of which she must in conscience be the judge. A court of equity ought not in such a case require her to bring the action for divorce or starve, unless she can find some one who is willing to make her cause his own, and furnish her with necessary supplies on the credit of her recreant husband."

[9]Goss v. Goss, 29 Ga. 109; McGee v. McGee, 10 Ga. 477; Trotter v. Trotter, 77 Ill. 510; Ross v. Ross, 69 Ill. 569; Petrie v. People, 40 Ill. 334; Stanbrough v. Stanbrough, 60 Ind. 275; Chapman v. Chapman, 13 Ind. 396; Fischli v. Fischli, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251; Rariden v. Rariden, 33 Ind. App. 284, 70 N. E. 398, 104 Am. St. 252; Carroll v. Carroll, 42 La. Ann. 1071, 8 So. 400; Holbrook v. Holbrook, 32 La. Ann. 13; Moore v. Moore, 18 La. Ann. 613; Heyob v. Her Husband, 18 La. Ann. 41; Adams v. Adams, 100 Mass. 365, 1 Am. Rep. 111; Shannon v. Shannon, 2 Gray (Mass.) 285; Perkins v. Perkins, 16 Mich. 162; Peltier v. Peltier, Har. (Mich.) 19;

In a jurisdiction where the rule obtains that separate maintenance may be enforced in equity it is held that a statute making it a misdemeanor for a husband to wilfully neglect his wife, does not deprive a court of equity of the right to order separate maintenance for a wife in a proper case.[10]

§ 637. **Necessity of valid marriage.**—It is always essential to the allowance of separate maintenance that a valid subsisting marriage should exist between the parties.[11] The allowance will ordinarily be denied where there is doubt as to the existence of the relation.[12] A husband will ordinarily be estopped to assert the invalidity of a marriage as a defense where they have lived together as husband and wife and reared a family.[13]

Doyle v. Doyle, 26 Mo. 545; DeGraw v. DeGraw, 7 Mo. App. 121; Wallace v. Wallace, 75 N. H. 217, 72 Atl. 1033; Parsons v. Parsons, 9 N. H. 309, 32 Am. Dec. 362; Lynde v. Lynde, 54 N. J. Eq. 473, 35 Atl. 641; Anshutz v. Anshutz, 16 N. J. Eq. 162; Yule v. Yule, 10 N. J. Eq. 138; Johnson v. Johnson, 206 N. Y. 561, 100 N. E. 408, Ann. Cas. 1914B, 407; Ramsden v. Ramsden, 91 N. Y. 281, 2 McCarty Civ. Proc. 418; Griffin v. Griffin, 47 N. Y. 134; Atwater v. Atwater, 53 Barb. (N. Y.) 621, 36 How. Pr. 431; Pomeroy v. Wells, 8 Paige (N. Y.) 406; Durham v. Durham (Ohio St.), 135 N. E. 280; Bamford v. Bamford, 4 Ore. 30; Rees v. Waters, 9 Watts (Pa.) 90; Trevino v. Trevino, 63 Tex. 650; Simons v. Simons, 23 Tex. 344; Prosser v. Warner, 47 Vt. 667, 19 Am. Rep. 132; Harrington v. Harrington, 10 Vt. 505; Stewart v. Stewart, 27 W. Va. 167; Clarke v. Burke, 65 Wis. 359, 27 N. W. 22, 56 Am. Rep. 631. See also Edgerton v. Edgerton, 12 Mont. 122, 29 Pac. 966, 16 L. R. A. 94, 33 Am. St. 557.

[10]Austin v. Austin, 42 Colo. 130, 94 Pac. 309; Baier v. Baier, 91 Minn. 165, 97 N. W. 671. In Dye v. Dye, 9 Colo. App. 320, 48 Pac. 313, the court said: "We are, however, unable to see that such a statute was designed or can be held operative to destroy or defeat the general powers of courts of equity to entertain suits to compel the husband to pay alimony which is consistent with his condition in life, and reasonable for the maintenance of his wife or his family, or both." The enactment of statutes touching separate maintenance in no wise affects the common-law right of action in favor of a person supplying necessaries to the wife. Seybold v. Morgan, 38 Ill. App. 39. But this seems to be doubted in Massachusetts, where it is said, "It is probable that this statute should be taken as a declaration of the legislative sense that a married woman, living apart from her husband, should obtain money for necessaries through the aid of the probate court, and not by pledging his credit." Skinner v. Tirrell, 159 Mass. 474, 34 N. E. 692, 21 L. R. A. 673, 38 Am. St. 447.

[11]Pennaman v. Pennaman, 153 Ga. 647, 112 S. E. 829. See also Nelson v. Nelson, 200 Ill. App. 584.

[12]Profenius v. Profenius, 90 N. J. Eq. 45, 106 Atl. 144.

[13]Dillon v. Dillon, 60 Ga. 204. The defense in this case was that his wife was a person of African de-

§ 638. **Necessity of separation—Effect of living under one roof.**—The independent suit for separate maintenance, as the very term implies, demands that the parties should be living apart at the commencement, and this more especially where a statute authorizing the action so provides.[14] Such a provision in the statute is sometimes held satisfied although the parties are still living under the same roof, but not occupying the same room or cohabiting as man and wife.[15] In Illinois, however, the provision is a condition precedent to the action, to be both alleged and proved, and living in the same house, although not occupying the same room is held not to constitute a living apart.[16] But there may be a living apart though in a house provided by the husband if he is living elsewhere in adultery.[17] In Missouri there may be an abandonment though the parties are living under same roof but without cohabitation.[18]

§ 639. **Matters operative as a bar in general.**—An antenuptial agreement will not bar the action.[19]

scent, having more than one-eighth of African blood in her veins, and the court said: "To allow the husband to indulge in scruples about the pedigree of his old wife, when her youth, beauty, and strength have all waned, and thus escape responding to her claim for reasonable alimony, would be unwise in policy, and unsound in principle."

[14]Rabb v. Rabb, 150 Ill. App. 554; Will v. Will, 134 Ill. App. 67; Earle v. Earle, 60 Ill. App. 360; Margarum v. Margarum, 57 N. J. Eq. 249, 41 Atl. 357; Battery v. Battery, 1 R. I. 212.

[15]Will v. Will, 134 Ill. App. 67; Smith v. Smith, 172 Iowa 329, 151 N. W. 1085; McIlroy v. McIlroy, 208 Mass. 458, 94 N. E. 696, Ann. Cas. 1912A, 934; Bucknam v. Bucknam, 176 Mass. 229, 57 N. E. 343, 49 L. R. A. 735; Polster v. Polster, 145 Mo. App. 606, 123 S. W. 81; Anshutz v. Anshutz, 16 N. J. Eq. 162. In the Bucknam case, 176 Mass. 229, 57 N. E. 343, under a statute authorizing the court to make an order for the support of the wife when the husband fails without just cause to support her, or has deserted her, or when she, for justifiable cause, is actually living apart from him, and they live in the same house but do not occupy the same room or bed, or eat together, and have only such conversation as is absolutely necessary and she cooks the food furnished by him for both, the conditions of the statute are satisfied.

[16]Lowe v. Lowe, 213 Ill. App. 607; Pratt v. Pratt, 197 Ill. App. 530; Rathmann v. Rathmann, 196 Ill. App. 20; Will v. Will, 134 Ill. App. 67; Klemme v. Klemme, 37 Ill. App. 54.

[17]Cooper v. Cooper, 160 Ill. App. 449.

[18]Polster v. Polster, 145 Mo. App. 606, 123 S. W. 81.

[19]Walker v. Walker, 125 Md. 649, 94 Atl. 346, Ann. Cas. 1916B, 934. In Logan v. Logan, 2 B. Mon. (Ky.) 142, it was held that an antenuptial contract, in which both parties re-

Neither will the action be barred because of a prior decree in a similar suit, where the later action is based on newly committed offenses,[20] even though the prior decree is entered in another state.[21] But, of course, it will, where the same facts are relied on in the subsequent action.[22] Nor is the action barred by an order for temporary alimony in a former action by her for divorce, where the divorce was denied.[23]

The release by the wife upon a fraudulently obtained foreign divorce, is no defense to her action for separate maintenance.[24]

§ 640. **Agreements and settlements as bar to action.**—As a general rule a fair and equitable separation agreement between the parties providing for her separate support will defeat the action,[25] so long as it is fully and faithfully performed, otherwise

nounced all right of the property of each other, presents no bar to a decree for alimony. In Clopton v. Clopton, 162 Cal. 27, 121 Pac. 720, the court said: "There is nothing in this contract that purports to relieve the husband from the obligation of supporting and maintaining his wife during the continuance of the proposed marriage relation, and, of course, nothing of that kind was intended by either party. That duty on the part of the husband was in no way affected by the contract." In Tallmon v. Tallmon, 166 Iowa 370, 147 N. W. 746, it was held that an authorized agreement by the wife's attorneys was a bar to the action, the husband not being responsible if the attorneys overcharged.

[20]Hardy v. Hardy, 97 Cal. 125, 31 Pac. 906; Schraeder v. Schraeder, 26 Ill. App. 524; Griffin v. Griffin, 8 B. Mon. (Ky.) 120; Creasey v. Creasey, 168 Mo. App. 98, 151 S. W. 215; Schradin v. Schradin, 24 Ohio Cir. Ct. 647. In Kientz v. Kientz, 104 Ark. 381, 149 S. W. 86, it was held that the refusal to grant the wife a decree of divorce in an action, did not preclude her at any time thereafter to prosecute an action for alimony, if she were entitled to it.

[21]Freund v. Freund, 71 N. J. Eq. 524, 63 Atl. 756.

[22]Hardy v. Hardy, 97 Cal. 125, 31 Pac. 906.

[23]Doggett v. Doggett (Okla.), 203 Pac. 223; Lewis v. Lewis, 39 Okla. 407, 135 Pac. 397.

[24]Lister v. Lister, 86 N. J. Eq. 30, 97 Atl. 170.

[25]Tallmon v. Tallmon, 166 Iowa 370, 147 N. W. 746; Bailey v. Dillin, 186 Mass. 244, 71 N. E. 538, 66 L. R. A. 427; Commonwealth v. Henderschedt, 1 Kulp (Pa.) 42. In Clisby v. Clisby, 160 Ala. 572, 49 So. 445, 135 Am. St. 110, after the separation and before suit was brought, an agreement for a stated sum to be paid monthly was made between husband and wife, and the court said that had it been performed, the suit would have been dismissed at the plaintiff's costs. An agreement between the husband and wife for separate maintenance of the wife, which is free from fraud or duress, and which makes an equitable provision for the wife, considering the situation of life of the parties, is valid, and is a bar to a separate maintenance proceeding brought by the wife; but they can not, by such an agreement between them, deprive a court of chancery of

it will not.[26] But in Massachusetts, such agreements have been held void,[27] unless made through the intervention of a trustee.[28] Nor will a stipulation not to sue be a bar,[29] where the provision

its power over the care, custody, and support of the minor children of the parties. Longhi v. Longhi, 193 Ill. App. 21. In Middleton v. Middleton, 18 Ill. App. 472, the court said: "If the case were, in reality, only a case of a bill by the wife for separate maintenance, and the articles of separation were fairly obtained and fully performed, then there would be a grave question whether the bill for separate maintenance would lie." This is mere dictum, for the court immediately said: "But such is not the case. Her bill is so drawn that if it should be sustained by the evidence at the trial, she could, at her election, take a decree of divorce." In Kelly v. Bausman, 98 Wash. 686, 168 Pac. 181, the wife's action for separate maintenance, where she had made persons having possession of the property of her husband co-defendants, it was held error to strike from their answer an alleged prior settlement between her and her husband, set up as an affirmative defense. Dicta in Patterson v. Patterson, 111 Ill. App. 342, seems to contravene this proposition. All that was decided, or necessary to be decided in the case, was that an action for separate maintenance did not bar a suit in assumpsit for unpaid instalments of a previous agreement for support. To the same effect, is Shriner v. Shriner, 155 Ill. App. 191.

[26]French v. French, 302 Ill. 152, 134 N. E. 33, reversing decree in 20 Ill. App. 658; Walker v. Walker, 125 Md. 649, 94 Atl. 346, Ann. Cas. 1916B, 934; Meyerl v. Meyerl, 125 Mich. 607, 84 N. W. 1109; Scheinkman v. Scheinkman, 64 Misc. 443, 118 N. Y. S. 775; Cram v. Cram, 116 N. Car. 288, 21 S. E. 197. In Landes v. Landes, 172 App. Div. 758, 159 N. Y. S. 230, the court said: "The agreement has been broken by the defendant, and the plaintiff has now brought an action in derogation of it, which is equivalent to a repudiation of it on her part. That leaves open the entire question of her right to a separation and to support." In Hill v. Hill, 190 Ill. App. 541, it was held that a decree of separate maintenance finding that the court had jurisdiction of the subject matter of complainant's bill, and that she had the right to maintain the same, not improper because of the fact that the parties had entered into a separation agreement, where the contract was unfair and inequitable to the complainant, and it appeared it was executed under a misunderstanding on her part of its terms and meaning while she was in a nervous condition of mind brought about by the cruel and unkind treatment of the husband, and it also appeared that the husband had breached the contract by refusing to make payments for her support.

[27]Silverman v. Silverman, 140 Mass. 560, 5 N. E. 639.

[28]Bailey v. Dillon, 186 Mass. 244, 71 N. E. 538, 66 L. R. A. 427.

[29]In Gaines v. Poor, 3 Metc. (Ky.) 503, 79 Am. Dec. 559, it was held that a contract by a husband, made before marriage, or afterwards when living in amity with his wife, to pay an allowance for her support, if at any time she should separate from him, is against public policy, and void; but such a contract is valid if made in contemplation of the continuance of a previous separation, or

thereby made is inadequate;[30] and especially so if there is no provision therein for her support,[31] neither will such agreement bar the action where it is procured by fraud or coercion;[32] nor where the husband subsequent thereto commits adultery.[33] The fact that the wife did not join in any conveyances as stipulated in the separation agreement, will not bar her action.[34] An action may not be based upon a cause occurring prior to the execution of the agreement.[35] A contract which contemplates a divorce is invalid and will not bar the action.[36]

§ 641. **Causes for granting separate maintenance in general.** —The causes which will invoke the jurisdiction of the courts toward alimony in an independent action, whether under the authority of statutes, or the inherent power of courts of equity,[37]

an immediate separation, where disagreements have taken place between husband and wife. In Patterson v. Patterson, 111 Ill. App. 342, the court said: "If the wife had expressly agreed, as a consideration for the payments to be made for her support, not to bring a suit for separate maintenance, she would not be bound thereby." But see Atwood v. Atwood, 15 Ont. Pr. Rep. 425, 16 Ont. Pr. Rep. 50.

[30]Miller v. Miller, 1 N. J. Eq. 386. See also Cram v. Cram, 116 N. Car. 288, 21 S. E. 197.

[31]Shriner v. Shriner, 155 Ill. App. 191; Morgan v. Morgan, 22 Ont. Wk. Rep. 25, 3 Ont. Wk. n. 1220, 3 D. L. R. 802; Freemont v. Freemont, 26 Ont. L. R. 6. In Kelly v. Kelly, 61 Misc. 480, 115 N. Y. S. 587, where there had been a settlement of property between the husband and wife, the court held that the agreement did not show or intend to include the right of the wife's support among the differences then settled with her husband.

[32]Hill v. Hill, 190 Ill. App. 541; Hollingshead v. Hollingshead, 91 N. J. Eq. 261, 110 Atl. 19. In Lister v. Lister, 86 N. J. Eq. 30, 97 Atl. 170, the wife had accepted the sum of $400 in full of her husband's obligation to support her. The court said: "She was under great stress of pecuniary embarrassment, and greatly discouraged in her effort to get justice from her derelict husband, and was tempted by the opportunity for temporary relief which was held out before her, when she executed this paper." In Bueter v. Bueter, 1 S. Dak. 94, 45 N. W. 208, 8 L. R. A. 562, the court was fully convinced from the evidence that the execution of the article of separation by the wife, was caused by threats of bodily injury, and accomplished by menace on the part of the husband.

[33]Miller v. Miller, 19 B. C. 563, 27 West. L. R. 607, 16 D. L. R. 557, 6 West. Wk. Rep. 168; Tuxford v. Tuxford, 9 Sask. L. R. 251, 28 D. L. R. 239, 34 West L. R. 419.

[34]Jones v. Jones, 174 Ala. 461, 57 So. 376.

[35]Curtis v. Curtis, 29 Misc. 257, 61 N. Y. S. 59.

[36]Birch v. Anthony, 109 Ga. 349, 34 S. E. 561, 77 Am. St. 379.

[37]The right to separate maintenance is given by statute in Arkansas, California, Georgia, Illinois, In-

are, generally speaking, substantially the same. Thus, with[38] or without[39] the aid of the statute, it may be said as a general rule, that whatever will be a cause for divorce or judicial separation, will justify the exercise of this jurisdiction.

Generally speaking, a decree for alimony independent of divorce under statutes giving that relief must be confined to the causes therein specified,[40] although it would seem that such

diana, Kansas, Massachusetts, Michigan, New Jersey, New Hampshire, New York, North Carolina, Oklahoma, Tennessee, Wisconsin, Wyoming.

[38]Taylor v. Taylor, 73 N. J. Eq. 745, 70 Atl. 323; Dummer v. Dummer (N. J.), 41 Atl. 149. In Weigand v. Weigand, 41 N. J. Eq. 202, 3 Atl. 699, under a statute which provided action might be brought where the husband has abandoned his wife, without justifiable cause, or separated himself from her, and refused to maintain and provide for her, it was held that whenever a husband commits a matrimonial offense which entitled his wife to a divorce, he does that which justifies his wife in leaving him, and she is entitled to a decree against him for separate maintenance.

[39]Russell v. Russell, 150 Iowa 137, 129 N. W. 835; Shors v. Shors, 133 Iowa 22, 110 N. W. 16; May v. May, 108 Iowa 1, 78 N. W. 703, 75 Am. St. 202; Carlisle v. Carlisle, 99 Iowa 247, 68 N. W. 681; Graves v. Graves, 36 Iowa 310, 14 Am. Rep. 525; Hood v. Hood, 138 Md. 355, 113 Atl. 895, 15 A. L. R. 774; Heinmuller v. Heinmuller, 133 Md. 491, 105 Atl. 745; Polley v. Polley, 128 Md. 60, 97 Atl. 526; Walker v. Walker, 125 Md. 649, 94 Atl. 346, Ann. Cas. 1916B, 934; Goldberg v. Goldberg, 237 Mass. 279, 129 N. E. 392; Irwin v. Irwin, 88 N. J. Eq. 139, 102 Atl. 440; Rhame v. Rhame, 1 McCord Eq. (S. Car.) 197, 16 Am. Dec. 597. In Marschalk v. Marschalk, 45 App. D. C. 455, the husband and wife acquired a home by a cash payment by her, and both agreeing to pay the balance in installments, after which he left her, and procured a home elsewhere, in which he offered to live with the plaintiff, she was awarded separate maintenance and support only so long as he should remain away from her. The wife is not required to justify separation by proof which would entitle her to a divorce. Tutwiler v. Tutwiler, 205 Ala. 283, 87 So. 852. Wife need not show grounds for divorce. Cobb v. Cobb, 82 Fla. 287, 89 So. 869. Probable grounds sufficient. Wooley v. Wooley, 24 Ill. App. 431; Jenkins v. Jenkins, 91 Ill. 167. In Iowa it is held that inhuman treatment which would warrant a divorce must be such as to endanger the life, and it must be treatment which has not been provoked or caused by the fault of the complaining party. Aitchison v. Aitchison, 99 Iowa 93, 68 N. W. 573. It is not necessary that the conduct or treatment of the wife by the husband should constitute grounds for divorce. Gans v. Gans, 157 Ky. 775, 164 S. W. 96.

[40]Anshutz v. Anshutz, 16 N. J. Eq. 162; Cory v. Cory, 11 N. J. Eq. 400; Yule v. Yule, 10 N. J. Eq. 138; Miller v. Miller, 1 N. J. Eq. 386. In California the legislature has limited the right of maintaining such action to the single cause of desertion on the part of the husband, and has not authorized it to be maintained

statutes, being remedial, should have a liberal construction to effect the purpose for which they were designed.[41]

§ 642. **Causes for separate maintenance—Desertion by husband.**—Desertion or abandonment of the wife by the husband, without reasonable cause, is, generally, the basis of this action.[42] And so is his leaving her without sufficient means of support.[43]

upon the ground of neglect, intemperance, cruelty, or any other act on his part which might be a sufficient ground for divorce. Proof of wilful desertion by a husband is therefore an essential element in the plaintiff's cause of action. Hardy v. Hardy, 97 Cal. 125, 31 Pac. 906.

[41]Ross v. Ross, 69 Ill. 569; Hilton v. Second Judicial Dist. Ct., 43 Nev. 128, 183 Pac. 317; Weigand v. Weigand, 41 N. J. Eq. 202, 3 Atl. 699. Johnson v. Johnson, 125 Ill. 510, 16 N. E. 891. In the latter case, the court said: "At common law, the husband was liable, in an action at law at the suit of any person furnishing to the wife necessaries suitable to her condition in life, if the wife was residing apart from him because of his wilful and improper treatment of her, or by his consent. No right of action existed in the wife, courts of equity refusing to take cognizance of her suit, and enforce the legal obligation of the husband to maintain her. The statute was passed to remedy this defect in the law." So, the statutes have been construed so as to give a wife a right of action against her husband, whenever she separates from him under such circumstances as will enable a third person to maintain an action against him for necessaries furnished to her. See Weigand v. Weigand, 41 N. J. Eq. 202, 3 Atl. 699; Ross v. Ross, 69 Ill. 569.

[42]Towson v. Towson, 258 Fed. 517; Olsen v. Olsen, 3 Alaska 616; Kinsey v. Kinsey, 37 Ala. 393; McMullin v. McMullin, 123 Cal. 653, 56 Pac. 554; Hardy v. Hardy, 97 Cal. 125, 31 Pac. 906; Stanbrough v. Stanbrough, 60 Ind. 275; Carr v. Carr, 6 Ind. App. 377, 33 N. E. 805; McMullen v. McMullen, 10 Iowa 412; Steele v. Steele, 96 Ky. 382, 16 Ky. L. 517, 29 S. W. 17; Clubb v. Clubb, 23 Ky. L. 659, 63 S. W. 587. Logan v. Logan, 2 B. Mon. (Ky.) 142; Butler v. Butler, 4 Litt. (Ky.) 201; Heinmuller v. Heinmuller, 133 Md. 491, 105 Atl. 745; Bucknam v. Bucknam, 176 Mass. 229, 57 N. E. 343, 49 L. R. A. 735; Simpson v. Simpson, 31 Mo. 24; Hooper v. Hooper, 19 Mo. 355; Youngs v. Youngs, 78 Mo. App. 225; Taylor v. Taylor, 73 N. J. Eq. 745, 70 Atl. 323; Parker v. Parker, 57 N. J. Eq. 577, 42 Atl. 160; Margarum v. Margarum, 57 N. J. Eq. 249, 41 Atl. 357; Marsh v. Marsh, 10 N. J. L. 300; Meeker v. Meeker (N. J.), 27 Atl. 78; Elliott v. Elliott, 48 N. J. Eq. 231, 21 Atl. 381; Boyce v. Boyce, 23 N. J. Eq. 337; Anshutz v. Anshutz, 16 N. J. Eq. 162; Schuyler v. Schuyler (N. J.), 3 Atl. 517; Gloster v. Gloster, 23 App. Div. 336, 48 N. Y. S. 160; Levin v. Levin, 68 S. Car. 123, 46 S. E. 945; Briggs v. Briggs, 24 S. Car. 377; Thompson v. Thompson, 10 Rich. Eq. (S. Car.) 416; Prather v. Prather, 4 Desaus. Eq. (S. Car.) 33; Schonborn v. Schonborn, 27 Wash. 421, 67 Pac. 987; Kimble v. Kimble, 17 Wash. 75, 49 Pac. 216.

[43]Hinds v. Hinds, 80 Ala. 225; Kinsey v. Kinsey, 37 Ala. 393; Mims v. Mims, 33 Ala. 98; Glover v. Glov-

But not if his leaving her is by her fault.[44]

The desertion by the husband need not be for the length of time required in order to obtain a divorce,[45] and the action may be commenced at any time after the desertion occurs.[46]

§ 643. **Causes justifying the wife in leaving husband—Constructive desertion—Cruel treatment—Adultery.**—The conduct of the husband toward the wife may be of such a character as to justify her in going way. In such a case he is considered as leaving her. In other words he is guilty of a constructive desertion of the wife.[47] There is such a case where he is guilty of such

er, 16 Ala. 440; Winterberg v. Winterberg, 177 Ill. App. 493; Tallmon v. Tallmon, 166 Iowa 370, 147 N. W. 746; McMullin v. McMullin, 10 Iowa 412; Belcher v. Belcher, 145 Ky. 308, 140 S. W. 309; Steele v. Steele, 96 Ky. 382, 29 S. W. 17; Jamison v. Jamison, 4 Md. Ch. 289; Prather v. Prather, 4 Desaus. (S. Car.) 33; Motley v. Motley, 117 Wash. 234, 200 Pac. 1099. In French v. French, 302 Ill. 152, 134 N. E. 33, it is said: "Incompatibility of disposition, slight moral obliquities, occasional ebullitions of passion or trivial difficulties will not justify a separation; but, where the husband pursues, a persistent, unjustifiable, and wrongful course of conduct toward his wife which will necessarily and inevitably render her life miserable and living with him unendurable, she is justified in living apart from him, where she is without fault within the meaning of the statute."

[44]Angelo v. Angelo, 81 Ill. 251; Boggess v. Boggess, 4 Dana. (Ky.) 307; Griffin v. Griffin, 8 B. Mon. (Ky.) 120; Logan v. Logan, 2 B. Mon. (Ky.) 142; and Anonymous, 4 Desaus. (S. Car.) 94.

[45]Hardy v. Hardy, 97 Cal. 125, 31 Pac. 906; Harlow v. Harlow, 150 Iowa 173, 129 N. W. 833; Russell v. Russell, 150 Iowa 137, 129 N. W. 835; Steele v. Steele, 96 Ky. 382, 29 S. W. 17; Hulett v. Hulett, 80 Ky. 364, 4 Ky. L. 193.

[46]Decker v. Decker, 56 Mont. 338, 185 Pac. 168.

[47]Kinsey v. Kinsey, 37 Ala. 393; Benton v. Benton, 122 Cal. 395, 55 Pac. 152; Galland v. Galland, 38 Cal. 265; In re Popejoy, 26 Colo. 32, 55 Pac. 1083, 77 Am. St. 222; King v. King, 65 Fla. 303, 61 So. 592; Sikes v. Sikes, 143 Ga. 314, 85 S. E. 193; Parker v. Parker, 134 Ga. 316, 67 S. E. 812. Barginde v. Barginde, 189 Ill. App. 390; Platner v. Platner, 66 Iowa 378, 23 N. W. 764; Finn v. Finn, 62 Iowa 482, 17 N. W. 739; Graves v. Graves, 36 Iowa 310, 14 Am. Rep. 525; McMullin v. McMullin, 10 Iowa 412; Taylor v. Taylor, 108 Md. 129, 69 Atl. 632; Helms v. Franciscus, 2 Bland (Md.) 544, 20 Am. Dec. 402; Kindorf v. Kindorf, 178 Mo. App. 635, 161 S. W. 318; Decker v. Decker, 56 Mont. 338, 185 Pac. 168; Edgerton v. Edgerton, 12 Mont. 122, 29 Pac. 966, 16 L. R. A. 94, 33 Am. St. 557; Pick v. Pick, 99 Nebr. 433, 156 N. W. 769; Maas v. Maas, 34 N. J. Eq. 113; Starkey v. Starkey, 21 N. J. Eq. 135; Rhame v. Rhame, 1 McCord Eq. (S. Car.) 197, 16 Am. Dec. 597; Threewits v. Threewits, 4 Desaus. (S. Car.) 560; Taylor v. Taylor, 4 Desaus. (S. Car.) 167; Devall v. Devall, 4 Desaus. (S. Car.) 79; Prather v. Pra-

ill usage as endangers her life and limb,[48] or of personal violence, although the life or the health of the wife is not thus endangered.[49] So a husband may be said to desert his wife where the

ther, 4 Desaus. (S. Car.) 33; Bueter v. Bueter, 1 S. Dak. 94, 45 N. W. 208; Corley v. Corley, 8 Baxt. (Tenn.) 7; Burtt v. Burtt, 59 Utah 457, 204 Pac. 91; Anderson v. Anderson, 54 Utah 309, 181 Pac. 168; Almond v. Almond, 4 Rand (Va.) 662, 15 Am. Dec. 781. As to the fault of the wife, which will defeat her action, see Garrison v. Garrison, 31 Ky. L. 1209, 104 S. W. 980; Springer v. Springer, 21 Ky. L. 1292, 54 S. W. 710; Scott v. Scott, 19 Ky. L. 929, 42 S. W. 836; Woolfolk v. Woolfolk, 96 Ky. 657, 29 S. W. 742; Taylor v. Taylor, 108 Md. 129, 69 Atl. 632; Hilton v. Hilton, 88 Miss. 529, 41 So. 662. In Rose v. Rose, 9 Ark. 507-513, the court said: "In a state of personal danger, no duties to others can be perfectly performed, for the reason that under such circumstances, the duty of self preservation, which is primary in its commencement, and paramount in obligation, is superior to the duties imposed by the marital connection, and when called into action, is inconsistent with those duties, and renders their discharge impossible." There may be an abandonment within the meaning of the statute while the parties continue under the same roof: as where the husband refuses to have any intercourse with his wife and excludes her from that part of the house which he occupies Weigand v. Weigand, 41 N. J. Eq. 202, 3 Atl. 699, citing Anshutz v. Anshutz, 16 N. J. Eq. 162. In Starkey v. Starkey, 21 N. J. Eq. 135, the court said: "In all cases where a husband either actually drives his wife from himself and his house, or by his cruel and abusive treatment compels her to leave its safety and comfort, it is abandonment and separation by him. And so a husband is guilty of abandonment when he compels his wife, by cruel and abusive treatment to leave him." Benton v. Benton, 122 Cal. 395, 55 Pac. 152; Maas v. Maas, 34 N. J. Eq. 113.

[48]Outlaw v. Outlaw, 118 Md. 498, 84 Atl. 383; Grant v. Grant, 171 Mo. App. 317, 157 S. W. 673; Threewits v. Threewits, 4 Desaus. Eq. (S. Car.) 560; Devall v. Devall, 4 Desaus. (S. Car.) 79; Prather v. Prather, 4 Desaus. (S. Car.) 33; Taylor v. Taylor, 4 Desaus. (S. Car.) 167; Rhame v. Rhame, 1 McCord Eq. (S. Car.) 197, 16 Am. Dec. 597. Separation is not to be tolerated for light causes, and the causes are light which the law does not recognize as grounds for the dissolution of the marriage bond. Groves' Appeal, In re, 37 Pa. St. 443; Nye's Appeal, 126 Pa. St. 341, 17 Atl. 618, 12 Am. St. 873, 24 Wkly. Notes Cas. 121. Under this rule it has been held that a single act of cruelty on a single occasion, may be so severe, and attended with such corresponding circumstances of atrocity, as might under fair and liberal consideration of the statute, justify a divorce. But no single act of cruelty, however severe, that comes short of endangering life, is sufficient to justify a divorce. Richards v. Richards, 1 Grant's Cas. (Pa.) 389.

[49]Johnson v. Johnson, 125 Ill. 510, 16 N. E. 891; Hunter v. Hunter, 7 Ill. App. 253; Levin v. Levin, 68 S. Car. 123, 46 S. E. 945; Wise v. Wise, 60 S. Car. 426, 38 S. E. 794.

home provided for her and the mode of living are unreasonably and grossly unfit.[50]

Again she may be justified where she is subjected to treatment which affects her mind to such a degree as to destroy health or endanger life.[51] And the case is the same with words of menace, importing danger of bodily harm,[52] or where he sends her a warning not to return to him;[53] or compels her to live in a home with his relatives who mistreat her.[54] But if bodily harm is not threatened his language, manner, conduct or temper do not ordinarily justify the wife in leaving her husband,[55] unless he makes unfounded charges of infidelity against her.[56] The cruelty which will justify her in leaving him may consist of practices in the family circle which are so obscene and indecent as to outrage all the sentiments of delicacy and refinement characteristic of the female sex;[57] as where, for example the husband places a

[50]Napier v. Napier, 187 Ky. 722, 220 S. W. 735; Decker v. Decker, 56 Mont. 338, 185 Pac. 168.

[51]Jackman v. Jackman, 213 Ill. App. 329; Pratt v. Pratt, 197 Ill. App. 530; Shors v. Shors, 133 Iowa 22, 110 N. W. 16; Berry v. Berry, 115 Iowa 543, 88 N. W. 1075; Sackrider v. Sackrider, 60 Iowa 397, 14 N. W. 736; Girdner v. Girdner (Mo. App.), 230 S. W. 382; Hoagland v. Hoagland (N. J.), 114 Atl. 744. Cruelty need not amount to physical violence. Taylor v. Taylor, 73 N. J. Eq. 745, 70 Atl. 323. Gross habits of intoxication of husband may be a justification. Steensland v. Steensland, 43 S. Dak. 416, 179 N. W. 495.

[52]Rhame v. Rhame, 1 McCord Eq. (S. Car.) 197, 16 Am. Dec. 597; Hair v. Hair, 10 Rich. Eq. (S. Car.) 163; Oliver v. Oliver, 1 Hag. Con. 364.

[53]Wise v. Wise, (S. Car.), 111 S. E. 792.

[54]Napier v. Napier, 187 Ky. 722, 220 S. W. 735; Girdner v. Girdner (Mo. App.), 230 S. W. 382.

[55]Words of mere insult, however galling, are insufficient, and a mere austerity of temper, petulance of manner, want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty. Rhame v. Rhame, 1 McCord Eq. (S. Car.) 197, 16 Am. Dec. 597; Hair v. Hair, 10 Rich. Eq. (S. Car.) 163.

[56]Kinsey v. Kinsey, 37 Ala. 393; Schriner v. Schriner, 155 Ill. App. 191; Hite v. Hite, 136 Ky. 529, 124 S. W. 815; see Finn v. Finn, 62 Iowa 482, 17 N. W. 739; Parker v. Parker, 57 N. J. Eq. 577, 42 Atl. 160, where such charges were accompanied by other acts of cruelty. False charges of adultery against the wife without a shadow of foundation for them, is an excuse for abandoning the matrimonial domicil. Brindley v. Brindley, 121 Ala. 429, 25 So. 751. Unfounded accusations of unchastity may wound the feelings and destroy the wife's peace of mind to such an extent as to endanger her life as surely and as certainly as extreme physical violence. Shors v. Shors, 133 Iowa 22, 110 N. W. 16.

[57]In Hair v. Hair, 10 Rich. Eq. (S. Car.) 163, the court said: "A

nude picture of his former fiancee and letters to her where his wife would find them,[58] or where he compels her to submit to repeated abortions.[59] So, he may be guilty of such lewd conduct as to make cohabitation impossible without shame or embarrassment.[60]

A husband refusing to converse or cohabit with his wife while living in the same house with her, will be deemed to have abandoned her, and she is entitled to separate maintenance.[61] She may leave him on account of his adultery.[62] But in a state where adultery is not a ground for divorce, there seems to be some doubt on the question.[63] Where the conduct of the husband justifies a wife in leaving him, her domicil does not follow him into another state.[64]

§ 644. **Necessity of wife's freedom from fault.**—The right of the wife to separate maintenance depends on her freedom from fault in causing the separation.[65] A wife's misconduct which

wife is justified in leaving her husband, although he has not inflicted or threatened any bodily injury upon her, yet practices such obscene and revolting indecencies in the family circle, and so outrages all the sentiments of delicacy and refinement characteristic of the sex, that a modest and pure minded woman would find these grievances more dreadful and intolerable to be borne, than the most cruel infliction upon her person, and she would be justified in fleeing from the polluting presence of that monster, with whom, in an evil hour, she had united her destiny." See Cash v. Cash, 201 Ill. App. 151; Briggs v. Briggs, 24 S. Car. 377. In Griffin v. Griffin, 8 B. Mon. (Ky.) 120, it is said: "The law, with due consideration of the frailty of human nature, does not require the conduct of the wife to be entirely blameless, to entitle her to alimony, but when it is evident that she has been the chief cause of all the disturbances and scenes of violence in the family, * * * to sustain her claim to alimony would be to encourage family dissensions, and a contemptuous disregard of those duties imposed by the marriage relation."

[58]Turner v. Turner, 234 Mass. 37, 124 N. E. 721.

[59]Rhodes v. Rhodes, 92 N. J. Eq. 252, 114 Atl. 414.

[60]Williams v. Williams, 136 Ky. 71, 123 S. W. 337.

[61]Pinkinson v. Pinkinson, 91 N. J. Eq. 281, 109 Atl. 731. See also Polley v. Polley, 128 Md. 60, 97 Atl. 526.

[62]Graves v. Graves, 36 Iowa 310, 14 Am. Rep. 525; Helms v. Franciscus, 2 Bland. (Md.) 544, 20 Am. Dec. Weigand v. Weigand, 41 N. J. Eq. 202, 3 Atl. 699; Briggs v. Briggs, 24 S. Car. 377; Almond v. Almond, 4 Rand (Va.) 662, 15 Am. Dec. 781.

[63]Briggs v. Briggs, 24 S. Car. 377; Hair v. Hair, 10 Rich. Eq. (S. Car.) 163.

[64]Turner v. Turner, 234 Mass. 37, 124 N. E. 721.

[65]Bushnell v. Cooper, 289 Ill. 260, 124 N. E. 521, 6 A. L. R. 1517; Smith v. Smith, 214 Ill. App. 302;

will defeat her action for separate maintenance necessarily includes her voluntary abandonment of the matrimonial home; therefore, when she so abandons a home, suitable to the family conditions, the husband being without fault, she can not maintain this action.[66] So, if without his fault she refuses to accompany him to a proper new home, her action fails.[67] Similarly there

Hosto v. Hosto, 183 Ill. App. 463; Raab v. Raab, 150 Ill. App. 554; Reifschneider v. Reifschneider, 144 Ill. App. 119; Rosenbleet v. Rosenbleet, 122 Ill. App. 408; Hodgen v. Hodgen, 160 Ky. 267, 169 S. W. 713; Hubbard v. Hubbard, 131 Md. 291, 101 Atl. 772, 6 A. L. R. 3; McCaddin v. McCaddin, 116 Md. 567, 82 Atl. 554; Vickers v. Vickers (Nev.), 199 Pac. 76; Ivanhoe v. Ivanhoe, 68 Ore. 297, 136 Pac. 21, 49 L. R. A. (N. S.) 86; Nicholson v. Nicholson, 115 S. Car. 326, 105 S. E. 700; Haynor v. Haynor, 112 Va. 123, 70 S. E. 531; Loeper v. Loeper, 81 Wash. 454, 142 Pac. 1138; Herrett v. Herrett, 60 Wash. 607, 111 Pac. 867.

[66]Brindley v. Brindley, 121 Ala. 429, 25 So. 751; Anonymous, 206 Ala. 295, 89 So. 462; Mattson v. Mattson, 181 Cal. 44, 183 Pac. 443; Brisendine v. Brisendine, 152 Ga. 745, 111 S. E. 22; Ward v. Ward, 144 Ga. 312, 87 S. E. 17; Sikes v. Sikes, 143 Ga. 314, 85 S. E. 193; Rorie v. Rorie, 134 Ga. 69, 67 S. E. 410; Pearson v. Pearson, 125 Ga. 132, 54 S. E. 194; Reams v. Reams, 202 Ill. App. 491; Leonard v. Leonard, 174 Iowa 734, 156 N. W. 803; Droege v. Droege, 52 Mo. App. 84; Dummer v. Dummer (N. J.), 41 Atl. 149; Reischfield v. Reischfield, 100 Misc. 561, 166 N. Y. S. 898; Crews v. Crews, 175 N. Car. 168, 95 S. E. 149; Ivanhoe v. Ivanhoe, 68 Ore. 297, 136 Pac. 21, 49 L. R. A. (N. S.) 86; Rhame v. Rhame, 1 McCord Eq. (S. Car.) 197, 16 Am. Dec. 597; Campbell v. Campbell, 37 Wis. 206; Hill v. Hill, 2 Ont. L. Rep. 289-541; Edwards v. Edwards, 20 Grant Ch. (U. C.) 392; McKay v. McKay, 6 Grant Ch. (U. C.) 380. But Knox v. Knox, 139 Ga. 480, 77 S. E. 628, seems to be in conflict with the previous Georgia cases. In Davis v. Davis, 151 Ky. 116, 151 S. W. 361, the husband had provided as comfortable a home as his circumstances would permit, at a place where his business required him to be, and his wife abandoned him because he would not locate in the town where her parents lived. She was denied alimony. In Springer v. Springer, 21 Ky. L. 1292, 54 S. W. 710, it is held that disagreement between the wife and her step-children, for which the husband is not responsible, is not sufficient reason for the wife to leave the husband's home. In Finley v. Finley, 9 Dana (Ky.) 52, 33 Am. Dec. 528, it was said, that, "an assault, or stroke, or slap, or slaps with the hand on a single occasion, or occasional petulance of temper, rudeness of language, or sallies of passion that do not threaten bodily injury, or expose the wife's person or health to danger, cannot be deemed sufficient to constitute cruel, inhuman, and barbarous treatment." To the same effect is Rhame v. Rhame, 1 McCord Eq. (S. Car.) 197, 16 Am. Dec. 597. In Nielson v. Nielson, 54 Utah 544, 182 Pac. 366, alimony was not allowed where the wife sold the home provided by the husband, and in use by the family, without consulting him, and took up her abode elsewhere.

[67]Mayr v. Mayr, 161 Cal. 134, 118 Pac. 546; Price v. Price, 75 Nebr.

can be no abandonment where the husband consents to a voluntary separation.[68] So, a wife who attends dances and associates against her husband's wishes with persons of questionable character, is not without fault.[69] She is not without fault where she leaves the marital domicil because the husband excludes from his home relatives of the wife who are distasteful to him;[70] or because she is dissatisfied with married life, or with her husband, and has an opportunity to better herself;[71] or because he refuses

552, 166 N. W. 657; Reade v. Continental Trust Co., 49 App. Div. 400, 63 N. Y. S. 395; Wise v. Wise, 60 S. Car. 426, 38 S. E. 794; Hair v. Hair, 10 Rich Eq. (31 S. Car.) 163. It was held in Price v. Price, 75 Nebr. 552, 106 N. W. 657, that it was the duty of the wife to follow her husband to a matrimonial domicil in good faith prepared by him. "The wife is bound to follow her husband when he changes his residence even without her consent, providing the change is made by him in the bona fide exercise of his power as head of the family of determining what is best for her," the court said in Boyce v. Boyce, 23 N. J. Eq. 337. Thomas v. Thomas, 152 Ill. 577, 38 N. E. 794; Leave the home, Wahle v. Wahle, 71 Ill. 510; Rosenbleet v. Rosenbleet, 122 Ill. App. 408; Giese v. Giese, 107 Ill. App. 659. Houts v. Houts, 17 Ill. App. 439 (refusing to go to a new one); Babbitt v. Babbitt, 69 Ill. 277. In Pratt v. Pratt, 197 Ill. App. 530, the court defined the word "fault" as used in Sec. 1, of the Separate Maintenance Act (J. & A. P. 6159) to mean "a voluntary consenting to the separation of the husband and wife, or such failure of duty or misconduct on the part of the wife as 'materially contributes to the disruption of the marital relations.'" Evidently relying on Johnson v. Johnson, 125 Ill. 510, 16 N. E. 891.

[68]Jenny v. Jenny, 178 Cal. 604, 174 Pac. 652; In re Bose's Estate, 158 Cal. 428, 111 Pac. 258; Modjeski v. Modjeski, 209 Ill. App. 213; Labbe v. Abat, 2 La. 553, 28 Am. Dec. 151; Powers v. Powers, 33 App. Div. 126, 53 N. Y. S. 346; Desbrough v. Desbrough, 29 Hun (N. Y.) 592. In Mayr v. Mayr, 161 Cal. 134, 118 Pac. 546, the court said: "While a husband and wife may, in the absence of ground for divorce, agree to live apart, a mere verbal contract that they shall so reside will not place upon the man the duty of supporting his wife." This was under a statute requiring such contracts to be in writing. Under that statute, the court said, in Volkmore v. Volkmore, 147 Cal. 175, 81 Pac. 413, that: "In no case should a court decree permanent alimony to the wife living separate and apart from her husband, in the absence of facts showing an obligation on the part of the husband to support her under such conditions." In Powers v. Powers, 33 App. Div. 126, 53 N. Y. S. 346, the court said: "There can be no abandonment where the parties have agreed to live apart." Approved in Reischfield v. Reischfield, 100 Misc. 561, 166 N. Y. S. 898.

[69]Buchan v. Buchan, 201 Ill. App. 349.

[70]Davis v. Davis, 145 Ga. 56, 88 S. E. 566 (antipathy to wife's mother); Napier v. Napier, 187 Ky. 722, 220 S. W. 735 (nephews and nieces).

[71]Jackman v. Jackman, 213 Ill. App. 329.

her request to convey some of his property to her;[72] or because he had caused her to be committed to an insane asylum, where it appears he had been led by an honest desire to benefit the wife in all that he had done.[73]

Inasmuch as this relief, in almost every jurisdiction in this country, is now statutory, where the equities are equal, the law will prevail;[74] hence where the wife voluntarily leaves the matrimonial home;[75] or, where the parties are otherwise separated, her

[72]Von Der Brelie v. Von Der Brelie, 198 Ill. App. 187.

[73]Kuster v. Kuster, 37 Misc. 136, 74 N. Y. S. 853.

[74]Cunningham v. Cunningham, 48 Pa. Super. Ct. 442.

[75]Decker v. Decker, 279 Ill. 300, 116 N. E. 688; Thomas v. Thomas, 152 Ill. 577, 38 N. E. 794; Angelo v. Angelo, 81 Ill. 251; Ross v. Ross, 69 Ill. 569; Buchan v. Buchan, 201 Ill. App. 349; Pratt v. Pratt, 197 Ill. App. 530; Hosto v. Hosto, 183 Ill. App. 463; Kingman v. Kingman, 150 Ill. App. 456; Rosenbleet v. Rosenbleet, 122 Ill. App. 408; Giese v. Giese, 107 Ill. App. 659; Orendorff v. Orendorff, 91 Ill. App. 61; Umlauf v. Umlauf, 9 Ill. App. 517; Tureman v. Tureman, 4 Ill. App. 335; Cooper v. Cooper, 4 Ill. App. 285; Jenkins v. Jenkins, 3 Ill. App. 641; Briggs v. Briggs, 102 Iowa 318, 71 N. W. 198; VanDuzer v. VanDuzer, 70 Iowa 614, 31 N. W. 956; Davis v. Davis, 151 Ky. 116, 151 S. W. 361; Garrison v. Garrison, 31 Ky. L. 1209, 104 S. W. 980; Scott v. Scott, 19 Ky. L. 829, 42 S. W. 836; Boggess v. Boggess, 4 Dana (Ky.) 307; Hilton v. Hilton, 88 Miss. 529, 41 So. 262; Meeker v. Meeker, (N. J. Eq.), 27 Atl. 78; Davis v. Davis, 19 N. J. Eq. 180; Dagnall v. Dagnall, 100 S. Car. 298, 84 S. E. 870; Anonymous, 4 Desaus. (S. Car.) 94. In Gorbrandt v. Gorbrandt, 131 Ky. 395, 115 S. W. 210, the parties were over fifty years of age, and the wife complained that the husband was not demonstrative toward her; that he did not show her that affection and tenderness which he ought to have shown. The court said: "When people marry under such circumstances, they do so with the understanding that the enthusiasm of youth is gone and with it the tenderness and sentiment which are inseparable from it." In Righter v. Righter, (Ky.), 114 S. W. 786, relief was denied the wife where the defendant treated her with coolness, persistently refused to speak to her, and while she was speaking to him called her a liar, she often quarreling with him and calling him vile names, and was of a jealous disposition. In Schindel v. Schindel, 12 Md. 294, the court said: "The causes must be grave and weighty, and such as show an absolute impossibility that the duties of the married life can be discharged." In Grant v. Grant, 171 Mo. App. 317, 157 S. W. 673, the court said: "The fact, standing alone, that plaintiff left defendant's abode, will not deprive her of her statutory action for maintenance. If the husband's treatment of the wife is such as to make her position unbearable, if it is such as would afford her ground for an action for divorce, she may quit their residence and bring her action for maintenance." In Payne v. Payne, 10 Ont. L. Rep. 742, the court said: "Separate maintenance is awarded to a

misconduct which materially contributes thereto being equal to, or greater than that of the husband, she can not maintain this action.[76] Yet, recognizing the frailty of human nature, the law does not require the conduct of the wife to be entirely blameless,[77]

wife whose life or health is jeopardized by her husband's misconduct toward her, notwithstanding her willingness to perform her matrimonial duties, and not to her who has deserted her home and who seeks to make the court a party to her efforts to obtain alimony by trickery." "A wife will not gain the help of the court when she misconducts herself, provokes ill treatment, and then makes complaint that it is not safe to live with her husband. The court hesitates to call retaliatory acts thus provoked to be acts of legal cruelty, unless the behavior of the wife has been visited with intemperate, excessive violence by the incensed husband."

[76]Jenkins v. Jenkins, 104 Ill. 134; Umlauf v. Umlauf, 103 Ill. 651; Von Der Brelie v. Von Der Brelie, 198 Ill. App. 187; Pratt v. Pratt, 197 Ill. App. 530; Hassett v. Hassett, 189 Ill. App. 342; Winterberg v. Winterberg, 177 Ill. App. 493; Harris v. Harris, 109 Ill. App. 148; Porter v. Porter, 58 Ill. App. 670; Anderson v. Anderson, 45 Ill. App. 168; Hunter v. Hunter, 7 Ill. App. 253; Graves v. Graves, 36 Iowa 310, 14 Am. Rep. 525; Griffin v. Griffin, 8 B. Mon. (Ky.) 120; Price v. Price, 75 Nebr. 552, 106 N. W. 657; Chapman v. Chapman, 74 Nebr. 388, 104 N. W. 880; Bradbury v. Bradbury, (N. J. Eq.), 74 Atl. 150; Kamman v. Kamman, 167 App. Div. 423, 152 N. Y. S. 579; Edwards v. Edwards, 155 App. Div. 904, 139 N. Y. S. 1069; Yetter v. Yetter, 45 Pa. Super. Ct. 332. Snouffer v. Snouffer, 150 Iowa 58, 129 N. W. 326. (Overt act of the wife inconsistent with her duty as a wife.) In Butler v. Butler, 4 Litt. (Ky.) 201, the court said: "The husband must have withdrawn the means of support from her, or have refused to provide for her before he could be liable to a decree. In Faller v. Faller, 146 Mich. 84, 109 N. W. 47, proof did not show the husband had failed in his duty to support his wife, and both were at fault, the husband no more than the wife being responsible for the trouble between them. Ivanhoe v. Ivanhoe, 68 Ore. 297, 136 Pac. 21, 49 L. R. A. (N. S.) 186. (Where both parties are at fault.) In Fowler v. Fowler, 31 Ore. 65, 49 Pac. 489, the court said: "The action can not be maintained except in cases where the husband could be compelled at common law to pay for necessaries furnished his wife." Where, over a period of fourteen years, she refused to consummate the marriage, pursuant to her interpretation of an antenuptial contract to live a pure life during marriage, the court said: "She is met at the threshold with certain requisite maxims, which are generally guiding principles. 'He who seeks equity must do equity.' 'He who comes into equity must come with clean hands.' 'Equity regards the substance and intent, not the form.' 'Where the equities are equal the law will prevail.'" Cunningham v. Cunningham, 48 Pa. Super Ct. 442. Boyd v. Boyd, Harp Eq. (5. S. Car.) 144. In Willey v. Willey, 18 Manitoba L. R. 298, 9 West. L. R. 166, it was not shown any misconduct of the husband not condoned, was not provoked or accompanied with misconduct of the wife.

[77]Methvin v. Methvin, 15 Ga. 97,

and the relief may be granted where some fault is hers, but it is less than his fault.[78]

The burden of proof is upon the wife to establish that she left

60 Am. Dec. 664; McCarthy v. McCarthy, 219 Ill. App. 369; Griffin v. Griffin, 8 B. Mon. (Ky.) 120; Levin v. Levin, 68 S. Car. 123, 46 S. E. 945; Hare v. Hare, 10 Rich Eq. (S. Car.) 163.

[78]Johnson v. Johnson, 125 Ill. 510, 16 N. E. 891, (wife voluntarily leaving home); Wahle v. Wahle, 71 Ill. 510; Barginde v. Barginde, 189 Ill. App. 390; Judd v. Judd, 169 Ill. App. 21; Finch v. Finch, 160 Ill. App. 639; Jones v. Jones, 124 Ill. App. 201; Bartlow v. Bartlow, 114 Ill. App. 604; Summers v. Summers, (Ind. App.), 98 N. E. 900; Carr v. Carr, 6 Ind. App. 377, 33 N. E. 805; Smith v. Smith, 172 Iowa 329, 151 N. W. 1085; Hodgen v. Hodgen, 160 Ky. 267, 169 S. W. 713; Logan v. Logan, 2 B. Mon. (Ky.) 142; Hubbard v. Hubbard, 131 Md. 291, 101 Atl. 772, 6 A. L. R. 3; Jamison v. Jamison, 4 Md. Ch. 289; Watts v. Watts, 160 Mass. 464, 36 N. E. 479, 23 L. R. A. 187; Hooper v. Hooper, 19 Mo. 355; Keup v. Keup, 98 Nebr. 321, 152 N. W. 555; Irwin v. Irwin, 88 N. J. Eq. 139, 102 Atl. 440; Taylor v. Taylor, 73 N. J. Eq. 745, 70 Atl. 323; Boyce v. Boyce, 23 N. J. Eq. 337; Battey v. Battey, 1 R. I. 212; Levin v. Levin, 68 S. Car. 123, 46 S. E. 945. See also Mattson v. Mattson, 181 Cal. 44, 183 Pac. 443. In Brandt v. Brandt, 178 Cal. 548, 174 Pac. 55, it was unfounded and unjustified accusations of unchastity upon which relief was granted. Wise v. Wise, 60 S. Car. 426, 38 S. E. 794. In Smith v. Smith, 172 Iowa 329, 151 N. W. 1085, it was said: "Notwithstanding that the plaintiff has not been totally free from fault, in many of the controversies, this is not sufficient to justify or excuse the major blame which rests upon the defendant, and which makes the separate maintenance, for the time being, at least, a necessity." In Logan v. Logan, 2 B. Mon. (Ky.) 142, the court said: "Being a contract for life, indissoluble by the consent of the parties merely, it should not be dissolved by the sovereign will for any other excuses than such as are subversive to the essential ends, or inconsistent with the general welfare." In Hubbard v. Hubbard, 131 Md. 291, 101 Atl. 772, where a wife had her husband arrested and asked for police protection in case he returned home, she was granted alimony upon her application therefor, the court saying: "Such reasons, however galling they may have been to the husband's pride, can not be relied upon as justifying a total failure to make any provision whatever for the support of the wife." In Bascom v. Bascom, Wright (Ohio) 632, the court said: "Her temper in the family was intolerable, and only finds palliation in the circumstances in which she was placed." In Ivanhoe v. Ivanhoe, 68 Ore. 297, 136 Pac. 21, 49 L. R. A. 21, the court said: "This record fairly seethes with anger long pent up, and the parties seem to have made this litigation a mere pretext to vent their wrath against each other. Neither of them comes into court with clean hands, as required by one of the standard maxims of equity." In Prather v. Prather, 4 Desaus. Eq. (S. Car.) 33, oral abuse of her husband did not equal his ill usage of her, and being turned out of their home.

her husband for justifiable cause.[79] But if he leaves her, and she shows in the first instance that she has reasonably performed her duties as a wife, the burden shifts to him to show that he had reasonable ground for leaving her.[80]

§ 645. **Effect of wife's unchastity on her right to maintenance.**—Conduct of the wife such as would give a husband a cause for divorce, may defeat her action for separate maintenance.[81] So, an adulterous wife can not maintain this action.[82] But notwithstanding the wife's adultery, she may be found to be justified in living away from her husband on account of his extreme cruelty, though he was willing to forgive the adultery.[83] In North

[79]Dummer v. Dummer (N. J.), 41 Atl. 149. See also Reade v. Continental Trust Co., 49 App. Div. 400, 63 N. Y. S. 395, and Wallingsford v. Wallingsford, 6 Harr. & J. (Md.) 485.

[80]Chapman v. Chapman, 74 Nebr. 388, 104 N. W. 880. Hunter v. Hunter, 121 Ill. App. 380, in which the court said: "Ordinarily in suits under the statutes providing for separate maintenance, the wife leaves the husband, and the burden is cast upon her of showing that she had reasonable grounds for leaving him. In this case the husband leaves the wife, and while the burden of proof is still upon her to show that she is living separate and apart from her husband without her fault, yet it is of a negative character, and the most she can be expected to show in the first instance is that she reasonably performed her duties as a wife, and then the burden is cast upon the husband to show that he had reasonable ground to leave her; and upon the whole case presented, the question is, 'Is the wife living separate and apart from her husband without her fault?' "

[81]Modjeski v. Modjeski, 209 Ill. App. 213.

[82]Bickley v. Bickley, 136 Ala. 548, 34 So. 946; Elliott v. Elliott, 34 Colo. 298, 83 Pac. 630; State v. Schweitzer, 57 Conn. 532, 18 Atl. 787, 6 L. R. A. 125; Razor v. Razor, 149 Ill. 621, 36 N. E. 963; Angelo v. Angelo, 81 Ill. 251; Wahle v. Wahle, 71 Ill. 510; Hunter v. Hunter, 121 Ill. App. 380; Rawson v. Rawson, 37 Ill. App. 184; Bradbury v. Bradbury (N. J. Eq.), 74 Atl. 150; Maas v. Maas, 34 N. J. Eq. 113; Wise v. Wise, 159 App. Div. 575, 144 N. Y. S. 649; Roth v. Roth, 77 Misc. 673, 138 N. Y. S. 573; Mayer v. Mayer, 5 Ohio Dec. (Reprint) 444, 2 Wkly. L. Bul. 47; Hair v. Hair, 10 Rich. Eq. (31 S. Car.) 163. Obligation to support is on husband unless she has been guilty of some marital offense entitling him to a divorce. Vickers v. Vickers, 89 W. Va. 236, 109 S. E. 234.

[83]Watts v. Watts, 160 Mass. 464, 36 N. E. 479, 23 L. R. A. 187, 39 Am. St. 509, in which the court said: "If he had, for a long time, been guilty of extreme cruelty towards her, and had inflicted serious bodily injury upon her when he ejected her from his house, and then had asked her to return to his home, and had offered to forgive the adultery if she would come back, she would have been justified in refusing to return on the ground that she had reason to fear great bodily injury from his

Carolina, under a statute authorizing the action, where the husband had separated himself from the wife, the question of her adultery was held irrelevant.[84]

But the wife's adultery will not defeat her action for alimony if the husband connives thereat.[85] In New York the rule that a wife's adultery is a defense obtains, although the husband himself has committed adultery.[86] Her improprieties, short of adultery, with other men, may aid in defeating her action.[87] But such conduct alone will not defeat the action, especially in jurisdictions where her conduct is such as would not entitle the husband to a divorce.[88]

Unchastity of the wife prior to the marriage, of which the husband has knowledge, and rumors thereof known to him, do not constitute a defense to an action for separate maintenance.[89]

§ 646. **Effect of offer to resume marital relation.**—If a wife who has been abandoned by her husband, or has been compelled to leave the matrimonial domicil on account of his conduct or ill treatment of her, receives a request from him to resume their marital relations, which is made in good faith, with sincere assurances that he will thereafter perform his marital obligations, and under such circumstances as indicate that he is really penitent, her independent cause of action for separate maintenance or alimony

cruelty, if she continued to live with him."

[84]Skittletharpe v. Skittletharpe, 130 N. Car. 72, 40 S. E. 851.

[85]White v. White, 87 N. J. Eq. 354, 100 Atl. 235, L. R. A. 1917D, 639.

[86]Hawkins v. Hawkins, 193 N. Y. 409, 86 N. E. 468, 19 L. R. A. (N. S.) 468, 127 Am. St. 979, 15 Ann. Cas. 371. In New York, misconduct of the wife was made by statute, a defense to her action for alimony; and in this case the husband's adultery was committed before that of the wife, and unknown to her. In holding that the husband's offense did not excuse hers, the court said: "Especially is this so where there could be no claim that his adultery, since it was unknown to her, could have been a moral inducement to hers."

[87]Brindley v. Brindley, 121 Ala. 429, 25 So. 751.

[88]Aldrich v. Aldrich, 21 Ont. Rep. 449.

[89]Verner v. Verner, 64 Miss. 184, 1 So. 52; Fairchild v. Fairchild, 43 N. J. Eq. 473, 11 Atl. 426. In Steele v. Steele, 96 Ky. 382, 29 S. W. 17, the court said: "He had knowledge before the marriage that there were rumors affecting her character for chastity, and was not only entirely free to investigate the truthfulness of such rumors, but was distinctly told by plaintiff's father not to marry her if they turned out to be true."

is extinguished.[90] But on the other hand, if such offer is not made in good faith, her cause of action still exists.[91]

[90]McMullin v. McMullin, 123 Cal. 653, 56 Pac. 554; Johnson v. Johnson, 125 Ill. 510, 16 N. E. 891; Angelo v. Angelo, 81 Ill. 251; McCarthy v. McCarthy, 219 Ill. App. 369; Napier v. Napier, 187 Ky. 722, 220 S. W. 735; Alderson v. Alderson, 113 Ky. 830, 69 S. W. 700; Clubb v. Clubb, 23 Ky. L. 650, 63 S. W. 587; Scott v. Scott, 19 Ky. L. 929, 42 S. W. 836; Logan v. Logan, 2 B. Mon. (Ky.) 142; Holbrook v. Her Husband, 18 La. Ann. 643; Helms v. Franciscus, 2 Bland. (Md.) 554, 20 Am. Dec. 402; Hilton v. Hilton, 88 Miss. 529, 41 So. 262; Howey v. Howey, 77 N. J. Eq. 591, 78 Atl. 696; Dummer v. Dummer (N. J.), 41 Atl. 149; Quallich v. Quallich, 33 Ohio C. C. 76, 72 Ohio St. 671, 76 N. E. 1131; Com. ex rel. Perry v. Perry, 7 Pa. Dist. R. 240; Levin v. Levin, 68 S. Car. 123, 46 S. E. 945; Wise v. Wise, 60 S. Car. 426, 38 S. E. 794; Briggs v. Briggs, 24 S. Car. 377; Taylor v. Taylor, 4 Desaus. (S. Car.) 167; Anonymous, 4 Desaus. (S. Car.) 94; Jelineau v. Jelineau, 2 Desaus. (S. Car.) 45; Hair v. Hair, 10 Rich. Eq. (31 S. Car.) 163; Almond v. Almond, 4 Rand. (Va.) 662, 15 Am. Dec. 781; Thomas v. Thomas, 152 Ill. 577, 38 N. E. 794, the wife had voluntarily left the matrimonial domicil for a residence about two miles distant, and after a few weeks had offered to return if her husband would escort her or send a conveyance for her, which he declined to do, although willing to receive her. In holding that she was living apart from her husband of her own fault, the court said: "She had no right to stand on mere matter of sentiment as to the manner of returning. The marriage relation cannot be so readily broken off." In Creasey v. Creasey, 168 Mo. App. 109, 151 S. W. 215, the court said: "The wife gets no vested right to separate maintenance because her husband has abandoned her and refuses to provide for her. Such right ceases if he does not persist in such wrongful conduct, and sincerely offers to resume his marital relations," citing Schraeder v. Schraeder, 26 Ill. App. 524. Wife may maintain action, though offer of husband is in good faith if he has remained away for a sufficient time to entitle her to a divorce. Stauffer v. Stauffer, 205 Mo. App. 515, 226 S. W. 40. In Yetter v. Yetter, 45 Pa. Super. Ct. 332, it was said: "Where the husband was engaged in honorable employment, at fair wages, and could readily perform his undertaking, and, so far as the record shows, he was entitled to have his promise made under oath taken at its face value," and further "the wife being the plaintiff in such a proceeding, equity expects of her that she shall at least meet her husband half way."

[91]Olsen v. Olsen, 3 Alaska 616; Sheppard v. Sheppard, 15 Cal. App. 614, 115 Pac. 751; Porter v. Porter, 162 Ill. 398, 44 N. E. 740; Mellanson v. Mellanson, 113 Ill. App. 81; Wilson v. Wilson, 67 Ill. App. 522; Farber v. Farber, 64 Iowa 362, 20 N. W. 472; McCaddin v. McCaddin, 116 Md. 567, 82 Atl. 554; Wyrick v. Wyrick, 162 Mo. App. 723, 145 S. W. 144; Spengler v. Spengler, 38 Mo. App. 266; Eisenger v. Eisenger, (N. J. Eq.), 100 Atl. 840; Irvine v. Irvine, 81 N. J. Eq. 20, 88 Atl. 377; Parker v. Parker, 57 N. J. Eq. 577, 42 Atl. 160; Enslin v. Enslin (N. J. Eq.), 37 Atl. 442; Elliott v. Elliott, 48 N. J. Eq. 231, 21 Atl. 381; Directors of Poor of Delaware v. Mercer,

The good faith of such an offer, is a question of fact.[92]

If the wife offers to return where there was no sufficient cause to leave him, and he refuses to receive her, the wrong is then his, and she is entitled to alimony;[93] but to have such effect, her offer must have been made in good faith.[94] The wife, however, is not bound to accept the husband's offer to take her back if

2 Clark (Pa.) 75; Levin v. Levin, 68 S. Car. 123, 46 S. E. 945; Briggs v. Briggs, 24 S. Car. 377; Threewits v. Threewits, 4 Desaus. (4 S. Car.) 560; Williams v. Williams, 4 Desaus. (4 S. Car.) 183; Taylor v. Taylor, 4 Desaus. (4 S. Car.) 167. The court, in Belden v. Belden, 82 Conn. 611, 74 Atl. 896, in upholding the wife's rejection of an offer to resume marital relations, said: "The story in all its details is one which offends against all the decencies and proprieties of life between man and wife, and involves not only privation and physical hardship, but such offendings against that which a true woman holds most dear, that no such woman could reasonably be asked to endure them." In Winterberg v. Winterberg, 177 Ill. App. 493, the court said: "The court below was fully warranted in the conclusion that his offer on the trial to live with her was not made in good faith after his withering, and cruel, and unwarranted denunciations of her, and his repeated declarations that he would not live with her." In Smith v. Smith, 172 Iowa 329, 151 N. W. 1085, the court said: "It is idle for a husband to testify to his willingness to live with his wife while professing convictions of this kind," namely, of the infidelity of the wife. In the case of Alderson v. Alderson, 113 Ky. 830, 69 S. W. 700, it appears the marriage was for the purpose of ending a criminal action for seduction, and the court said: "The court is further of the opinion that the offer of the husband under the circumstances, and at the time it was made, was not in good faith, and was made for the purpose of obtaining an undue and improper advantage over his wife. It has the appearance of being a studied and heartless scheme to overreach this already sufficiently wronged young woman. After ten years of continued desertion, a husband's offer to take his wife back, thus effecting a condonation, was not made in good faith." Tuttle v. Tuttle (Mass.), 134 N. E. 231. The offer to resume marital relations after a foreign decree of divorce a mensa et thoro comes too late. Tehsman v. Tehsman (N. J.), 117 Atl. 34. In Howey v. Howey, 77 N. J. Eq. 591, 78 Atl. 696, the court said: "It is works rather than words which are forceful, and carry conviction, and I do not think the complainant was required to accept the statement of the defendant that he would provide her a home when he made no effort and had no means to accomplish that purpose,—no apparent present opportunity to accomplish, at any rate."

[92]Sheppard v. Sheppard, 15 Cal. App. 614, 115 Pac. 751; Winterberg v. Winterberg, 177 Ill. App. 493.

[93]Alderson v. Alderson, 113 Ky. 830, 69 S. W. 700. See also Pratt v. Pratt, 197 Ill. App. 530.

[94]Sheppard v. Sheppard, 15 Cal. App. 614, 115 Pac. 751; Thomas v. Thomas, 152 Ill. 577, 38 N. E. 794; Jenkins v. Jenkins, 104 Ill. 134; Cooper v. Cooper, 4 Ill. App. 285.

the home he offers is an improper one for her state of health and physical condition.[95] Nor is she required to accept where the husband has a constant habit of intoxication and when drunk is especially malignant toward his wife;[96] nor when he is living with another woman in open adultery;[97] nor to a home from which she was liable at any time to be ousted;[98] nor to a home in which the adult children of the husband have vowed they would not permit her to remain;[99] nor to a home under the control of a hostile mother-in-law.[1] Neither spouse is entitled to demand that the other live in such manner that his or her parents can not visit them.[2]

A condition, if any, attached to an offer to return should be reasonable.[3] So, where an offer is coupled with so many conditions and limitations that no self-respecting woman could comply therewith, she is not compelled to accept it.[4] But a condition that the wife should refrain from associating with men who are objectionable to him is not unreasonable.[5] Nor is one that he intended to allow other members of his family to live with him; but in such case he was bound to protect the wife from their insults and abuse.[6] Nor is it unreasonable for the husband to want to retain in their home a little orphan girl whom they had adopted.[7] That she should pay her own traveling expenses across one entire state in order to return to him, is not a reasonable condition;[8] but otherwise where she was located but two miles

[95]Bernsdorff v. Bernsdorff, 26 App. D. C. 520; Parker v. Parker, 134 Ga. 316, 67 S. E. 812.

[96]Almond v. Almond, 4 Rand. (Va.) 662, 15 Am. Dec. 781.

[97]Oertel v. Oertel, 92 N. J. Eq. 327, 112 Atl. 487; Fred v. Fred, 67 N. J. Eq. 495, 58 Atl. 611.

[98]Bernsdorff v. Bernsdorff, 26 App. D. C. 520.

[99]Weir v. Weir, 10 Grant Ch. (U. C.) 565.

[1]Brewer v. Brewer, 79 Nebr. 726, 113 N. W. 161, 13 L. R. A. (N. S.) 222.

[2]Coulter v. Coulter, 175 Mo. App. 1, 161 S. W. 281.

[3]Thomas v. Thomas, 152 Ill. 577, 38 N. E. 794; Cash v. Cash, 201 Ill. App. 151; Schraeder v. Schraeder, 26 Ill. App. 524; Coulter v. Coulter, 175 Mo. App. 1, 161 S. W. 281; Lindenschmidt v. Lindenschmidt, 29 Mo. App. 295; Meeker v. Meeker, (N. J. Eq.), 27 Atl. 78.

[4]Cash v. Cash, 201 Ill. App. 151.

[5]Meeker v. Meeker, (N. J.), 27 Atl. 78.

[6]Lindenschmidt v. Lindenschmidt, 29 Mo. App. 295.

[7]Hilton v. Hilton, 88 Miss. 529, 41 So. 262.

[8]Coulter v. Coulter, 175 Mo. App. 1, 161 S. W. 281. In this case the husband had gone to Oklahoma to live and requested his wife in Missouri to come to him, and she asked him to send her the traveling ex-

distant from him.[9] The refusal of the wife to accept such an offer must be sincere and reasonably founded.[10]

§ 647. **Effect of condonation on right to maintenance.**—As in divorce, the condonation of matrimonial offenses may defeat a suit based on such offenses, so in a suit for separation or alimony by the wife, her forgiveness of the offenses complained of may bar her action.[11] But such forgiveness is not to be considered when the same or other offenses have followed until the wrong becomes unbearable.[12]

Condonation is based upon the idea that the offender will reform and will commit no more matrimonial offenses, and if he does the injured party is entitled to all the relief she was entitled to if she had not condoned the offense; otherwise she will suffer for her own rightful conduct.[13] But the simple act of the usual marital intercourse may not condone persistent cruel treatment or practical abandonment, for it may have been permitted through fear of further cruelty or in hopes of a change

penses, which was his duty; the court said: "His failure to perform that duty deprived his request for her to return of any legal force."

[9]Thomas v. Thomas, 152 Ill. 577, 38 N. E. 794.

[10]Hilton v. Hilton, 88 Miss. 529, 41 So. 262.

[11]Meeker v. Meeker, (N. J. Eq.), 27 Atl. 78; Levin v. Levin, 68 S. Car. 123, 46 S. E. 945; Wise v. Wise, 60 S. Car. 426, 38 S. E. 794; Doe v. Doe, 48 Utah 200, 158 Pac. 781. In Wade v. Wade, 96 Cal. xviii, 31 Pac. 258, a decree for separate maintenance under the statute was discontinued where the wife consented to a renewal of their marital relations for fear that if she did not her husband would be entitled to a divorce, of which she had a horror. In Deenis v. Deenis, 65 Ill. 167, it was said: "The continuous cohabitation with knowledge of the alleged guilt, and the acquiescence for years, must be regarded as a remission of the first offenses."

[12]Harrison v. Harrison, 20 Ala. 629, 56 Am. Dec. 227; Williams v. Williams, 77 Ill. App. 229; Rhodes v. Rhodes, 92 N. J. Eq. 252, 114 Atl. 414; Levin v. Levin, 68 S. Car. 123, 46 S. E. 945. It was said in Threewits v. Threewits, 4 Desaus. (4 S. Car.) 560: The wife "has a right to judge of the future by the past; and the court will connect the whole of his [husband's] conduct in order to form a correct judgment." See also Wise v. Wise, 60 S. Car. 426, 38 S. E. 794. Where the cruelty consisted of unjust accusations of unchastity there was no condonation when they were made up to the very moment of final separation, and, even if there had been a mutual understanding that previous charges were to be forgiven it was based upon condition of future good conduct, and a repetition of the act revived the condoned offense. Shors v. Shors, 133 Iowa 22, 110 N. W. 1.

[13]Williams v. Williams, 77 Ill. App. 229.

for the better and reconciliation,[14] and a condonation will not be implied from the conduct of the wife while acting under restraint of fear or the force of circumstances, for condonation must be a voluntary act.[15]

§ 648. **Right of nonresident wife to maintain action—Venue.**—The action for separate maintenance is transitory, and a nonresident wife may maintain it against a resident husband.[16] The time of residence in the state necessary to maintain a suit for divorce for abandonment is not a condition precedent to the suit for maintenance.[17]

The venue of a suit for maintenance without divorce is given by the laws applying to ordinary suits for the vindication of legal or equitable rights, and is in no wise controlled by the statute in relation to jurisdiction in divorce suits.[18]

§ 649. **Application of statutes of limitations.**—As a general rule the statute of limitations does not run against this action.[19] And the laches which will bar it must be gross and inexcusable.[20]

[14]Weir v. Weir, 10 Grants Ch. (U. C.) 565; Lovell v. Lovell, 11 Montreal L. R. 547, 13 Montreal L. R. 569.

[15]Williams v. Williams, 77 Ill. App. 229; Harnett v. Harnett, 55 Iowa 45, 7 N. W. 394.

[16]Badger v. Badger, 69 Colo. 564, 196 Pac. 861; Cobb v. Cobb, 82 Fla. 287, 89 So. 869; George v. George, 190 Ky. 706, 228 S. W. 408; Hilton v. Second Judicial Dist. Ct., 43 Nev. 128, 183 Pac. 317; Kelley v. Bausman, 98 Wash. 686, 168 Pac. 181.

[17]Chaves v. Chaves, 79 Fla. 602, 84 So. 672.

[18]Lang v. Lang, 70 W. Va. 205, 73 S. E. 716, 38 L. R. A. (N. S.) 950, Ann. Cas. 1913D, 1129. In Kelly v. Bausman, 98 Wash. 686, 168 Pac. 181, the court said: "An action for separate maintenance is entirely independent of divorce statutes, and is transitory, and may be maintained without reference to the residence of the parties, or either of them."

[19]Olsen v. Olsen, 3 Alaska 616; Directors of Poor of Delaware v. Mercer, 2 Clark (Pa.) 75; Kimble v. Kimble, 17 Wash. 75, 49 Pac. 216. In Carr v. Carr, 6 Ind. App. 377, 33 N. E. 805, where the defense was the statute of limitations, the court said: "It is sufficient to say to this that the obligation of a husband to support his wife and infant children is a continuing one, and lasts so long as the relation exists. The purpose of this action is not to recover for the past support, but for present and future maintenance."

[20]In Judson v. Judson, 171 Mich. 185, 137 N. W. 103, where the delay was nineteen years, the court said: "Neither the promises nor the advice of her counsel, nor belief in the assertions of immunity by a prospective defendant, are excuses for laches." In Reed v. Reed, 52 Mich. 117, 17 N. W. 720, 50 Am. St. Rep. 247, there was a delay of eighteen years, but her living apart was against the will of the husband, and in disregard of his repeated requests that she should return to him.

§ 650. **Pleading.**—Generally speaking a complaint sufficient for a decree of divorce is sufficient to support a bill for alimony alone.[21] It will generally be sufficient for the wife to allege that she was compelled to leave her husband because his conduct towards her made her life miserable and unbearable.[22] As against a demurrer the wife's complaint need not negative any fault on her part, or show affirmatively that she was without funds. Fault will not be presumed.[23] It is not a fatal defect that the residence of the plaintiff is not alleged.[24]

The bill will not be rendered multifarious because it also seeks the custody of the children.[25] There is authority that the custody of the children, may be awarded to the mother when warranted by the evidence, though there is no prayer for such custody.[26]

A husband is not required to file answer in a wife's suit for maintenance.[27]

§ 651. **Evidence.**—The plaintiff must show the marriage, the failure of the husband without the wife's fault to maintain her, the ability of the husband to pay, and the living apart.[28] It is not always required that the evidence should be sufficient to sustain a decree of divorce.[29] The marriage status may be established by prima facie evidence.[30] and corroboration is not demanded.[31] The wife is entitled to the prima facie presumption of good faith in the absence of anything tending to the contrary.[32]

The intention of the husband to compel his wife to leave him,

[21]Marsicano v. Marsicano, 79 Fla. 278, 84 So. 156; Polley v. Polley, 128 Md. 60, 97 Atl. 526.

[22]French v. French, 302 Ill. 152, 134 N. E. 33.

[23]Kelley v. Bausman, 98 Wash. 686, 168 Pac. 181.

[24]Mattson v. Mattson, 181 Cal. 44, 183 Pac. 443.

[25]Tutwiler v. Tutwiler, 205 Ala. 283, 87 So. 852.

[26]Mills v. Mills, 150 Ga. 782, 105 S. E. 357.

[27]Marshall v. Marshall, 236 Mass. 248, 128 N. E. 27.

[28]Chaves v. Chaves, 79 Fla. 602, 84 So. 672; Glover v. Glover, 151 Ga. 574, 107 S. E. 861; George v. George, 190 Ky. 706, 228 S. W. 408; McPheeters v. McPheeters, 207 Mo. App. 634, 227 S. W. 872; Broaddus v. Broaddus (Mo. App.), 221 S. W. 804; Hilton v. Second Judicial District Court, 43 Nev. 128, 183 Pac. 317; Pinkinson v. Pinkinson, 92 N. J. Eq. 669, 113 Atl. 143; Weppler v. Weppler, 91 N. J. Eq. 535, 111 Atl. 159.

[29]Pratt v. Pratt, 197 Ill. App. 530.

[30]Chaves v. Chaves, 79 Fla. 602, 84 So. 672.

[31]Mattson v. Mattson, 181 Cal. 44, 183 Pac. 443; Pinkinson v. Pinkinson, 92 N. J. Eq. 669, 113 Atl. 143, affirming decree 109 Atl. 731.

[32]Nolker v. Nolker, (Mo. App.), 226 S. W. 304.

may be inferred when he does that which compels her to leave him.[33]

§ 652. **Reference to find facts necessary to determination of amount.**—To determine the wife's necessities and the husband's facilities, the better practice, unless the court itself will hear the evidence, is to refer such questions to a master if the case is in equity, and to a commissioner if it is at law,[34] but this will be unnecessary where the necessities of the wife and the facilities of the husband are established by the pleadings.[35]

§ 653. **The allowance and its incidents in general.**—The amount to be allowed for maintenance and support is largely within the discretion of the court, under the evidence,[36] but it should not exceed the amount prayed for in the complaint.[37] The support contemplated is a reasonable support under all the circumstances,[38] and this will call for a consideration of ages, health, habits, social conditions, and the circumstances in life of the parties.[39]

The amount should be sufficient to sustain the wife in decency and comfort,[40] and should not be so restricted as to force the wife to return to the husband from sheer necessity for money.[41]

[33]French v. French, 302 Ill. 152, 134 N. E. 33.

[34]Arendall v. Arendall, 61 Fla. 496, 54 So. 957, Ann. Cas. 1913A, 662. As to the effect of filing a plea in abatement and an order refusing temporary alimony going into the merits of the case, see Dougherty v. Dougherty, 126 Ga. 33, 54 S. E. 812.

[35]In Holly v. Holly, 81 Fla. 881, 89 So. 132, it is said: "Alimony pendente lite is awarded to furnish the wife, from whom the husband has withdrawn his support, with the means of living, and for the further reason, in which there is a high public interest, that she may not become a charge upon the state, while her rights are being adjudicated. Counsel fees are awarded to enable the wife to maintain or defend her suit."

[36]Fountain v. Fountain, 150 Ga. 742, 105 S. E. 294; Longhi v. Longhi, 193 Ill. App. 21; Hill v. Hill, 190 Ill. App. 541; Williford v. Williford, 162 Ill. App. 24; Glynn v. Glynn, 139 Ill. App. 185; Meunier v. Thibodeaux, 138 La. 393, 70 So. 337; Crews v. Crews, 175 N. Car. 168, 95 S. E. 149; Cram v. Cram, 116 N. Car. 288, 21 S. E. 197; Shearer v. Shearer, 112 S. Car. 126, 99 S. E. 754.

[37]Benton v. Benton, 122 Cal. 395, 55 Pac. 152.

[38]Clisby v. Clisby, 160 Ala. 572, 49 So. 445, 135 Am. St. 110; Belden v. Belden, 82 Conn. 611, 74 Atl. 896; Harding v. Harding, 79 Ill. App. 590.

[39]Cooper v. Cooper, 160 Ill. App. 449; Youngs v. Youngs, 78 Mo. App. 225.

[40]Logan v. Logan, 2 B. Mon. (Ky.) 142; Hires v. Hires, 91 N. J. Eq. 366, 110 Atl. 513.

[41]Rhodes v. Rhodes, 92 N. J. Eq. 252, 114 Atl. 414.

Consideration is first given to the estate of the husband and where he has no estate then his earning capacity becomes of first importance.[42]

As long as the husband retains his faculties, the obligation to support the wife still remains.[43]

The separate property or income of the wife may also be considered and the quantity of it may or may not defeat her action for separate maintenance.[44]

[42]Fahey v. Fahey, 43 Colo. 354, 96 Pac. 251, 18 L. R. A. (N. S.) 1147, 127 Am. St. 118. A specific proportion of the property of the husband may be decreed to the wife for her support. Dorsey v. Dorsey, 142 Minn. 279, 171 N. W. 933. Current earnings as well as income on permanent investments may be applied to the payment. Crews v. Crews, 175 N. Car. 168, 95 S. E. 149.

[43]Eidenmuller v. Eidenmuller, 37 Cal. 364; Foote v. Foote, 22 Ill. 425; McCrocklin v. McCrocklin, 2 B. Mon. (Ky.) 370; Muse v. Muse, 84 N. Car. 35; Battey v. Battey, 1 R. I. 212; Prince v. Prince, 1 Rich. Eq. (18 S. Car.) 282; Messervy v. Messervy, 80 S. Car. 277, 61 S. E. 442; Bailey v. Bailey, 21 Gratt. (Va.) 43; Campbell v. Campbell, 37 Wis. 206. In Canine v. Canine, 13 Ky. L. 124, 16 S. W. 367, the court said: "But that the appellee has no estate, is no reason why a just allowance should not be made, because he is shown to be about thirty years of age, blessed with good health, and educated in a profitable profession. * * * If he is not making money at his profession, he, being able bodied, can find some business, the income from which should be equitably divided between him and his wife." In Stephen v. Stephen, 102 Minn. 301, 113 N. W. 913, the court said: "The duty which the law imposes upon a husband to support his wife, is absolute, and not dependent upon her ability to support herself by her own labor, or out of her own property." In Furth v. Furth (N. J.), 39 Atl. 128, the court said: "The duty of the husband to support his wife is continuous, and is not dependent upon his prosperity." In Messervy v. Messervy, 85 S. Car. 189, 67 S. E. 130, 30 L. R. A. (N. S.) 1001, 137 Am. St. 873, the court said: "The court can not deny a party a right to a judgment to which he is entitled on the ground that judgment debtor is insolvent, or unable to pay the amount adjudged to be due, for the debtor thereafter may acquire property which could be subjected to the payment of the judgment. There is, therefore, no inconsistency in the court decreeing alimony in a case like this, though it may find itself unable to enforce payment thereof." In Messervy v. Messervy, 86 S. Car. 90, 67 S. E. 129, the court said: "Alimony may be granted when the defendant is without estate or certain income, but is able, by the use of his faculties, to provide reasonable maintenance for his wife. The absence of an estate or an income can not absolve the husband from his personal duty to exert himself to support his wife."

[44]Austin v. Austin, 42 Colo. 130, 94 Pac. 309; Rawson v. Rawson, 37 Ill. App. 491; Kenemer v. Kenemer, 26 Ind. 330; Stephen v. Stephen, 102 Minn. 301, 113 N. W. 913; Maxwell v. Maxwell, 28 Hun (N. Y.) 566;

The estimation of the husband's income may include a pension received by him,[45] and amounts owed him by third persons. These debtors may be made parties to the action.[46] An allowance of one-third of the husband's income is generally held not excessive.[47]

As a rule, the allowance is made pendente lite if the wife is without means of her own, independent of the controversy upon

Converse v. Converse, 9 Rich. Eq. (S. Car.) 535. "The amount of alimony to be allowed in a separate maintenance suit is to be determined in the same manner as in cases of divorce," was said in Decker v. Decker, 279 Ill. 300, 116 N. E. 688. It was further said there, "The amount, if any, to be allowed the wife for separate maintenance, depends not only upon the question of the misconduct of the husband, but also upon the matter of their property and income, as well as their ages, health, past and present habits, social conditions, and circumstances." In Harding v. Harding, 180 Ill. 481, 54 N. E. 587, it was said: "If the wife's income be insufficient to maintain her and to carry on the litigation, the husband's income should be required to contribute to her income as alimony, and to bear the expense of the suit. If the income of the wife be sufficient to suitably maintain her, there ordinarily exists no reason for making an allowance for that purpose." In Cole v. Cole, 142 Ill. 19, 31 N. E. 109, 19 L. R. A. 811, 34 Am. St. 56, the court said: "Equity and good conscience require that the husband shall not profit by his own wrong, and that restitution shall be made to the wife of the property which she brought to the husband, or a suitable sum in lieu thereof be allowed out of his estate, so far as may be done consistently with the preservation of the rights of each." The statement in Collins v. Collins, 80 N. Y. 12, that "the fact that the wife is destitute of means to carry on her suit and support herself during its pendency, is as essential as any other fact to authorize the court to award temporary alimony; and this is not a mere matter of discretion, but a set principle of equity," was made as a jurisdictional proposition in the absence of a statute authorizing the allowance, rather than as a principle governing the allowance. In Mayer v. Mayer, 5 Ohio Dec. (Reprint) 444, 2 Wkly. L. Bul. 47, the court said: "A husband may not be entitled to a dissolution of marriage where he has been guilty of misconduct, and yet at the same time may not be obliged to render support out of his estate to a wife who independent of that, has means of her own." A wife may be allowed separate maintenance although she has a separate estate. Vickers v. Vickers, 89 W. Va. 236, 109 S. E. 234.

[45]McGrady v. McGrady, 48 Mo. App. 668.

[46]Leib v. Henderson, 73 Ind. App. 181, 126 N. E. 856; Kelley v. Bausman, 98 Wash. 686, 168 Pac. 181.

[47]Razor v. Razor, 149 Ill. 621, 36 N. E. 963; Bennett v. Bennett (N. J. Eq.), 59 Atl. 245. But see Hogg v. Maxwell, 233 Fed. 290; Anderson v. Anderson, 183 N. Car. 139, 110 S. E. 863.

the merits,[48] and may include reasonable counsel fees and suit money.[49] It may be made to cover necessary medical and dental bills for the children.[50] Credit may be given the husband for necessaries purchased by the wife on his account,[51] and for the rental of premises belonging to him and occupied by her.[52]

The decree for allowance may be modified on a showing of material changes in the condition of either party.[53] The instalments may begin from the date of filing the bill.[54] The judgment for the allowance becomes a lien upon the property of the husband, enforceable by execution,[55]

Where there is no property the decree for a monthly alimony may be enforced by contempt proceedings but not where is shown the inability of the husband to pay the instalments.[56]

[48]Bagot v. Bagot, 68 Colo. 562, 191 Pac. 96; Nolker v. Nolker, (Mo. App.), 226 S. W. 304; Allen v. Allen, 180 N. Car. 465, 105 S. E. 11.

[49]Tutwiler v. Tutwiler, 205 Ala. 283, 87 So. 852; Cobb v. Cobb, 82 Fla. 287, 89 So. 869; Cash v. Cash, 201 Ill. App. 151; Shipley v. Shipley, 187 Iowa 1295, 175 N. W. 51; Vanderburgh v. Vanderburgh (Minn.), 188 N. W. 276; Robertson v. Robertson, 138 Minn. 290, 164 N. W. 980; Anderson v. Anderson, 54 Utah 309, 181 Pac. 168; Vickers v. Vickers, 89 W. Va. 236, 109 S. E. 234; State v. Maxwell, 89 W. Va. 31, 108 S. E. 418.

[50]Buskie v. Buskie (Mo. App.), 203 S. W. 468.

[51]Gans v. Gans, 157 Ky. 775, 164 S. W. 96.

[52]Bennett v. Bennett (N. J. Eq.), 59 Atl. 245.

[53]Lane v. Lane, 211 Ill. App. 511; Bottorff v. Bottorff, (Ind.), 125 N. E. 478; Decker v. Decker, 56 Mont. 338, 185 Pac. 168; McDermott v. McDermott, 92 N. J. Eq. 245, 109 Atl. 729, 111 Atl. 926; Crews v. Crews, 175 N. Car. 168, 95 S. E. 149. Decree may not be modified as to accrued instalments. Simonton v. Simonton, 33 Idaho 255, 193 Pac. 386.

[54]Tehsman v. Tehsman, 93 N. J. 422, 117 Atl. 34.

[55]Cash v. Cash, 201 Ill. App. 151; Decker v. Decker, 56 Mont. 338, 185 Pac. 168; Anderson v. Anderson, 183 N. Car. 139, 110 S. E. 863. See also Bottorff v. Bottorff (Ind.), 129 N. E. 478; Moore v. Moore (Ind. App.), 129 N. E. 480. An order allowing a wife to sell, control, and encumber the husband's property may be allowed where he has absented himself from the state for more than a year. Hollan v. Kepner, 297 Ill. 332, 130 N. E. 699. A suit to fasten the allowance of alimony as a specific lien on specific property, is an action in rem. Shipley v. Shipley, 187 Iowa 1295, 175 N. W. 51. A warrant of attachment may issue against the land of the husband when he is a non-resident of the state and a fugitive from justice. Walton v. Walton, 178 N. Car. 73, 100 S. E. 176.

[56]Harmon v. Harmon, 152 Ark. 129, 237 S. W. 1096; Lightfoot v. Lightfoot, 149 Ga. 213, 99 S. E. 611; Potter v. Potter, 145 Ga. 60, 88 S. E. 546; Simonton v. Simonton, 33 Idaho

Reasonable security may be required for the payment of the judgment.[57]

It is allowed in some jurisdictions where separate maintenance is denied, that the court may make provision for the care, custody and support of the children living with the wife.[58]

§ 654. **Injunction against conveyance or incumbrance of property.**—Where such a course is necessary to safeguard the rights of the wife suing for separate maintenance a husband may be enjoined from alienating or encumbering his property without leave of the court.[59] Such a proceeding would seem unnecessary and unwarranted where the power of the court is limited to making the alimony a lien on the real property of the husband.[60]

§ 655. **Termination of right to separate maintenance.**—The right to separate maintenance ceases on the death of either of the parties,[61] or on their reconciliation and resumption of the marital relation,[62] in which latter case the court may set aside the order or decree if the parties thereto become reconciled and resume marital relations.[63]

255, 193 Pac. 386. A petition in contempt proceedings against a husband to pay an order for support of children should disclose the nature of the proceeding in which the order was made. People v. Gensen, 204 Ill. App. 630.

[57]Klepper v. Klepper, 199 Mo. App. 294, 202 S. W. 593; Decker v. Decker, 56 Mont. 338, 185 Pac. 168.

[58]McAuliffe v. McAuliffe, 53 Cal. App. 352, 199 Pac. 1071; Marshall v. Marshall, 236 Mass. 248, 128 N. E. 127.

[59]Peck v. Peck, 214 Ill. App. 41 (notice necessary); Anderson v. Anderson, 54 Utah 309, 181 Pac. 168.

[60]Peck v. Peck, 214 Ill. App. 41.

[61]Polley v. Polley, 128 Md. 60, 97 Atl. 526.

[62]Umlauf v. Umlauf, 103 Ill. 651; Polley v. Polley, 128 Md. 60, 97 Atl. 526; Wallingsford v. Wallingsford, 6 Har. & J. (Md.) 485; Kuntz v. Kuntz, 80 N. J. Eq. 429, 83 Atl. 787.

[63]Hanscom v. Hanscom, 6 Colo. App. 97, 39 Pac. 885; Umlauf v. Umlauf, 103 Ill. 651; Goldie v. Goldie, 123 Iowa 175, 98 N. W. 630, 99 N. W. 707; Hulett v. Hulett, 80 Ky. 364, 4 Ky. L. 193; Lockridge v. Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52; Logan v. Logan, 2 B. Mon. (Ky.) 142; Polley v. Polley, 128 Md. 60, 97 Atl. 526; Macnamara's Case, 2 Bland (Md.) 566; Hewitt v. Hewitt, 1 Bland (Md.) 101; Wallingsford v. Wallingsford, 6 Har. & J. (Md.) 485; McIlroy v. McIlroy, 208 Mass. 458, 94 N. E. 696, Ann. Cas. 1912A, 934; Keup v. Keup, 98 Nebr. 321, 152 N. W. 555; Price v. Price, 75 Nebr. 552, 106 N. W. 657; Kuntz v. Kuntz, 80 N. J. Eq. 429, 83 Atl. 787; Crews v. Crews, 175 N. Car. 168, 95 S. E. 149; Skittletharpe v. Skittletharpe, 130 N. Car. 72, 40 S. E. 851; Prather v. Prather, 4 Desaus. (4 S. Car.) 33; Rhame v. Rhame, 1 McCord Eq. (6 S. Car.) 197, 16 Am. Dec. 597; Cureton v. Cureton, 117 Tenn. 103, 96 S. W. 608. Pritchard v. Pritchard, 189 Mo. App. 470, 176

Very frequently decrees are made which continue only until the parties are reconciled.[64] It has been held that where the parties become reconciled after suit is brought it may be, if pleaded, shown in order to defeat the action.[65] But it has also been held that the order once made should continue in force until revised or altered by the court itself, and that the decree is not to be annulled by the acts of the parties.[66]

A conditional order for alimony may be entered, its discontinuance depending upon the defendant convincing the court of his good faith in an offer to resume marital relations with the plaintiff.[67] So, when conditions are attached to the decree it will be modified only when it appears that they have been faithfully performed.[68] The condition may be until the husband should have provided a home for the plaintiff suitable for her to live in.[69] But an order or decree for maintenance may not be set aside, suspended, or modified, if it is apparent to the court that the offer is made simply for the purpose of avoiding its payment.[70]

S. W. 1124, in which the court said: "The very nature of the husband's offense is such that if abandonment ceases, the penalty should cease to be exacted, and it was not the intent of the statute that an inflexible and perpetual judgment should block the way to reconciliation; nor was it the intention of the legislature to authorize a judgment which could not be altered, where the situation had been so changed as to make the statute necessarily inapplicable."

[64]Hanscom v. Hanscom, 6 Colo. App. 97, 39 Pac. 885; Macnamara's Case, 2 Bland. (Md.) 566; Hewitt v. Hewitt, 1 Blands (Md.) 101.

[65]Holbrook v. Her Husband, 18 La. Ann. 643.

[66]McIlroy v. McIlroy, 208 Mass. 458, 94 N. E. 696, Ann. Cas. 1912A, 934; Crews v. Crews, 175 N. Car. 18, 95 S. E. 149; Cureton v. Cureton, 117 Tenn. 103, 96 S. W. 608.

[67]Shaw v. Shaw, 2 App. D. C. 204; Sheppard v. Sheppard, 15 Cal. App. 614, 115 Pac. 751; Kenley v. Kenley, 2 How. (Miss.) 751; Creasey v. Creasey, 168 Mo. App. 98, 151 S. W. 215; Lamsback v. Lamsback (N. J. Eq.), 71 Atl. 387; Enslin v. Enslin, (N. J. Eq.), 37 Atl. 444; Rhame v. Rhame, 1 McCord Eq. (6. S. Car.) 197, 16 Am. Dec. 597; Hair v. Hair, 10 Rich Eq. (31 S. Car.) 163; Purcell v. Purcell, 4 Hen. & M. (Va.) 507.

[68]Rhame v. Rhame, 1 McCord Eq. (S. Car.) 197, 16 Am. Dec. 597.

[69]Sheppard v. Sheppard, 15 Cal. App. 614, 115 Pac. 751; Keup v. Keup, 98 Nebr. 321, 152 N. W. 555; Price v. Price, 75 Nebr. 552, 106 N. W. 657; Enslin v. Enslin (N. J.) 37 Atl. 442.

[70]Cronk v. Cronk, 19 Grant Ch. (U. C.) 283; in which the court said: "If the defendant really wishes to be reconciled to his wife for any other purpose than the contemptible one of getting rid of the small allowance which the master has made to her, let him obtain his wife's consent to return to him; let him withdraw the foul aspersions which he has cast upon her and not attempted to prove."

CHAPTER 43

ALIMONY GENERALLY

Section

660. In general.
661. Valid marriage as a prerequisite.
662. Alimony distinguished from wife's equity.
663. Alimony distinguished from dower.
664. Alimony under common-law marriage.
665. Necessity of separation of parties.
666. Persons liable.
667. Liability of nonresident defendant.
668. Manner of awarding alimony.
669. Alimony in nullity suits.
670. Alimony allowed without divorce proceedings—Separate maintenance.
671. Husband's general denial under oath—Effect on allowance.
672. Divorce to husband, alimony to wife.
673. Husband's right to alimony.
674. Liability of alimony to attachment or execution—Set-off.
675. Adjustment of property rights.
676. Assignment and anticipation of alimony.
677. Jurisdiction to grant alimony in general.
678. Jurisdiction to award dependent on nature of service of process.
679. Jurisdiction to award acquired by appearance.
680. Pleading—Prayer for alimony.
681. Liability for necessities after grant of alimony.
682. Jurisdiction dependent on domicil of parties.
683. Jurisdiction to grant alimony though none to grant divorce.
684. Appeal.
685. Alimony pending appeal.
686. Effect of discharge of bankruptcy on liability.

§ 660. **In general.**—Alimony is the allowance which the husband is compelled to pay for his wife's maintenance while she is

living apart from him, or after she has been divorced. It is the equivalent of that obligation for support which arises in favor of the wife out of the marriage relation.[1] It includes her food, clothing, habitation, and other necessaries for her sustenance.[2] In other words, it is an allowance paid to the wife out of her husband's estate or income and is allowed where absolute or partial divorces are granted, or even aside from divorce decree. As a wife is compelled to share her husband's adversity, she is also entitled to share his prosperity. The alimony to which she is entitled should correspond to the degree of his wealth and position. No man is required to provide for his wife in a manner inconsistent with his or her surroundings, or better than he can provide for himself. As a general rule, alimony is the outcome of a suit for divorce and will be allowed only after the libel has been filed in court.[3]

It is the duty of the husband to provide a comfortable support for his wife, according to his ability and circumstances in life, and if, by his wrongful acts, he forces his wife to take legal action against him, or he leaves her without just cause, the law will recognize her right of support and maintenance and will make provision for her out of his income or estate.[4] It is founded upon the marital obligation to support and maintain, and is awarded by the court in enforcement of this obligation and

[1]Chaires v. Chaires, 10 Fla. 308; Cole v. Cole, 142 Ill. 19, 31 N. E. 109, 19 L. R. A. 811, 34 Am. St. 56; Adams v. Storey, 135 Ill. 448, 26 N. E. 582, 11 L. R. A. 790, 25 Am. St. 392; Stillman v. Stillman, 99 Ill. 196, 39 Am. Rep. 21; Russell v. Russell, 4 Greene (Iowa) 26, 61 Am. Dec. 112; Lockridge v. Lockridge, 3 Dana. (Ky.) 28, 28 Am. Dec. 52; Outlaw v. Outlaw, 118 Md. 498, 84 Atl. 383; Crane v. Meginnis, 1 Gill & J. (Md.) 474, 19 Am. Dec. 237; Greene v. Greene, 49 Nebr. 546, 68 N. W. 947, 34 L. R. A. 110, 59 Am. St. 560; Ex parte Phillips, 43 Nev. 368, 187 Pac. 311; Parsons v. Parsons, 9 N. H. 309, 32 Am. Dec. 362; Griffin v. Griffin, 47 N. Y. 134; North v. North, 1 Barb. Ch. (N. Y.) 241, 43 Am. Dec. 778; Taylor v. Taylor, 93 N. Car. 418, 53 Am. Rep. 460; Huffman v. Huffman, 47 Ore. 610, 86 Pac. 593, 114 Am. St. 943; Henderson v. Henderson, 37 Ore. 141, 60 Pac. 597, 61 Pac. 136, 48 L. R. A. 766, 82 Am. St. 741; Gilbert v. Hayworth, 37 R. I. 303, 92 Atl. 625, 627.

[2]Russell v. Russell, 4 Greene (Iowa) 26, 61 Am. Dec. 112; Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. 544; Brenger v. Brenger, 142 Wis. 26, 125 N. W. 109, 26 L. R. A. (N. S.) 387, 135 Am. St. 1050, 19 Ann. Cas. 1136.

[3]Bowman v. Worthington, 24 Ark. 522; Foss v. Foss, 2 Ill. App. 411.

[4]Mussing v. Mussing, 104 Ill. 126; Keerl v. Keerl, 34 Md. 21; Johnson v. Johnson (Tenn. Ch.), 49 S. W. 305; Francis v. Francis, 31 Grat.

duty,[5] and amounts to a continuous allotment of sums, payable at regular periods for her support.[6] Final alimony may, however, be awarded in a gross sum.[7]

The decree for alimony is not a debt which has been put in the form of a judgment, but is rather a legal means of enforcing the obligation the marriage relation imposes upon the husband. The law interferes when the husband neglects or refuses to discharge his duty, and enforces it against him by means of legal proceedings.[8]

As to the time when alimony is allowed, it is classed, first, as being temporary or pendente lite and ad interim and, second, as permanent alimony. Temporary alimony is allowed as support money pending trial and is allowed to the wife regardless of her guilt or innocence; included in this are temporary allowances for solicitors' fees and expense money necessary to prosecute or defend the action.[9]

In England the allowance of temporary alimony is usually termed "costs."[10]

(Va.) 283; Pauly v. Pauly, 69 Wis. 419, 34 N. W. 512.

[5]Wetmore v. Markoe, 196 U. S. 68, 49 L. ed. 390, 25 Sup. Ct. 172, 2 Ann. Cas. 265; Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. 735; Willits v. Willits, 76 Nebr. 228, 107 N. W. 379, 5 L. R. A. (N. S.) 767, 14 Ann. Cas. 803; Shepard v. Shepard, 99 App. Div. 308, 90 N. Y. S. 982.

[6]Burrows v. Purple, 107 Mass. 428; Taylor v. Taylor, 93 N. Car. 418, 93 Am. Rep. 460; Brenger v. Brenger, 142 Wis. 26, 125 N. W. 109, 19 Ann. Cas. 1136; Palica v. Palica, 114 Wis. 236, 90 N. W. 165; Maxwell v. Sawyer, 90 Wis. 352, 63 N. W. 283; Blake v. Blake, 68 Wis. 303, 32 N. W. 48. Alimony is property in one sense, but not in the broad general sense of the term. It is a specific fund provided for a specific purpose, with restraint and limitation written all over its face by the very law and decree which brought it into existence. Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. 554.

[7]Burrows v. Purple, 107 Mass. 428.

[8]Wetmore v. Markoe, 196 U. S. 68, 49 L. ed. 390, 25 Sup. Ct. 172, 2 Ann. Cas. 265; Stillman v. Stillman, 99 Ill. 196, 39 Am. Rep. 21.

[9]Huffman v. Huffman, 47 Ore. 610, 86 Pac. 593, 114 Am. St. 943; Henderson v. Henderson, 37 Ore. 141, 60 Pac. 597, 61 Pac. 136, 48 L. R. A. 766, 82 Am. St. 741; Gilbert v. Hayward, 37 R. I. 303, 92 Atl. 625; Fitzgerald v. Fitzgerald, 1 Lee Ecc. 649; Bird v. Bird, 1 Lee Ecc. 572; Weber v. Weber, 1 Swab. & Tr. 219.

[10]Bird v. Bird, 1 Lee Ecc. 572; Fitzgerald v. Fitzgerald, 1 Lee Ecc. 649; Weber v. Weber, 1 Swab. & Tr. 219. Alimony for husband allowed only where there is statutory authority therefor, as in Oregon. Huffman v. Huffman, 47 Ore. 610, 86 Pac. 593, 114 Am. St. 943; Henderson v. Henderson, 37 Ore. 141, 60 Pac. 597, 61 Pac. 136, 48 L. R. A. 766, 82 Am. St. 741. Alimony is the

Permanent alimony is allowed at the conclusion of the trial as the wife's share of the common property and also in fulfilment of the husband's duty of support. Where the husband is not the wrongdoer the wife is not entitled to alimony.[11] Alimony is permanent merely as distinguished from temporary alimony as above defined; and it cannot in any strict sense be considered permanent, as it ceases when one of the parties dies;[12] or upon the reconciliation of the parties and the resumption of the marital relation.[13]

§ 661. **Valid marriage as a prerequisite.**—As a valid marriage and a breach of the duties imposed by such marriage are the very ground for alimony, a marriage must be admitted or proved before alimony can be decreed.[14] If there is no legal marriage

allowance which the husband is compelled to pay for his wife's maintenance while she is living apart from him or after she has been divorced. Gilbert v. Hayward, 37 R. I. 303, 92 Atl. 625.

[11]Palmer v. Palmer, 1 Paige (N. Y.) 276. Judgment may be granted in a subsequent proceeding solely for alimony where decree of divorce is granted on service by publication. Hutton v. Dodge, 58 Utah 228, 198 Pac. 165.

[12]Casteel v. Casteel, 38 Ark. 477; Kurtz v. Kurtz, 38 Ark. 119; Craig v. Craig, 163 Ill. 176, 45 N. E. 153; Adams v. Storey, 135 Ill. 448, 26 N. E. 582, 11 L. R. A. 790, 25 Am. St. 392; Lennahan v. O'Keefe, 107 Ill. 620; Gaines v. Gaines, 9 B. Mon. (Ky.) 295, 48 Am. Dec. 425; Lockridge v. Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52; Wallingsford v. Wallingsford, 6 Har. & J. (Md.) 485; Knapp v. Knapp, 134 Mass. 353; Dewees v. Dewees, 55 Miss. 315; Wilson v. Hinman, 182 N. Y. 408, 75 N. E. 236, 2 L. R. A. (N. S.) 232, 108 Am. St. 820; Shepard v. Shepard, 99 App. Div. 308, 90 N. Y. S. 982; Field v. Field, 15 Abb. N. C. (N. Y.) 434; Francis v. Francis, 31 Grat. (Va.) 283.

[13]Lockridge v. Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52; Rogers v. Vines, 6 Ired. (N. Car.) 293; Lockwood v. Krum, 34 Ohio St. 1; Tiffin v. Tiffin, 2 Bin. (Pa.) 202.

[14]Turner v. Turner, 44 Ala. 437; Bowman v. Worthington, 24 Ark. 522; Cowan v. Cowan, 10 Colo. 540, 16 Pac. 215; Frith v. Frith, 18 Ga. 273; Roseberry v. Roseberry, 17 Ga. 139; McGee v. McGee, 10 Ga. 477; Shaw v. Shaw, 92 Iowa 722, 61 N. W. 368; McFarland v. McFarland, 51 Iowa 565; Strode v. Strode, 3 Bush (Ky.) 227, 97 Am. Dec. 211; Holbrook v. Holbrook, 32 La. Ann. 13; Chase v. Chase, 55 Maine 21; Coles v. Coles, 2 Md. Ch. 341; Cooper v. Mayhew, 40 Mich. 528; Robinson v. Robinson, 112 Miss. 224, 72 So. 923; Cray v. Cray, 32 N. J. Eq. 25; Collins v. Collins, 80 N. Y. 1; Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460; Griffin v. Griffin, 47 N. Y. 134; Appleton v. Warner, 51 Barb. (N. Y.) 270; McQueen v. McQueen, 61 How. Pr. (N. Y.) 280; Humphreys v. Humphreys, 49 How. Pr. (N. Y.) 140; Schonwald v. Schonwald, 62 N. Car. (Phill. Eq.) 215; Cox v. Cox, 20 Ohio St. 439; Bardin v. Bardin, 4 S. Dak. 305, 56 N. W. 1069, 46 Am.

there is no legal obligation of the wife's support upon the husband.[15]

§ 662. **Alimony distinguished from wife's equity.**—Alimony proper is payable out of the husband's own estate.[16]

And in this respect it differs from what is known as the "wife's equity" which was payable out of the fortune which she brought into the marriage, and which by the fiction of the marital unity became legally the property of the husband when reduced by him into his possession, if the same was in the reach of the court. When needed for the support of herself and children by reason of his abandoning and refusing to support her, or such misconduct on his part as compelled her to leave him, or his insolvency, or inability, equity would aid her under an original bill by her for that purpose.[17] But if he sought the aid of equity to reduce such property to his possession, relief would be denied him unless he made provision for the support of his wife and children. Her equity extends to all her equitable choses in action, and generally to all equitable estates or interests falling within the jurisdiction of the court of chancery; but not to the mere legal choses in action, to terms for years, or any chattel of which the husband may legally take possession.[18]

St. 791; Purcell v. Purcell, 4 Hen. & M. (Va.) 507; Portsmouth v. Portsmouth, 3 Add. Ecc. 63; Smyth v. Smyth, 2 Add. Ecc. 254; Bird v. Bird, 1 Lee Ecc. 205, 211; Miles v. Chilton, 1 Rob. Ecc. 684; Campbell v. Sassen, 2 Wils. & S. 309.

[15]Sharon v. Sharon, 84 Cal. 484, 23 Pac. 1100; Morgan v. Morgan, 148 Ga. 25, 97 S. E. 675, 4 A. L. R. 925; Robinson v. Robinson, 112 Miss. 224, 72 So. 923. See also Schonwald v. Schonwald, 62 N. Car. 215.

[16]Adams v. Storey, 135 Ill. 338, 26 N. E. 582, 25 Am. St. 392; Rush v. Flood, 105 Ill. App. 182; Russell v. Russell, 4 Greene (Iowa) 26, 61 Am. Dec. 112; Parsons v. Parsons, 9 N. H. 309, 32 Am. Dec. 362.

[17]In Helms v. Franciscus, 2 Bland. (Md.) 544, 20 Am. Dec. 402, it is said: "If the husband be insolvent, then the maintenance to be provided for her is always a present one, and made to commence immediately; because the husband being under an obligation to maintain his wife, and his doing so being the condition upon which the law gives him her property, therefore his incapacity to maintain her, owing to his insolvency, gives her an equitable right to claim an immediate provision for her own support. And where the incapacity of the husband to maintain his wife arises from bankruptcy or legal insolvency, the court fastens that obligation upon the property itself.

[18]Bell v. Bell, 1 Ga. (Kelly) 637; Quigly v. Muse, 15 La. Ann. 197; Carleton v. Lovejoy, 54 Maine 445; Wiles v. Wiles, 3 Md. 1, 56 Am. Dec. 733; Cram v. Dudley, 28 N. H. (Frost.) 537; Van Duzer v. Van Duzer, 6 Paige (N. Y.) 366, 31 Am. Dec. 257; Briggs v. Mitchell, 60 Barb. (N. Y.) 288; Blanchard v. Blood, 2 Barb. (N. Y.) 352. The

A court will not suffer a husband who has become possessed of the property of his wife by virtue of an agreement, to avail himself of his own wrong, in order to free himself of the duty to maintain her. Even without any such consideration, stipulations in such an agreement to pay money for a wife's support have always been regarded as enforceable in a court of equity.[19]

Where a married woman has been illtreated or abandoned by her husband, and left without the means of subsistence, a provision for a separate maintenance may be secured for her by the court of chancery out of her own fortune which happens to be in reach of the court.[20]

But as in the case of alimony proper, the foundation of it was the obligation of the husband to support her.[21]

However, the learning on this intricate, though interesting subject, need be pursued no further. In about all the jurisdic-

ground upon which this jurisdiction is exercised is, that as the interest of the wife's fortune is intended for both of them, and is given to the husband by the laws upon the tacit condition that he maintain her, if he either will not maintain her, or so demeans himself that she can not with safety or decency consort with him, to receive a maintenance at his hands, that interest shall be taken from him and given to her; since it would be very hard that the party from whom the fortune moves should lose, and the other gain the whole, and that, too, by his own misconduct. Helms v. Franciscus, 2 Bland. (Md.) 544, 20 Am. Dec. 402. 2 Story Eq. 650. See also Parsons v. Parsons, 9 N. H. 309, 32 Am. Dec. 63, where it is said: "Whenever the wife has any equitable property within the reach or the jurisdiction of courts of equity, they will lay hold of it; and in such case of the desertion or ill treatment of the wife by the husband, as well as in the case of his inability or refusal to maintain her, they will decree a suitable maintenance for her, out of such equitable funds. The general ground on which this jurisdiction is asserted, is that the law when it gives the property of the wife to the husband, imposes upon him the corresponding obligation to maintain her, and that obligation will fasten itself upon such equitable property in the nature of a lien or a trust which a court of equity, when necessary, will, in pursuance of its duty, enforce.

[19]Aspinwall v. Aspinwall, 49 N. J. Eq. 302, 24 Atl. 926; Miller v. Miller, 1 N. J. Eq. 386.

[20]Helms v. Franciscus, 2 Bland's Ch. (Md.) 544, 20 Am. Dec. 402.

[21]Scott v. Scott, 83 Conn. 634, 78 Atl. 314, 21 Ann. Cas. 464; Adams v Storey, 135 Ill. 338, 26 N. E. 582, 25 Am. St. 392; Rush v. Flood, 105 Ill. App. 182; Russell v. Russell, 4 Greene (Iowa) 26, 61 Am. Dec. 112; Helms v. Franciscus, 2 Bland. (Md.) 544, 20 Am. Dec. 402; Parsons v Parsons, 9 N. H. 309, 32 Am. Dec 362; Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. 544; Sheppard v. Sheppard, 98 App. Div. 624, 90 N. Y. S. 1113; Allen v. Farmers Loan & Trust Co., 18 App. Div. 27, 45 N. Y. S. 298.

tions the common law whereby the marriage vested the wife's estate in the husband has been abolished, and the question has become purely academic. It may, however, be noted that this jurisdiction arose partly out of the necessity to prevent the delinquent husband conspiring to defeat the wife's right to support out of her own fortune.[22]

§ 663. **Alimony distinguished from dower.**—As to the support of the wife, alimony and dower are the supplements of each other. Alimony is the allowance made for her during the life of her husband, and dower is the provision which the law makes for her out of his lands and tenements after his death.[23]

The effect of an absolute divorce where there is no statutory regulation, is to put an end to all rights of property depending upon the marriage, and not actually vested, which would include the right to dower in the wife.[24]

On the other hand a divorce a mensa et thoro at common law leaves all the other marital rights and obligations in full force.[25]

Alimony rests upon the obligation of the husband to support his wife; allowance for future support has been held to be in consideration of and as a substitute for her interests in the community property; or her right of dower or inheritance in the property of the husband.[26] So a court can not, without statutory aid, decree alimony to the wife in lieu of dower in a decree of absolute divorce, granted in her favor for her husband's delinquencies, and divest her of her dower interests in his property.[27] So, too, in an action for a limited divorce a decree that the husband shall pay a gross sum to the wife, and be discharged from all other liabilities for her support, does not bar dower.[28]

But where under a statute, dower is reserved after a decree of

[22]Van Duzer v. Van Duzer, 6 Paige (N. Y.) 366, 31 Am. Dec. 257.

[23]Adams v. Storey, 135 Ill. 448, 26 N. E. 582, 11 L. R. A. 790, 25 Am. St. 392; Taylor v. Taylor, 93 N. Car. 418, 53 Am. Rep. 460.

[24]Billan v. Hercklebrath, 23 Ind. 71; Whitsell v. Mills, 6 Ind. 229; Stilphen v. Houdlette, 60 Maine 447; Barbour v. Barbour, 46 Maine 9; Given v. Marr, 27 Maine 212; Tatro v. Tatro, 18 Nebr. 395, 25 N. W. 571, 53 Am. Rep. 820; Wait v. Wait, 4 N. Y. 95; Rice v. Lumley, 10 Ohio St. 596; Miltimore v. Miltimore, 40 Pa. St. 151; Burdick v. Briggs, 11 Wis. 126.

[25]Storey v. Storey, 125 Ill. 608, 18 N. E. 329, 1 L. R. A. 320, 8 Am. St. 417.

[26]Ex parte Spencer, 83 Cal. 460, 23 Pac. 395, 17 Am. St. 266.

[27]Russell v. Russell, 1 Ind. 510.

[28]Crain v. Cavana, 36 Barb. (N. Y.) 410; Taylor v. Taylor, 93 N. Car. 418, 53 Am. Rep. 460.

absolute divorce against the husband on account of his misconduct, the court may, in the nature of alimony award the plaintiff dower in the lands of which her husband was seized at the date of the decree. In such cases, however, the right of dower is not contingent upon the death of the husband, but accrues at once upon the rendition of the decree, the same as if he were dead.[29] And where an annuity is given for life by a consent decree, making the annuity a lien and charge upon the real estate of the husband, and the wife has taken her support and maintenance under the decree and still continues to claim it, her right to dower will be barred.[30]

§ 664. **Alimony under common-law marriage.**—Proof of a common-law marriage has been held sufficient to decree alimony.[31]

§ 665. **Necessity of separation of parties.**—Alimony cannot be decreed unless the parties are actually separated. If they are living together there is no need of alimony.[32] The reason

[29]Plaster v. Plaster, 47 Ill. 290; Merrill v. Shattuck, 55 Maine 370; Harding v. Alden, 9 Greenl. (Maine) 140, 23 Am. Dec. 549; Davol v. Howland, 14 Mass. 219; Smith v. Smith, 13 Mass. 231; Owen v. Yale, 75 Mich. 256, 42 N. W. 817; Tatro v. Tatro, 18 Nebr. 395, 25 N. W. 571, 53 Am. Rep. 820.

[30]Adams v. Storey, 135 Ill. 448, 26 N. E. 582, 11 L. R. A. 790, 25 Am. St. 392; Owen v. Yale, 75 Mich. 256, 42 N. W. 817; Julier v. Julier, 62 Ohio St. 90, 56 N. E. 661, 78 Am. St. 697. A married woman may bar her dower by giving a deed of conveyance of the estate, or by a separate deed. She may also be barred by a jointure, settled on her with her assent before marriage, or by a pecuniary provision in lieu of dower to which she has assented. She may also elect between her right to dower under the statute and a provision in will of her husband, but she will not be entitled to claim under both, unless that appears to have been the intention. Where the wife accepts any pecuniary provision named in lieu of dower, she will be barred thereby. Tatro v. Tatro, 18 Nebr. 395, 25 N. W. 571, 53 Am. Rep. 820. In Gercke v. Gercke, 100 Mo. 237, 13 S. W. 400, where a lump sum had been awarded the wife as alimony, the Supreme Court stayed execution on the judgment of the Circuit Court therefor until the wife should execute a conveyance in due form of law, relinquishing to the husband, all her inchoate dower interests in his estate, and deposit the same in the office of the clerk of the court below for the use of the defendant.

[31]Bowman v. Bowman, 24 Ill. App. 165; McFarland v. McFarland, 51 Iowa 565, 2 N. W. 269; Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460; Smith v. Smith, 1 Edw. Ch. (N. Y.) 255. See synopsis of marriage statutes, chap. 50, as to common-law marriages.

[32]Cowan v. Cowan, 10 Colo. 540, 16 Pac. 215; Harmon v. Harmon, 21

is that if the wife is living with her husband she can pledge his credit for her support.[33] Furthermore the continuing to live under the same roof raises a presumption that the offense complained of has been condoned.[34]

The wife is not entitled to temporary alimony where she voluntarily deserts her husband without cause and refuses to return.[35] But where she is justified in leaving him, her refusal of his offer to support her coupled with a condition that she should live in his house although occupying a separate bed, will not defeat her right to temporary alimony.[36]

§ 666. **Persons liable.**—Ordinarily no question arises in suits for divorce or the annulment of the marriage relation as to the person liable for alimony (including suit money and solicitors' fees), if the person bringing or defending such suit is the husband or wife, for the liability rests upon the husband by virtue of the marital relation.[37]

But the question has arisen in a suit for divorce and alimony against an adjudged spendthrift and his guardian properly appeared therein to defend against the action and here it was held that the guardian was not personally liable for alimony and suit money, but it might be awarded against the spendthrift.[38] So in an action by a parent to annul the marriage of her infant son, alimony can not be awarded against the plaintiff.[39] In a suit to annul a marriage for non-age by a man having no means of his own and incapable of earning any, where his father, a man of

Del. 152, 58 Atl. 1042; Pinckard v. Pinckard, 22 Ga. 31; McGee v. McGee, 10 Ga. 477; Klemme v. Klemme, 37 Ill. App. 54; Burns v. Burns, 60 Ind. 259; Tayman v. Tayman, 2 Md. Ch. 393; Garland v. Garland, 50 Miss. 694; Quincy v. Quincy, 10 N. H. 272; Anshutz v. Anshutz, 16 N. J. Eq. 162; Marsh v. Marsh, 14 N. J. Eq. 315, 82 Am. Dec. 251; Sykes v. Halstead, 3 N. Y. Super. Ct. 483; Battey v. Battey, 1 R. I. 212; Sullivan v. Sullivan, 2 Add. Ecc. 299. See note, 60 Am. Dec. 667, 673.

[33]Tayman v. Tayman, 2 Md. Ch. 393; Debenham v. Mellon, 5 Q. B. D. 394.

[34]Marsh v. Marsh, 14 N. J. Eq. 315, 82 Am. Dec. 251; Beeby v. Beeby, 1 Hag. Ecc. 789.

[35]Pitel v. Pitel, 90 N. J. Eq. 366, 107 Atl. 145.

[36]Pinckard v. Pinckard, 22 Ga. 31; Sykes v. Halstead, 3 N. Y. Super. Ct. 483; Luciar v. Luciar, 6 Pa. Co. Ct. 406; Gleason v. Gleason, 12 Wkly. Notes Cas. (Pa.) 408.

[37]Chapman v. Parsons, 66 W. Va. 307, 66 S. E. 41, 24 L. R. A. (N. S.) 1015, 135 Am. St. 1033, 19 Ann. Cas. 453.

[38]Sturgis v. Sturgis, 51 Ore. 10, 93 Pac. 696, 131 Am. St. 724.

[39]Stivers v. Wise, 18 App. Div. 316, 46 N. Y. S. 9.

wealth, had advised the suit and retained counsel for the son, the defendant and her parents being impecunious, it was held that the court, under a veiled threat either to dismiss the suit or stay its prosecution, could direct the payment of suit money to the defendant by the plaintiff.[40]

§ 667. **Liability of nonresident defendant.**—A decree for alimony or for counsel fees can not be imposed upon a nonresident defendant, unless he is summoned or voluntarily appears in court, in which case he can be bound by order to the court although his domicil is in another state.[41] The courts have held that there must be personal service of summons to justify an award of alimony, and it can not be allowed where the defendant was notified by publication and failed to appear.[42]

§ 668. **Manner of awarding alimony.**—Alimony is allowed by the court upon the petition of the claiming party,[43] and the question of the amount to be awarded as alimony is entirely within the discretion of the court, having regard to the conduct of both parties, the amount of property of each, and all the other circumstances of the case;[44] but the court's discretion must not be abused.[45]

Alimony may date back to the commencement of the suit.[46]

§ 669. **Alimony in nullity suits.**—In nullity causes marriage is the only question involved, and, as alimony depends on marriage, it should not be allowed when the marriage itself is in

[40]Eliot v. Eliot, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568.

[41]Garner v. Garner, 56 Md. 127; Ellison v. Martin, 53 Mo. 575. See notes, 2 Ann. Cas. 820; 14 Ann. Cas. 362.

[42]Hekking v. Pfaff, 91 Fed. 60, 43 L. R. A. 618; Turner v. Turner, 44 Ala. 437; Shillock v. Shillock, 24 Cal. App. 191, 140 Pac. 954; Beard v. Beard, 21 Ind. 321; Madden v. Fielding, 19 La. Ann. 505; Leith v. Leith, 39 N. H. 20; Smith v. Smith, 74 Vt. 20, 51 Atl. 1060, 93 Am. St. 882.

[43]Calhoun v. Calhoun, 146 Ga. 67, 90 S. E. 381; Donaldson v. Donaldson, 31 Idaho 180, 170 Pac. 94; Chase v. Chase, 55 Maine 21; Collins v. Collins, 71 N. Y. 269; Francis v. Francis, 31 Grat. (Va.) 283.

[44]White v. White, 73 Cal. 105, 14 Pac. 393; Ressor v. Ressor, 82 Ill. 442; Graves v. Graves, 108 Mass. 314; Potts v. Potts, 68 Mich. 492, 36 N. W. 240; Taylor v. Taylor, 19 N. Mex. 383, 142 Pac. 1129, L. R. A. 1915A, 1044, (on power of appellate court); Worden v. Worden, 3 Edw. Ch. (N. Y.) 387.

[45]Drollinger v. Drollinger, 57 Ind. App. 115, 106 N. E. 428.

[46]Swearingen v. Swearingen, 19 Ga. 265; Russell v. Russell, 69 Maine 336.

dispute. After a final decree of nullity, an award of alimony is improper by a majority of the decisions.[47]

§ 670. **Alimony allowed without divorce proceedings—Separate maintenance.**—In some states alimony may be prayed for and, in the discretion of the court, allowed without instituting divorce proceedings. This is known as the proceeding for separate maintenance.[48] But to justify the court in granting a wife alimony without divorce proceedings, she must show that she is separated from her husband and is absolutely deprived of his support.[49] The wife must also show that the separation was caused through no fault of hers.[50]

No decree can be awarded if the wife left her husband without cause, or has separate means of support, or is herself in fault, or has afterwards committed adultery.[51]

In most states alimony is looked upon as an incident to divorce proceedings.[52]

[47]See Brown v. Westbrook, 27 Ga 102; Frith v. Frith, 18 Ga. 273, 63 Am. Dec. 289; Arado v. Arado, 205 Ill. App. 261; Chase v. Chase, 55 Maine 21; Bloodgood v. Bloodgood, 59 How. Pr. (N. Y.) 42; Smyth v. Smyth, 2 Add. Ecc. 254; Bird v. Bird, 1 Lee Ecc. 209, 5 Eng. Ecc. 366. But see Coats v. Coats, 160 Cal. 671, 118 Pac. 441, 36 L. R. A. (N. S.) 844, 25 Harv. Law Rev. 391 (where the marriage was annulled on account of the wife's incapacity, theretofore unknown to her, but she was given an "allowance" of $10,000).

[48]Galland v. Galland, 38 Cal. 265; Whitcomb v. Whitcomb, 46 Iowa 437; Graves v. Graves, 36 Iowa 310, 14 Am. Rep. 525; Boggess v. Boggess, 4 Dana (Ky.) 307; Keerl v. Keerl, 34 Md. 21; Garland v. Garland, 50 Miss. 694; Miller v. Miller, 1 N. J. Eq. 386; Nicely v. Nicely, 3 Head (Tenn.) 184. See ante, chapter 42.

[49]Anshutz v. Anshutz, 16 N. J. Eq. 162.

[50]Babbitt v. Babbitt, 69 Ill. 277.

[51]Wray v. Wray, 33 Ala. 187; Angelo v. Angelo, 81 Ill. 251; Wahle v. Wahle, 71 Ill. 510.

[52]Bowman v. Worthington, 24 Ark. 522; Goss v. Goss, 29 Ga. 109; McGee v. McGee, 10 Ga. 477. But see Odom v. Odom, 36 Ga. 286 (statute authorizes granting of alimony when no divorce is sought); Moon v. Baum, 58 Ind. 194; Chapman v. Chapman, 13 Ind. 396; Muir v. Muir, 28 Ky. L. 1355, 92 S. W. 314, 4 L. R. A. (N. S.) 909; Henderson v. Henderson, 64 Maine 419; Adams v. Adams, 100 Mass. 365, 1 Am. Rep. 111; Shannon v. Shannon, 68 Mass. 285; Coffin v. Dunham, 62 Mass. 404, 54 Am. Dec. 769; McIntire v. McIntire, 80 Mo. 470; De Graw v. De Graw, 7 Mo. App. 121; Parsons v. Parsons, 9 N. H. 309, 32 Am. Dec. 362; Rockwell v. Morgan, 13 N. J. Eq. 119; Cory v. Cory, 11 N. J. Eq. 400; Davis v. Davis, 75 N. Y. 221; Prosser v. Warner, 47 Vt. 667, 19 Am. Rep. 132; Harrington v. Harrington, 10 Vt. 505.

§ 671. **Husband's general denial under oath—Effect on allowance.**—A wife will not be denied alimony because the husband denies the charges in the bill and swears to the truth of such denial.[53]

§ 672. **Divorce to husband, alimony to wife.**—The court, upon granting a divorce to the husband may decree alimony to the wife.[54]

§ 673. **Husband's right to alimony.**—Inasmuch as at common law, alimony, either temporary or permanent, could not be granted the husband to be paid by the wife, it requires specific statutory authority to allow it.[55] While the allowance of permanent alimony is a matter of statutory authority, the basis whereof is the moral and legal duty as well of the husband to support his wife, so without the aid of the statute there is no corresponding legal duty of the wife to support her husband.[56]

Statutes of various states give to the husband certain rights in the property of the wife, and some of them allow him alimony and maintenance.[57] It has, however, been allowed in equity where

[53]McGee v. McGee, 10 Ga. 477; Tyrrell v. Tyrrell (N. J.), 3 Atl. 266; Osgood v. Osgood, 2 Paige (N. Y.) 621; Shearin v. Shearin, 5 Jones Eq. (N. Car.) 233.

[54]Graves v. Graves, 108 Mass. 314.

[55]Groth v. Groth, 69 Ill. App. 68; Somers v. Somers, 39 Kans. 132, 17 Pac. 841; Greene v. Greene, 49 Nebr. 546, 68 N. W. 947, 34 L. R. A. 110, 59 Am. St. 560; Glynn v. Glynn, 8 N. Dak. 233, 77 N. W. 594; State v. Templeton, 18 N. Dak. 525, 123 N. W. 283, 25 L. R. A. (N. S.) 234; Hoagland v. Hoagland, 19 Utah 103, 57 Pac. 20; Kenyon v. Kenyon, 3 Utah 431, 24 Pac. 829; Barker v. Dayton, 28 Wis. 367.

[56]Meldrum v. Meldrum, 15 Colo. 478, 24 Pac. 1083, 11 L. R. A. 65; Greene v. Greene, 49 Nebr. 546, 68 N. W. 947, 34 L. R. A. 110, 59 Am. St. 560; State v. Templeton, 18 N. Dak. 525, 123 N. W. 283, 25 L. R. A. (N. S.) 234; Poloke v. Poloke, 37, Okla. 70, 130 Pac. 535, Ann. Cas. 1915B, 793; Brenger v. Brenger, 142 Wis. 26, 125 N. W. 109, 26 L. R. A. (N. S.) 387, 135 Am. St. 1050, 19 Ann. Cas. 1136.

[57]Mass. Gen. Laws, 1921, P. 2247, § 34; R. I. Gen. Laws 1909, p. 858, § 6; Vt. Gen. Laws, 1917, p. 624, § 3593; Cheever v. Wilson, 76 U. S. 108, 19 L. ed. 604; Oliver v. Oliver, 5 Ala. 75; Livingston v. Conant (Cal.) 51 Pac. 859; Livingston v. State Superior Court, 117 Cal. 633, 49 Pac. 836, 38 L. R. A. (N. S.) 175; Galland v. Galland, 38 Cal. 265; Casey v. Casey, 116 Iowa 655, 88 N. W. 937; Barnes v. Barnes, 59 Iowa 456 13 N. W. 441; Small v. Small, 42 Iowa 111; Snodgrass v. Snodgrass, 40 Kans. 494, 20 Pac. 203; Garnett v. Garnett, 114 Mass. 347; Greene v. Greene, 49 Nebr. 546, 68 N. W. 947, 34 L. R. A. 110, 59 Am. St. 560; Hagert v. Hagert, 22 N. Dak. 290, 133 N. W. 1035, 38 L. R. A. (N. S.)

the wife had independent means, and the husband was destitute and a paralytic, independent of statute, or of the pendency of divorce proceedings.[58]

A statute which provides for the support of a poor and indigent husband by a wife of "sufficient ability," deals only with the domestic relation of husband and wife during the existence of the marriage contract. It is a part of the system for the relief and support of the poor and does not authorize the awarding of permanent alimony after divorce.[59] But where a statute provides for the support of the husband by the wife, her obligation is the same as that which ordinarily rests upon the husband—the burden of maintenance shifts—and a court of equity in the exercise of its general powers without any express provision in the statute therefor, may compel her to support her husband, since the legal remedy, if any, is inadequate.[60]

It has been held that by granting to the wife a right to require the husband to pay alimony pending suit without making any alimony provision for the husband when sued for divorce by the wife, the express grant of such right to the wife necessarily excludes such a right to the husband.[61] Where a wife's money, given to her by her father, had purchased a farm, it was held the husband could not complain of a decree in a divorce action which gave her the farm and charged it with a large part of the costs in the case and with $75.00 per year for the support of the defendant husband, where she was also given the custody of the minor children and charged with their support and education.[62] Under a code provision authorizing it, $25.00 for the husband's attorneys' fees was allowed although he was a losing party.[63] In Oregon the husband as well as the wife may secure maintenance, and this, too, when the marriage is declared void.[64]

966, Ann. Cas. 1914B, 925; Wetmon v. Wetmon, 5 Ore. 469; Brashfield v. Brashfield, 96 Tenn. 580, 36 S. W. 384; Fitts v. Fitts, 14 Tex. 443; Webster v. Webster, 2 Wash. 417, 26 Pac. 864; Gallagher v. Gallagher, 89 Wis. 461, 61 N. W. 1104.

[58]Hagert v. Hagert, 22 N. Dak. 290, 133 N. W. 1035, 38 L. R. A. (N. S.) 966, Ann. Cas. 1914B, 925.

[59]Brenger v. Brenger, 142 Wis. 26, 125 N. W. 109, 135 Am. St. 1050, 19 Ann. Cas. 1136.

[60]Livingston v. Sup. Ct. of Los Angeles, 117 Cal. 633, 49 Pac. 836, 38 L. R. A. 175.

[61]Hagert v. Hagert, 22 N. Dak. 290, 133 N. W. 1035, 38 L. R. A. (N. S.) 966, Ann. Cas. 1914B, 925.

[62]Casey v. Casey, 116 Iowa 655, 88 N. W. 937.

[63]Barnes v. Barnes, 59 Iowa 456, 13 N. W. 441.

[64]Huffman v. Huffman, 47 Ore. 610, 81 Pac. 593, 114 Am. St. 943 citing Henderson v. Henderson, 37 Ore.

A husband can not be granted alimony in Nebraska,[65] or Oklahoma.[66]

§ 674. **Liability of alimony to attachment or execution—Set-off.**—During the marriage, the husband owes to the wife the duty of support and maintenance, although owing her no debt in the legal sense of the word; but under modern statutes, he does not owe her the duty of paying her debts contracted before the marriage or thereafter, if they are solely hers, and no debt of his. The divorce with its incidental allowance of alimony simply continues his duty beyond the decree, and compels him to perform it, but does not change its nature. The form and measure of the duty are indeed changed, but its substance remains unchanged. The allowance becomes a debt only in the sense that the general duty over which the husband had a discretionary control has been changed into a specific duty, over which, not he, but the court, presides.[67] And it follows that, as during the marriage, the husband, while bound to support the wife, was not bound to pay her pre-existing or separate debts, so, after the divorce he must continue to support, but is not required to pay out of his means furnished for that purpose, the wife's antecedent debts, and under no circumstances and at no time can alimony be so subjected,[68] either by attachment,[69] or execution.[70]

141, 60 Pac. 697, 61 Pac. 136, 48 L. R. A. 766, 82 Am. St. 741.

[65]Greene v. Greene, 49 Nebr. 546, 68 N. W. 947, 34 L. R. A. 110, 59 Am. St. 560.

[66]Poloke v. Poloke, 37 Okla. 70, 130 Pac. 535, Ann. Cas. 1915B, 793.

[67]Daniels v. Lindley, 44 Iowa 567; Wallingsford v. Wallingsford, 6 Har. & J. (Md.) 485; Jordon v. Westerman, 62 Mich. 179, 28 N. W. 826; Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. 554; Burr v. Burr, 7 Hill (N. Y.) 207; Crain v. Cravana, 62 Barb. (N. Y.) 109; Guenther v. Jacobs, 44 Wis. 354.

[68]In re LeClaire, 124 Fed. 654; Van Vaikenburgh v. Bishop, 164 N. Y. S. 86; Andrews v. Whitney, 82 Hun 117, 31 N. Y. S. 164; Fickle v. Granger, 83 Ohio St. 101, 93 N. E. 527, 32 L. R. A. (N. S.) 270, 21 Ann. Cas. 1347; Branger v. Branger, 142 Wis. 26, 125 N. W. 109, 26 L. R. A. (N. S.) 387, 135 Am. St. 1050, 19 Ann. Cas. 1136. In Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. 554, the court says: "The decree cannot legally work the miracle of transforming the duty which he owes to the one which he does not and never did owe; and yet that result is inevitable if the antecedent creditor is at liberty to swoop down upon the provision and carry it away for his own use."

[69]Kingman v. Carter, 8 Kans. App. 46, 54 Pac. 13; Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. 544.

[70]Van Valkenburgh v. Bishop, 164

Likewise an attempt by receiver appointed in proceedings supplementary to an execution against the wife has failed,[71] and so with a creditor's bill.[72] So in case of the divorced wife's bankruptcy, property awarded to her in a divorce proceeding is not subject to distribution among her creditors by the bankruptcy court.[73] Neither may alimony awarded to a wife be subjected to payment of her debts contracted before the decree was made.[74]

But debts of the wife created subsequent to the decree of divorce are not governed by the same principle and the alimony provided in a decree of divorce may be subjected to the payment of such debts.[75]

A husband may not set off against unpaid alimony a judgment against the wife and himself upon her note on which he was an accommodation maker, which he has paid.[76] Neither may he set off against unpaid permanent alimony his delayed payment of alimony pendente lite, which he is compelled to pay.[77] But he may set off against the payment of unpaid alimony a sum which he was compelled to pay for the board of the wife and children subsequent to the decree.[78] He can not, however, claim as against the unpaid alimony, the value of furniture taken by the wife at the time of separation.[79]

It is held in a case where a statute permitted alimony to be awarded only to a successful wife in a divorce proceeding and the wife secured a division of community property in her husband's successful suit, such division was held subject to her debts, notwithstanding it is denominated "alimony" in the decree.[80]

N. Y. S. 86; Safford v. Maxwell, 23 La. Ann. 345. See also, Fickel v. Granger, 83 Ohio St. 101, 93 N. E. 527, 32 L. R. A. (N. S.) 270, 21 Ann. Cas. 1347.

[71]Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. 544.

[72]Andrews v. Whitney, 82 Hun 117, 31 N. Y. S. 164.

[73]In re LeClaire, 124 Fed. 654.

[74]Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. 544; Andrews v. Whitney, 82 Hun 117, 31 N. Y. S. 164.

[75]Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. 544; Stevenson v. Stevenson, 34 Hun (N. Y.) 157; Fickel v. Granger, 83 Ohio St. 101, 93 N. E. 527, 32 L. R. A. (N. S.) 270, 21 Ann. Cas. 1347.

[76]Locke v. Locke, 71 Hun. 363, 24 N. Y. S. 1129.

[77]Harmer v. Harmer, 3 Jur. N. S. 168, 5 Week. Rep. 413.

[78]Foote v. Foote, 71 N. J. Eq. 273, 65 Atl. 205.

[79]Foote v. Foote, 71 N. J. Eq. 273, 65 Atl. 205.

[80]Kelso v. Lovejoy, 76 Ohio St. 596, 81 N. E. 1188.

§ 675. **Adjustment of property rights.**—The power of the courts to deal with the property rights of the parties to a divorce proceeding is wholly statutory. In the absence of statutory authority the courts may not determine such rights.[81] Statutes exist in many of the states granting this authority to the courts.[82] The rule giving this power to make a division of the property in the divorce suit prevails very appropriately in the states recognizing the doctrine of community property.[83] The community property to be divided is the residue after community obligations have been discharged.[84]

Where the court has jurisdiction over the property of defendant it can adjust such property rights even if the defendant is a nonresident and was not served with process.[85] So also a restraining order will lie against disposal of property of defendant in hands of strangers pending alimony decree.[86]

Where no divorce is granted, property rights may not be determined.[87]

[81]Nelson v. Nelson, 149 Minn. 285, 183 N. W. 354; Fisher v. Fisher (Mo. App.), 207 S. W. 261; Beals v. Ares, 25 N. Mex. 459, 185 Pac. 780; Lovegrove v. Lovegrove, 128 Va. 449, 104 S. E. 804.

[82]Davidson v. Dingeldine, 295 Ill. 367, 129 N. E. 79; Carr v. Carr, 185 Iowa 1205, 171 N. W. 785; Putnam v. Putnam, 104 Kans. 47, 177 Pac. 838; Hoffman v. Hoffman, 190 Ky. 13, 226 S. W. 119; Dunn v. Dunn, 183 Ky. 841, 210 S. W. 943; O'Neil v. O'Neil, 148 Minn. 381, 182 N. W. 438; Maxwell v. Maxwell, 106 Nebr. 689, 184 N. W. 227; Morris v. Patterson, 180 N. Car. 484, 105 S. E. 25; Silva v. Silva, 81 Okla. 159, 197 Pac. 165; Seward v. Johnson, 77 Okla. 83, 186 Pac. 212, 8 A. L. R. 645; Seward v. Anderson, 77 Okla. 165, 186 Pac. 215; Youngberg v. Youngberg, 44 S. Dak. 530, 184 N. W. 360; Fitzpatrick v. Fitzpatrick, 105 Wash. 394, 177 Pac. 790; Norman v. Norman, 88 W. Va. 640, 107 S. E. 407; Schoen v. Schoen, 175 Wis. 20, 183 N. W. 876.

[83]McFadden v. McFadden, 22 Ariz. 246, 196 Pac. 452; Remley v. Remley (Cal. App.), 193 Pac. 604; Gould v. Superior Court, 47 Cal. App. 197, 191 Pac. 56; Milekovich v. Quinn, 40 Cal. App. 537, 181 Pac. 256; Carr v. Carr Co., 39 Cal. App. 53, 177 Pac. 856; Greinstein v. Greinstein, 44 Nev. 174, 191 Pac. 1082; Freeburn v. Freeburn, 107 Wash. 646, 182 Pac. 620.

[84]Farmers' Exch. Nat. Bank v. Drew, 48 Cal. App. 442, 192 Pac. 105.

[85]Hood v. Hood, 130 Ga. 610, 61 S. E. 471, 19 L. R. A. (N. S.) 193, 14 Ann. Cas. 359; Rea v. Rea, 123 Iowa 241, 98 N. W. 787; Wesner v. O'Brien, 56 Kans. 724, 44 Pac. 1090, 32 L. R. A. 289, 54 Am. St. 604; Chapman v. Chapman, 194 Mo. App. 483, 185 S. W. 221; Bailey v. Bailey, 127 N. Car. 474, 37 S. E. 502.

[86]Pennington v. Fourth Nat. Bank, 243 U. S. 269, 61 L. ed. 713, 37 Sup. Ct. 282, L. R. A. 1917F, 1159; Murray v. Murray, 115 Cal. 266, 47 Pac. 37, 37 L. R. A. 626, 56 Am. St. 97.

[87]Ledbetter v. Ledbetter (Tex. Civ. App.), 229 S. W. 576.

§ 676. **Assignment and anticipation of alimony.**—Alimony is not strictly a debt due to the wife, but a general duty of support, made specific and measured by the court;[88] it is not a property right.[89]

The purpose for which alimony is given is to secure the maintenance of the wife,[90] and this purpose would be frustrated if she had the right to make an assignment.[91]

Besides it is apparent that the wife is not the only person interested in the proper application of money decreed as alimony. Her former husband, her children, and the public are also interested,[92] and their interest would be in constant jeopardy if she could at pleasure assign a decree for alimony.[93]

The public interest is that she and her children are protected from becoming a public charge, and that she be secure against the temptations of a life of vice.[94] Therefore it is held generally that a periodical allowance of alimony, whether temporary or permanent is not susceptible of assignment by the wife to another.[95] Neither may the wife contract a debt with respect to

[88]Daniels v. Lindley, 44 Iowa 567; Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. 544; citing Wallingsford v. Wallingsford, 6 Har. & J. (Md.) 485; Jordon v. Westerman, 62 Mich. 170; Burr v. Burr, 7 Hill (N. Y.) 207; Crain v. Cavana, 62 Barb (N. Y.) 109; Guenther v. Jacobs, 44 Wis. 354.

[89]Lynde v. Lynde, 64 N. J. Eq. 736, 52 Atl. 694, 58 L. R. A. 471, 97 Am. St. 692. But the contrary view obtains in England on the ground that a sum in gross becomes the absolute property of the wife. Harrison v. Harrison, 13 P. E. 180; Watkins v. Watkins, 65 L. J. P. 75; MacClurken v. MacClurken, 77 L. T. N. S. 474.

[90]In re Robinson (L. R.), 27 Chan. Div. 160.

[91]Fournier v. Clutton, 146 Mich. 298, 109 N. W. 425, 7 L. R. A. (N. S.) 179, 117 Am. St. 638, 10 Ann. Cas. 392. But see Bassett v. Waters, 103 Kans. 853, 176 Pac. 663.

[92]Ferguson v. Ferguson, 145 Mich. 290, 108 N. W. 682.

[93]Fournier v. Clutton, 146 Mich. 298, 109 N. W. 425, 7 L. R. A. (N. S.) 179, 117 Am. St. 638, 10 Ann. Cas. 392.

[94]Turner v. Turner, 108 Fed. 765.

[95]Fournier v. Clutton, 146 Mich. 298, 109 N. W. 425, 7 L. R. A. (N. S.) 179, 117 Am. St. 638, 10 Ann. Cas. 392; Jordon v. Westerman, 62 Mich. 170, 28 N. W. 826, 4 Am. St. 836; Lynde v. Lynde, 64 N. J. Eq. 736, 52 Atl. 694, 58 L. R. A. 471, 97 Am. St. 692; Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. 544; Kempster v. Evans, 81 Wis. 247, 51 N. W. 327, 15 L. R. A. 391. In Cohen v. Cohen, 150 Cal. 99, 88 Pac. 267, 11 Ann. Cas. 520, the court recognized the validity of an assignment, though that particular question was not at issue in the case. The principles underlying the non-assignability of periodical allowances of alimony, of course underlie an allowance of alimony in

an allowance of alimony in advance of a decree of divorce,[96] nor is the alimony capable of being enjoyed by her in anticipation.[97]

An assignment of alimony by the wife to her solicitor as compensation for his services has been disregarded and set aside, as being a misappropriation of a fund awarded for a specific purpose.[98]

§ 677. **Jurisdiction to grant alimony in general.**—A few courts of last resort in the United States have maintained that a grant of power to sever the marital relation carries with it by necessary intendment authority to allow permanent alimony in the absence of any enactment to that effect:[99] but the great weight of judicial utterance is to the effect that all authority to award alimony on decreeing a dissolution of the marriage, must be found in the statute expressly conferring the right, which legislation is in general declaratory of the ecclesiastical law.[1]

gross, and therefore such allowances have been held non-assignable. In Meissner v. Bergman, 5 Ohio Cir. Dec. 225, 110 Ohio Cir. Ct. 539, the court said when this amount was given to her, it was hers although portions of the judgment might be paid in installments, she had a right to use it as she saw fit, and she had a right to exercise her own judgment as to her own comfort and convenience as to how she should live for the remainder of her life.

[96]Jordan v. Westerman, 62 Mich. 170, 28 N. W. 826, 4 Am. St. 836.

[97]Lynde v. Lynde, 64 N. J. Eq. 736, 52 Atl. 694, 58 L. R. A. 471, 97 Am. St. 692.

[98]Jordon v. Westerman, 62 Mich. 170, 28 N. W. 826, 4 Am. St. 836.

[99]Jones v. Jones, 18 Maine 308, 36 Am. Dec. 723. See also, In re Cave, 26 Wash. 213, 66 Pac. 425, 90 Am. St. 736.

[1]Kelly v. Kelly, 161 Mass. 111, 36 N. E. 837, 25 L. R. A. 806, 42 Am. St. 389; Cizek v. Cizek, 69 Nebr. 797, 96 N. W. 657, 99 N. W. 28, 5 Ann. Cas. 464; Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. 554; Erkenbrach v. Erkenbrach, 96 N. Y. 456; Huffman v. Huffman, 47 Ore. 610, 86 Pac. 593, 114 Am. St. 943; Houston v. Timmerman, 17 Ore. 499, 21 Pac. 1037, 4 L. R. A. 716, 11 Am. St. 848; Weber v. Weber, 16 Ore. 163, 17 Pac. 866; In re Cave, 26 Wash. 213, 66 Pac. 425, 90 Am. St. 736; Brenger v. Brenger, 142 Wis. 26, 125 N. W. 109, 26 L. R. A. (N. S.) 387, 135 Am. St. 1050, 19 Ann. Cas. 1136. The right to grant alimony may be inferred from a statute which creates a lien on the estate of the husband for the performance of any order which the court may make in a suit for divorce. Jones v. Jones, 18 Maine 308, 36 Am. Dec. 723. The allowance may be made under a statute authorizing the court to dispose of the property of the parties in such manner "as shall appear just and equitable." Ramsdell v. Ramsdell, 47 Wash. 444, 92 Pac. 278. Mitchell v. Mitchell, 39 Wash. 431, 81 Pac. 913; Clemans v. Western, 39 Wash. 290, 81 Pac. 824; Miller v. Miller, 38 Wash. 605, 80 Pac. 816.

In actions for divorce a mensa et thoro, the power of courts of equity to decree alimony did not originate in any statute; it is a power inherent in them.[2]

The general rule is that the income of the husband, whether derived or to be derived from his personal exertions, or from permanent property, or from both, is the fund from which alimony is derived, and over which there should be a personal decree.[3]

Alimony is a technical word, theoretically restricted to personalty, and practically to money.[4] So when courts have gone beyond income as a source, or an installment money allowance, and granted a sum in gross, or an allowance out of the husband's estate, or a division thereof, they have required express statutory authority for that purpose.[5]

Independently of statute, or of some special circumstances, there is, in general, no power in the court to transfer to the wife as permanent alimony, the fee simple title of the husband in his lands.[6] Of course jurisdiction of the matter of alimony can not be conferred by the consent of the parties; it is conferred only by the law.[7]

[2]Carr v. Carr, 22 Gratt. (Va.) 168; Reynolds v. Reynolds, 68 W. Va. 15, 69 S. E. 381, Ann. Cas. 1912A, 889, citing Stewart v. Stewart, 27 W. Va. 167.

[3]Lawrence v. Lawrence, 141 Ala. 356, 37 So. 379; Foote v. Foote, 22 Ill. 425; McCrocklin v. McCrocklin, 2 B. Mon. (Ky.) 370; Burrows v. Purple, 107 Mass. 428; Bursler v. Bursler, 5 Pick. (Mass.) 427; Miller v. Miller, 6 Johns. Ch. (N. Y.) 91; Kirby v. Kirby, 1 Paige (N. Y.) 261; Battey v. Battey, 1 R. I. 212; Prince v. Prince, 1 Rich. Eq. (S. Car.) 282; Cralle v. Cralle, 84 Va. 198, 6 S. E. 12; Myers v. Myers, 83 Va. 806, 6 S. E. 630; Bailey v. Bailey, 21 Grat. (Va.) 43; Reynolds v. Reynolds, 68 W. Va. 15, 69 S. E. 381, Ann. Cas. 1912A, 889; Campbell v. Campbell, 37 Wis. 206; Brisco v. Brisco, 2 Hagg. 199; Higgs v. Higgs, 3 Hagg. 472; Vaughan v. Buck, 3 El. & Eq. 135; Goodheim v. Goodheim, 2 Swab. & Tr. 250.

[4]Cizek v. Cizek, 69 Nebr. 797, 96 N. W. 657, 99 N. W. 28, 5 Ann. Cas. 464.

[5]Cizek v. Cizek, 69 Nebr. 797, 96 N. W. 657, 99 N. W. 28, 5 Ann. Cas. 464; State v. Templeton, 18 N. Dak. 525, 123 N. W. 283, 25 L. R. A. (N. S.) 234; Chapman v. Parsons, 66 W. Va. 307, 66 S. E. 461, 24 L. R. A. (N. S.) 1015, 135 Am. St. 1033, 19 Ann. Cas. 453.

[6]Cizek v. Cizek, 69 Nebr. 797, 96 N. W. 657, 99 N. W. 28, 5 Ann. Cas. 464; Ecker v. Ecker, 22 Okla. 873, 98 Pac. 918, 20 L. R. A. (N. S.) 421; Reynolds v. Reynolds, 68 W. Va. 15, 69 S. E. 381, Ann. Cas. 1912A, 889; Goff v. Goff, 60 W. Va. 9, 53 S. E. 769, 9 Ann. Cas. 1083.

[7]Cizek v. Cizek, 69 Nebr. 797, 96 N. W. 657, 99 N. W. 28, 5 Ann. Cas. 464, citing Armstrong v. Mayer, 69

A court of chancery has jurisdiction to award alimony after a divorce by the legislature.[8]

§ 678. **Jurisdiction to award dependent on nature of service of process.**—A valid decree of divorce may be granted so far as it affects the marriage tie only, by a constructive or substituted service where the statute so provides, although no actual personal service has been had upon the defendant. This is so because the decree is a judgment in rem—the thing attacked and operated upon is the marriage tie only; the only thing affected by it is the allegiance, fidelity, and contract relation of the marriage.[9] It only fixes the status of the parties with relation to each other, the state, and the world.[10]

But a decree or order for alimony is a judgment in personam, to entitle a court to render which there must be personal service of process within the jurisdiction of the court, voluntary appearance, or some sort of seizure of the property of the defendant; else such decree or order will be void not only in the state[11]

Nebr. 423, 83 N. W. 401; Anderson v. Story, 53 Nebr. 259, 73 N. W. 735; Burkland v. Johnson, 50 Nebr. 858, 70 N. W. 388.

[8]Crane v. Meginnis, 1 Gill & J. (Md.) 463, 19 Am. Dec. 237.

[9]Cook v. Cook, 56 Wis. 195, 14 N. W. 33, 43 Am. Rep. 706.

[10]Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. 269; Bartero v. Real Estate Savings Bank, 10 Mo. App. 76; Rigney v. Rigney, 127 N. Y. 408, 28 N. E. 405, 24 Am. St. 462; People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274; Manikin v. Chandler, 2 Brac. 127.

[11]Hekking v. Pfaff, 91 Fed. 60, 43 L. R. A. 618; Bunnell v. Bunnell, 25 Fed. 214; Walker v. Walker, 147 Ark. 376, 227 S. W. 762; Fleming v. West, 98 Ga. 778, 27 S. E. 157; Proctor v. Proctor, 215 Ill. 275, 74 N. E. 145, 69 L. R. A. 673, 106 Am. St. 168; Sowders v. Edmunds, 76 Ind. 123; Middleworth v. McDowell, 49 Ind. 386; Lytle v. Lytle, 48 Ind. 200; Beard v. Beard, 21 Ind. 321; Johnson v. Matthews, 124 Iowa 225, 99 N. W. 1064; Rea v. Rea, 123 Iowa 241, 98 N. W. 787; Rodgers v. Rodgers, 56 Kans. 483, 43 Pac. 779; Baker v. Jewell, 114 La. 726, 38 So. 532; Madden v. Fielding, 19 La. Ann. 505; Larson v. Larson, 82 Miss. 116, 33 So. 717; Ellison v. Martin, 53 Mo. 575; Hammill v. Talbott, 72 Mo. App. 22; Anderson v. Anderson, 55 Mo. App. 268; Dillon v. Starin, 44 Nebr. 881, 63 N. W. 12; Elmendorf v. Elmendorf, 58 N. J. Eq. 113, 44 Atl. 164; Lynde v. Lynde, 54 N. J. Eq. 473, 35 Atl. 641; Rigney v. Rigney, 127 N. Y. 408, 28 N. E. 405, 24 Am. St. 462, reversed on other grounds in 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. 366. Baylies v. Baylies, 196 App. Div. 677, 188 N. Y. S. 147; Edwards v. Edson, 104 N. Y. S. 292; Burch v. Burch, 116 App. Div. 865, 102 N. Y. S. 305; Phelps v. Baker, 60 Barb. (N. Y.) 107; Simmons v. Simmons, 62 N. Car. 63; Benner v. Benner, 63 Ohio St. 220, 58 N. E. 569; Massey v. Stimmel, 8

where rendered, but will also be void in foreign jurisdictions.[12]

So, where the wife is a resident citizen of the state where the action is brought, and the defendant husband is a nonresident, unless he voluntarily enters his appearance therein, or is served with process in the state of the forum, any order, judgment, or decree for alimony, counsel fees, or costs entered against him in such action is not binding upon him.[13] The same rule applies

O. C. D. 237, 15 Ohio Cir. Ct. 439; Hutton v. Dodge, 58 Utah 228, 198 Pac. 165; Smith v. Smith, 74 Vt. 20, 51 Atl. 1060, 93 Am. St. 882; Prosser v. Warner, 47 Vt. 667, 19 Am. Rep. 132; Coger v. Coger, 48 W. Va. 135, 35 S. E. 823.

[12]Hekking v. Pfaff, 91 Fed. 60, 43 L. R. A. 618; Middleworth v. McDowell, 49 Ind. 386; Rodgers v. Rodgers, 56 Kans. 483, 43 Pac. 779; Hamill v. Talbott, 72 Mo. App. 22; Rigney v. Rigney, 127 N. Y. 408, 28 N. E. 405, 24 Am. St. 462, reversed 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. 366; Phelps v. Baker, 60 Barb. (N. Y.) 107; Prosser v. Warner, 47 Vt. 667, 19 Am. Rep. 132.

[13]Pennoyer v. Neff, 95 U. S. 727, 24 L. ed. 565; De la Montanya v. De la Montanya, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. 165; Lynn v. Sentel, 183 Ill. 382, 55 N. E. 838, 75 Am. St. 110; Cloyd v. Trotter, 118 Ill. 391, 9 N. E. 507; Middleworth v. McDowell, 49 Ind. 386; Lytle v. Lytle, 48 Ind. 200; Beard v. Beard, 21 Ind. 321; Harding v. Alden, 9 Greenl. (Maine) 140, 23 Am. Dec. 549; Garner v. Garner, 56 Md. 127; Lynde v. Lynde, 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679, 76 Am. St. 332; Rigney v. Rigney, 127 N. Y. 408, 28 N. E. 405, 24 Am. St. 462; De Meli v. De Meli, 120 N. Y. 485, 24 N. E. 996, 17 Am. St. 652; Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505; People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274; Van Storch v. Griffin, 71 Pa. St. 240; Harding v. Harding, 16 S. Dak. 406, 92 N. W. 1080, 102 Am. St. 694; Smith v. Smith, 74 Vt. 20, 51 Atl. 1060, 93 Am. St. 882; Prosser v. Warner, 47 Vt. 667, 19 Am. Rep. 132. A decree for alimony has the same force and effect as a judgment at law. Hekking v. Pfaff, 91 Fed. 60, 43 L. R. A. 618; Bunnell v. Bunnell, 25 Fed. 214; Murray v. Murray, 115 Cal. 266, 47 Pac. 37, 56 Am. St. 97; De la Montanya v. De la Montanya, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. 165; Fleming v. West, 98 Ga. 778, 27 S. E. 157; Coulter v. Lumpkin, 94 Ga. 225, 21 S. E. 461; Proctor v. Proctor, 215 Ill. 275, 74 N. E. 145, 69 L. R. A. 73, 106 Am. St. 168, 2 Ann. Cas. 819; Sapp v. Wightman, 103 Ill. 150; Sowders v. Edmunds, 76 Ind. 123; Lytle v. Lytle, 49 Ind. 200; Frakes v. Brown, 2 Blackf. (Ind.) 295; Tyler v. Tyler, 99 Ky. 31, 34 S. W. 898; Baker v. Jewell, 114 La. 726, 38 So. 532; McSherry v. McSherry, 113 Md. 395, 77 Atl. 653, 140 Am. St. 428; Larson v. Larson, 82 Miss. 116, 33 So. 717; Ellison v. Martin, 53 Mo. 575; Anderson v. Anderson, 55 Mo. App. 268; DuFrene v. Johnson, 60 Nebr. 18, 82 N. W. 107; Dillon v. Starin, 44 Nebr. 821, 63 N. W. 12; Elmendorf v. Elmendorf, 58 N. J. Eq. 113, 44 Atl. 164; Hervey v. Hervey, 56 N. J. Eq. 424, 39 Atl. 762; Rigney v. Rigney, 127 N. Y. 408, 28 N. E. 405, 24 Am. St. 462; Massey v. Stimmel, 8 O. C. D. 237, 15 Ohio Cir. Ct. 439; Smith v. Smith, 74 Vt. 20, 51 Atl. 1060, 93 Am. St. 882.

where the defendant is a resident, and is personally present within the state and can be found therein and service is had on him only by publication;[14] but if he can not be found therein because he conceals himself to avoid the service of process, jurisdiction may be conferred by service by publication to render a personal judgment for alimony.[15] And likewise personal service of process upon the defendant without the state, even though he is domiciled therein,[16] is equally with constructive service by publication, ineffectual to give a court jurisdiction to award alimony.[17]

Such orders or decrees being void for want of jurisdiction, are not protected by either the due process of law clause or the full faith and credit clause of the federal Constitution.[18]

[14]Roberts v. Roberts, 135 Minn. 397, 161 N. W. 148, L. R. A. 1917C, 1140; McNamara v. Casserly, 61 Minn. 335, 63 N. W. 880; Smith v. Hurd, 50 Minn. 503, 52 N. W. 922, 36 Am. St. 661; Bardwell v. Collins, 44 Minn. 97, 46 N. W. 315, 9 L. R. A. 152, 20 Am. St. 547.

[15]Roberts v. Roberts, 135 Minn. 397, 161 N. W. 148, L. R. A. 1917C, 1140; Bardwell v. Collins, 44 Minn. 97, 46 N. W. 315, 9 L. R. A. 152, 20 Am. St. 547.

[16]Proctor v. Proctor, 215 Ill. 275, 74 N. E. 145, 69 L. R. A. 673, 106 Am. St. 168, 2 Ann. Cas. 819; Moss v. Fitch, 212 Mo. 484, 101 S. W. 475, 126 Am. St. 568. Process sent to a defendant out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability. Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Webster v. Reed, 11 How. (U. S.) 437, 13 L. ed. 761; Bickerdike v. Allen, 157 Ill. 95, 41 N. E. 741, 29 L. R. A. 782.

[17]De la Montanya v. De la Montanya, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. 165; Hood v. Hood, 130 Ga. 610, 61 S. E. 471, 19 L. R. A. 193, 14 Ann. Cas. 359; McSherry v. McSherry, 113 Md. 395, 77 Atl. 653, 140 Am. St. 428.

[18]Laing v. Rigney, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. 366; Hekking v. Pfaff, 91 Fed. 60, 43 L. R. A. 618; Middleworth v. McDowell, 49 Ind. 386; Harding v. Alden, 9 Greenl. (Maine) 140, 23 Am. Dec. 549; Hamill v. Talbott, 72 Mo. App. 22; Anderson v. Anderson, 55 Mo. App. 268; Elmendorf v. Elmendorf, 58 N. J. Eq. 113, 44 Atl. 164; Rigney v. Rigney, 127 N. Y. 408, 28 N. E. 405, 24 Am. St. 462; Phelps v. Baker, 60 Barb. (N. Y.) 107, 41 How. Pr. 237; Prosser v. Warner, 47 Vt. 667, 19 Am. Rep. 132; Adams v. Abbott, 21 Wash. 29. Fleming v. West, 99 Ga. 778, 27 S. E. 157; Bickerdike v. Allen, 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 982; Beard v. Beard, 21 Ind. 321; Henderson v. Staniford, 105 Mass. 504, 7 Am. Rep. 551; Continental Nat. Bank v. Thurber, 74 Hun 632, 26 N. Y. S. 956; Doerr v. Forsythe, 50 Ohio St. 726, 35 N. E. 1055, 40 Am. St. 703; Martin v. Burns, 80 Tex. 676, 16 S. W. 1072; Ferdinandez v. Casey, 77 Tex. 452, 14 S. W. 149; Ward Lumber Co. v. Henderson-White Mfg. Co., 107 Va. 626, 59 S. E. 476, 17 L. R. A. (N. S.) 324. Constructive service by leaving copy at residence. Bimeler v. Dawson, 4 Scam. (Ill.) 536, 39 Am. Dec. 430; Sturgis v. Fay, 16 Ind. 429, 79

Although it is competent for the legislature to authorize the courts to render a judgment for alimony upon constructive notice as against the citizens of the state, it is not competent to do so against a nonresident of the state. But it is to be noted that this proposition does not go undisputed in many jurisdictions.[19]

§ 679. **Jurisdiction to award acquired by appearance.**—A general appearance in an action for divorce follows the course of the proceedings until the end of the litigation in the court in which it is pending.[20] Thus, alimony may be awarded under a supplemental bill filed after the defendant has removed from the state, after appearing to the original bill, there being no statute requiring new process;[21] and this is so when he departs from the state after an agreement filed that alimony may thereafter be awarded, where notice thereof is given to his attorney of record.[22] But a special appearance to contest the jurisdiction of the court is insufficient to warrant an order for alimony.[23] An appearance

Am. Dec. 440; Raher v. Raher, 150 Iowa 511, 129 N. W. 494, 35 L. R. A. 292, Ann. Cas. 1912D, 680; Harryman v. Roberts, 52 Md. 64; McNamara v. Casserly, 61 Minn. 335, 63 N. W. 880; Hamill v. Talbot, 72 Mo. App. 22; Currier v. Gilman, 55 N. H. 364; Cassidy v. Leitch, 2 Abb. N. C. (N. Y.) 315; Huntley v. Baker, 33 Hun (N. Y.) 578; Beisenthall v. Williams, 1 Duv. (Ky.) 329, 85 Am. Dec. 629.

[19]Bear Lake Co. v. Budge, 9 Idaho 703, 75 Pac. 614, 108 Am. St. 179; Bardwell v. Collins, 44 Minn. 97, 46 N. W. 315, 9 L. R. A. 152, 20 Am. St. 547; Hockaday v. Jones, 8 Okla. 156, 56 Pac. 1054.

[20]Laing v. Rigney, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. 366; De la Montanya v. De la Montanya, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. 165; McSherry v. McSherry, 113 Md. 395, 77 Atl. 653, 140 Am. St. 428; Lynde v. Lynde, 162 N. Y. 405, 56 N. E. 979, 76 Am. St. 332. Jurisdiction is over him where he appears without reserve of record or objection to the jurisdiction of the court, to combat an application to amend an inadvertent omission in a decree of divorce as to alimony. Lynde v. Lynde, 160 N. Y. 671, 55 N. E. 1097.

[21]Laing v. Rigney, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. 366.

[22]McSherry v. McSherry, 113 Md. 395, 77 Atl. 653, 140 Am. St. 428.

[23]Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; De la Montanya v. De la Montanya, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. 165; McSherry v. McSherry, 113 Md. 395, 77 Atl. 653, 140 Am. St. 428; Gemundt v. Shipley, 98 Md. 657, 57 Atl. 12; Fisher v. Parr, 92 Md. 245, 48 Atl. 621; Garner v. Garner, 56 Md. 127. McGuinness v. McGuinness, 72 N. J. Eq. 381, 68 Atl. 768. In this case it was held that a defendant will not subject himself to the general jurisdiction of the court, when he appears to challenge an ex parte decree of divorce, the custody of the children, and alimony in toto, where the specific relief asked for is as to the alimony, only, notwithstanding

subsequent to the entry of a decree for alimony does not have the effect of curing jurisdictional defects therein.[24]

§ 680. **Pleading—Prayer for alimony.**—Unless the wife sets forth in her petition or complaint for a divorce or separation a cause of action, it is clear she will not be entitled to alimony;[25] but it is not an essential part of the cause of action that a specific request for alimony should be made in the original bill,[26] but at some stage of the proceedings, the facts showing the right to it must both be averred and proven, or such right will be barred.[27] Therefore, there need be no specific prayer for permanent alimony in a divorce proceeding. It may be awarded under the prayer for general relief.[28]

A petition or motion for permanent alimony may be asked for at any time pending the suit.[29] But in Kentucky it is held that inasmuch as maintenance, a form of alimony pendente lite, and alimony are mere instances of a suit for divorce, the recovery of either or both should properly be sought in the petition asking for a divorce.[30] It has been held that a decree in a default divorce case awarding alimony can not be made under a prayer for general relief.[31]

the prayer of his petition concludes with the words "and such other relief."

[24]Johnson v. Mathews, 124 Iowa 255, 99 N. W. 255; Rea v. Rea, 123 Iowa 241, 98 N. W. 787; Baker v. Jewel, 114 La. 726, 38 So. 532.

[25]Langan v. Langan, 91 Cal. 654, 27 Pac. 1092; Rosen v. Rosen, 37 Ill. App. 493; Sprague v. Sprague, 73 Minn. 474, 76 N. W. 268, 42 L. R. A. 419, 72 Am. St. 636; Strong v. Strong (Mo. App.), 216 S. W. 545; Carpenter v. Carpenter, 19 How. Pr. (N. Y.) 539; Rose v. Rose, 11 Paige (N. Y.) 166.

[26]Cohen v. Cohen, 150 Cal. 99, 88 Pac. 267, 11 Ann. Cas. 520; Sprague v. Sprague, 73 Minn. 474, 76 N. W. 268, 42 L. R. A. 419, 72 Am. St. 63. But see Chandler v. Chandler, 13 Ind. 492; Prescott v. Prescott, 59 Maine 146.

[27]Wood v. Wood, 59 Ark. 441, 27 S. W. 641, 28 L. R. A. 157, 43 Am. St. 42; Howell v. Howell, 104 Cal. 45, 37 Pac. 770, 43 Am. St. 70; Huff v. Huff, 73 W. Va. 330, 80 S. E. 846, 51 L. R. A. (N. S.) 282; alimony may be decreed on motion. Prescott v. Prescott, 59 Maine 146.

[28]Cohen v. Cohen, 150 Cal. 99, 88 Pac. 267, 11 Ann. Cas. 520; Day v. Day, 168 Ky. 68, 181 S. W. 937; Tilton v. Tilton, 16 Ky. L. 538, 29 S. W. 290; Wilmore v. Wilmore, 15 B. Mon. (Ky.) 49; Haven v. Trammell, 79 Okla. 309, 193 Pac. 631.

[29]Gaston v. Gaston, 114 Cal. 542, 46 Pac. 609, 55 Am. St. 86; Prescott v. Prescott, 59 Maine 146; Hecht v. Hecht, 14 Misc. 597, 36 N. Y. S. 271, 71 N. Y. St. 10; Damon v. Damon, 28 Wis. 510.

[30]Wallace v. Wallace, 189 Ky. 451, 225 S. W. 31.

[31]Bennett v. Bennett (Cal. App.), 194 Pac. 503.

The court has jurisdiction to award alimony notwithstanding there is no averment in the complaint of the wife of a husband's ability to pay alimony.[32]

The pleadings and other papers used in an application for temporary alimony and counsel fees should show a reasonable probability that the wife would succeed in her prayer for relief.[33]

A suit for alimony alone need not allege a cause for divorce. Marriage and abandonment by the husband without fault of the wife is sufficient.[34]

A bill for divorce by the husband need not, in its allegations, presuppose there would be a claim for alimony by the wife.[35] But of course, in an action for separate maintenance, the complaint should show the necessity therefor.[36] The general rule is that specific allegations as to the property rights of the parties need not be made in actions for divorce, as such rights are always a subject of inquiry.[37]

§ 681. **Liability for necessities after grant of alimony.**—In the absence of any express promise, the power of the wife separated from her husband without her fault rests on an implied authority to bind him for necessaries, when he has made no sufficient provision for her support. If he makes sufficient provision, or if he makes provision of an amount she consents to receive without coercion, he is not bound by her contracts for necessaries.[38]

[32]Cohen v. Cohen, 150 Cal. 99, 88 Pac. 267, 11 Ann. Cas. 520; Gaston v. Gaston, 114 Cal. 542, 46 Pac. 609, 55 Am. St. 86; Sprague v. Sprague, 73 Minn. 474, 76 N. W. 268, 42 L. R. A. 419, 72 Am. St. 636; Lynde v. Lynde, 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679, 76 Am. St. 332.

[33]De Vide v. De Vide, 186 App. Div. 814, 174 N. Y. S. 774.

[34]Williamson v. Williamson, 183 Ky. 435, 209 S. W. 503, 3 A. L. R. 799.

[35]Cohen v. Cohen, 150 Cal. 99, 88 Pac. 267, 11 Ann. Cas. 520; Gaston v. Gaston, 114 Cal. 542, 46 Pac. 609, 55 Am. St. 86; Sprague v. Sprague, 73 Minn. 474, 76 N. W. 268, 42 L. R. A. 419, 72 Am. St. 636.

[36]Finley v. Finley, 9 Dana (Ky.) 52, 33 Am. Dec. 528; Rhame v. Rhame, 1 McCord Eq. (S. Car.) 197, 16 Am. Dec. 597.

[37]O'Neil v. O'Neil, 148 Minn. 381, 182 N. W. 438. But see Rogers v. Rogers, 35 Idaho 645, 208 Pac. 234.

[38]Crittenden v. Schermerhorn, 39 Mich. 661, 33 Am. Rep. 440; Hodgkinson v. Fletcher, 4 Camp. 70; Reeve v. Marquis of Conyngham, 2 Car. & K. 444; Emett v. Norton, 8 C. & P. 506; Mizen v. Peck, 3 M. & W. 411; Turner v. Winter, 1 Selw. N. P. 295; Ozard v. Darnford, id. 11.

Inasmuch as alimony is an allowance for the maintenance of the wife while living apart from her husband where such alimony in a wife's suit for divorce has been fixed by the court and duly paid by the husband, the husband is not liable for subsequently furnished necessaries.[39] This rule applies as well to temporary alimony allowed during the pendency of the wife's petition as to alimony allowed in the final decree.[40]

Persons dealing with the wife, under these circumstances, do so at their own peril and are chargeable with knowledge of the allotment and payment of the alimony.[41] And a wife, who has been denied alimony by a court wherein was pending an action for divorce can not collect in a roundabout way, by borrowing from a friend and having him sue the husband.[42] To maintain the action, the wife must show a failure or refusal on the part of the husband to provide for her.[43] And a suitable allowance for the wife already made by the husband, or a good faith offer on his part to pay her reasonable allowance by installments, will defeat the action;[44] although some cases appear to hold to the contrary.[45] It is believed all the cases on this subject may be

[39]Malden Hospital v. Murdock, 218 Mass. 73, 105 N. E. 457; Baily v. Dillon, 186 Mass. 244, 71 N. E. 538, 66 L. R. A. 427; Alley v. Winn, 134 Mass. 77, 45 Am. Rep. 297; Crittenden v. Schermerhorn, 39 Mich. 661, 33 Am. Rep. 440.

[40]Crittenden v. Schermerhorn, 39 Mich. 661, 33 Am. Rep. 440; Hare v. Gibson, 32 Ohio St. 33, 30 Am. Rep. 568.

[41]Hare v. Gibson, 32 Ohio St. 33, 30 Am. Rep. 568.

[42]Simpson v. Dutcher, 123 N. Y. S. 340.

[43]Butler v. Butler, 4 Litt. (Ky.) 201; Kindorf v. Kindorf, 178 Mo. App. 635, 161 S. W. 318; Polster v. Polster, 145 Mo. App. 606, 123 S. W. 81; Youngs v. Youngs, 78 Mo. App. 225; Schonborn v. Schonborn, 27 Wash. 421, 67 Pac. 987. In Butler v. Butler, 4 Litt. (Ky.) 201, the court says: "Without deciding, however, (the husband had left the wife,) whether he was or was not completely justifiable, we are certain that the bare act of his taking a different house near at hand, is not sufficient to induce the chancery to decree alimony. Something more is necessary. He must have withdrawn the means of support from her, or have refused to provide for her before he could be liable to a decree."

[44]Wray v. Wray, 33 Ala. 187; Lathrop v. Lathrop, 78 Conn. 650, 63 Atl. 514; Butler v. Butler, 4 Litt. (Ky.) 201; Kindorf v. Kindorf, 178 Mo. App. 635, 161 S. W. 318; Finch v. Finch, 89 N. J. Eq. 563, 105 Atl. 205, 6 A. L. R. 1; Dudley v. Dudley, 86 N. J. Eq. 245, 98 Atl. 452; Symington v. Symington (N. J. Ch.), 36 Atl. 21; Herrett v. Herrett, 60 Wash. 607, 111 Pac. 867; Schonborn v. Schonborn, 27 Wash. 421, 67 Pac. 987.

[45]Sweasey v. Sweasey, 126 Cal. 123,

brought into harmony on the theory that in order to defeat the action, the necessaries furnished or offered must never be less than adequate, according to the circumstances of the parties, and their position in society.[46]

58 Pac. 456; Cooper v. Cooper, 160 Ill. App. 449; Earle v. Earle, 60 Ill. App. 360.

[46]Wray v. Wray, 33 Ala. 187. In Sweasey v. Sweasey, 126 Cal. 123, 58 Pac. 456, the court said: "If the trial court did, as surmised, rule that plaintiff could not have a provision made for her in her own suit because she can live at the hotel, and has not been prevented from the use of his credit to obtain necessaries, this was plainly error. A wife who is left otherwise unprovided for may always use his credit to obtain necessaries. It needs no decree of court to secure that right, but she may be entitled to more than what is absolutely necessary, and she is not compelled to rely upon his whim and temper for them." In Cooper v. Cooper, 160 Ill. App. 453, it is said: "The necessary expenses of a bare living are not all the wife is entitled to, but she should be maintained and supported consistently with her station in life, and the financial ability of her husband. We are of the opinion that it is immaterial where appellee resided, provided she was not living with appellant, and immaterial that he paid her necessary household expenses, when the alleged misconduct is considered, except that such matter should be considered in determining how much, if anything additional should be paid by appellant." In Earle v. Earle, 60 Ill. App. 360, the court said: "When appellee filed her bill, she was already provided by appellant with the home which had been deemed by them to be a suitable one for them to live together in, and she was living in it, undisturbed by appellant, and for anything that appears to the contrary, he was paying, or admitting his liability for all the bills that she incurred for her support there. At all events, it does not appear that she was held responsible for such bills. A decree in her favor would give her but little more, and until she has shown some refusal by him beyond a mere absenting himself from their home, to perform his marital obligations, or suitably provide for her in their home, a court of equity should refuse to aid her in any unmeritorious effort to reside at his expense pendente lite, in expensive hotels, attended by a personal maid, and subjecting him to great costs in solicitor's fees, and detective's services." In Finch v. Finch, 89 N. J. Eq. 563, 105 Atl. 205, 6 A. L. R. 1, where the defendant before leaving his wife, had given her two of four bank books, representing substantially the savings of the wife, and gifts to her from her mother, the court said: "There is no proof in this case that they were given as a means for her support, and as a release, tacitly, or otherwise, to the performance of the husband's manifest duty of support." In Herrett v. Herrett, 60 Wash. 607, 111 Pac. 867, where the defendant had provided groceries and paid for the laundry, and medicines, and doctor bills, and bills of that character, the court said: "It is as much the duty of the husband to supply his wife with clothing befitting her station in life as it is to furnish her with groceries and such like." In nearly every family, some comforts in excess of the strict necessaries of

§ 682. **Jurisdiction dependent on domicil of parties.**—No more than in any other action for money is the domicil of the defendant necessary to the jurisdiction to render a personal judgment for alimony if he has been actually served with process.[47] It has, however, been directly held that a wife temporarily absent in another state from the matrimonial domicil was bound by a decree for alimony entered thereat, in an action by the husband, the service upon her being a substituted service.[48] The action for alimony alone is in personam, and like any other action for money, is transitory, and is not governed by the residence provisions in statutes relating to suits for divorce.[49]

§ 683. **Jurisdiction to grant alimony though none to grant divorce.**—Where alimony may be ordered in a separate proceeding it is not essential that the plaintiff be a resident of the state in which the petition is filed,[50] and alimony may be ordered paid to the wife where the husband is the petitioner and the court has no jurisdiction to grant divorce.[51]

§ 684. **Appeal.**—An order granting alimony pendente lite is appealable,[52] although the contrary has been held.[53]

life are enjoyed, and treated as necessaries. Undoubtedly, the husband, who is the sole provider of the means of support, has the right to control the style of living, providing that that which he selects be reasonably suited to his means and situation in life; and as to those things which the family's mode of life classifies as necessaries, though they be in excess of strict necessaries, the wife and mother has implied authority on the part of the husband to purchase on his credit. Gately Outfitting Co. v. Vinson (Mo.), 182 S. W. 133.

[47]De la Montanya v. De la Montanya, 112 Cal. 101, 44 345, 32 L. R. A. 82, 53 Am. St. 165; Cox v. Cox, 19 Ohio St. 502, 2 Am. Rep. 415.

[48]Sprague v. Sprague, 73 Minn. 474, 76 N. W. 268, 42 L. R. A. 419, 72 Am. St. 636.

[49]Williamson v. Williamson, 183 Ky. 435, 209 S. W. 503, 3 A. L. R. 799.

[50]Hulett v. Hulett, 80 Ky. 364, 4 Ky. L. 193 (plaintiff need not be resident of state for one year); McCormick v. McCormick, 82 Kans. 31, 107 Pac. 546.

[51]Odum v. Odum, 132 Ga. 437, 64 S. E. 470.

[52]Sparks v. Sparks, 25 App. D. C. 356; Gay v. Gay, 146 Cal. 237, 79 Pac. 885; Wolff v. Wolff (Cal.), 37 Pac. 858; Bohnert v. Bohnert, 91 Cal. 428, 27 Pac. 732; Larkin v. Larkin, 71 Cal. 330, 12 Pac. 227; Ex parte Winter, 70 Cal. 291, 11 Pac. 630; Reilly v. Reilly, 60 Cal. 624; Robey v. Robey, 9 Idaho 371, 74 Pac. 957, 3 Ann. Cas. 50; Lawlor v. Lawlor, 76 Mo. App. 293; State ex rel. v. District Court, 31 Mont. 511, 79 Pac. 13; Haddock v. Haddock, 109 App. Div. 502, 96 N. Y. S. 522; Tonn v. Tonn, 16 N. Dak. 17, 111 N. W. 609.

[53]See In re Farrell, 196 Ala. 434, 71 So. 462, L. R. A. 1916F, 1257; Brady v. Brady, 144 Ala. 414, 39 So.

Where an order for temporary alimony may not be appealed from, mandamus can be awarded by the appellate court to vacate such order.[54] An appeal will lie from an order committing the husband to prison for nonpayment of temporary alimony previously ordered, such committing order being in the nature of a final decree.[55]

The amount of the alimony to be allowed in any given case, is very largely within the broad discretionary powers of the trial court and the appellate court will interfere and reverse on this issue only in a very clear case of abuse of this discretion.[56]

The question of the ability of the husband to pay alimony is held to be a question solely for the lower court.[57]

Objections to the allowance should be made in the trial court.[58] Where the appeal is solely from the order allowing suit money the higher court will not be called upon to review the merits of the principal controversy.[59] In Kentucky, the Court of Appeals has the power to review the decree as far as it relates to the alimony but is without power to reverse the decree of divorce proper.[60]

237; Fowler v. Fowler, 61 Okla. 280, 161 Pac. 227, L. R. A. 1917C, 89.

[54]Brady v. Brady, 144 Ala. 414, 39 So. 237.

[55]People v. Circuit Court, 169 Ill. 201, 48 N. E. 717; Blake v. Blake, 80 Ill. 523; Wells v. Wells, 46 Okla. 88, 148 Pac. 723.

[56]Poe v. Poe, 149 Ark. 62, 231 S. W. 198; Webster v. Webster, 43 Cal. App. 772, 185 Pac. 863; Reed v. Reed, 40 Cal. App. 102, 180 Pac. 43; Walden v. Walden, 151 Ga. 549, 107 S. E. 483; Martin v. Martin, 149 Ga. 682, 101 S. E. 794; Miles v. Miles, 149 Ga. 47, 99 S. E. 120; Etheridge v. Etheridge, 149 Ga. 44, 99 S. E. 37; Van Natta v. Van Natta, 188 Ind. 75, 121 N. E. 825; Francis v. Francis, 108 Kans. 220, 194 Pac. 641; Putnam v. Putnam, 104 Kans. 47, 177 Pac. 838; Wygodsky v. Wygodsky, 134 Md. 344, 106 Atl. 698; Larson v. Larson, 147 Minn. 457, 179 N. W. 723; Cummins v. Cummins, 59 Mont. 225, 195 Pac. 1031; Cassan v. Cassan, 27 N. Mex. 256, 199 Pac. 1010; Hennis v. Hennis, 180 N. Car. 606, 105 S. E. 274; Stout v. Stout, 99 Okla. 133, 195 Pac. 153; Cornelius v. Cornelius, 82 Okla. 195, 199 Pac. 1115; Adams v. Adams, 74 Pa. Super. Ct. 502; Lovegrove v. Lovegrove, 128 Va. 449, 104 S. E. 804.

[57]Phillips v. Phillips, 42 Nev. 460, 180 Pac. 907.

[58]Meyer v. Meyer, (Cal. App.), 195 Pac. 387. See also Bradley v. Bradley, 40 Cal. App. 638, 181 Pac. 237.

[59]Lisenbee v. Lisenbee, 42 Cal. App. 567, 183 Pac. 862; Donaldson v. Donaldson, (Mo. App.), 215 S. W. 904.

[60]Walter v. Walter, 190 Ky. 49, 226 S. W. 374; Hoffman v. Hoffman, 190 Ky. 13, 226 S. W. 119; Nichols v. Nichols, 189 Ky. 500, 225 S. W. 147; Sloan v. Sloan's Adm'r., 185 Ky. 369, 215 S. W. 38; McKinney v. McKinney, 185 Ky. 315, 215 S. W. 34; Burton v. Burton, 184 Ky. 268, 211 S. W. 869; Johnson v. Johnson, 183 Ky. 421, 209 S. W. 385.

§ 685. **Alimony pending appeal.**—Pending an appeal, the wife is entitled to an order for an allowance of temporary alimony, suit money, and counsel fees, where it appears the appeal is taken in good faith and for a reasonable cause.[61] It may be allowed whether the appeal is by her from a decree granting the husband a divorce,[62] or by him from a decree granting her a divorce,[63] or in his own action where a divorce has been denied,[64] or by him from an order allowing temporary alimony,[65] or by

[61]Jenkins v. Jenkins, 91 Ill. 167; Dinet v. Pfirshing, 86 Ill. 83; Harding v. Harding, 180 Ill. 592, 54 N. E. 604; Peavey v. Peavey, 76 Iowa 443, 41 N. W. 67; Call v. Call, 65 Maine 407; Rohrback v. Rohrback, 75 Md. 317, 23 Atl. 610; Chaffee v. Chaffee, 14 Mich. 463; Disborough v. Disborough, 51 N. J. Eq. 306, 28 Atl. 3; McBride v. McBride, 119 N. Y. 519, 23 N. E. 1065; Anonymous, 15 Abb. Pr. N. S. (N. Y.) 307; Halsted v. Halsted, 11 Misc. 592, 32 N. Y. S. 1080; Beeler v. Beeler (Tex. Civ. App.), 218 S. W. 553. In Gay v. Gay, 146 Cal. 237, 79 Pac. 885, on the question of good faith of an appeal, the court said: "The wife was not required to demonstrate that her appeal will be successful; she was only required to show to the satisfaction of the court that the appeal was taken in the belief, and upon the advice of her attorneys, that she had good grounds to expect a reversal upon all the record which she would be entitled to present to this court upon such appeal." Citing Bohnert v. Bohnert, 91 Cal. 428, 27 Pac. 732. Not allowed where wife's bill is dismissed for want of equity. Shaffer v. Shaffer, 219 Ill. App. 200. In Viertel v. Viertel, 99 Mo. App. 710, 75 S. W. 187, the court said: "Defendant's appeal, though unsuccessful, seems to have been taken in good faith, and as we have seen, was not entirely without merit, and, such being the case, we believe she ought to be allowed a reasonable sum to compensate her for her outlay for attorney's fees, and other costs."

[62]Gay v. Gay, 146 Cal. 237, 79 Pac. 885; Bohnert v. Bohnert, 91 Cal. 428, 27 Pac. 732; Goldsmith v. Goldsmith, 6 Mich. 285; Mahn v. Mahn, 70 Mo. App. 337; Rosenfeld v. Rosenfeld, 63 Mo. App. 411; Halsted v. Halsted, 21 App. Div. 589, 47 N. Y. S. 814.

[63]Mercer v. Mercer, 19 Colo. App. 51, 73 Pac. 662; McBride v. McBride, 119 N. Y. 519, 23 N. E. 1065; Haddock v. Haddock, 75 App. Div. 565, 78 N. Y. S. 304; Pollock v. Pollock, 7 S. Dak. 331, 64 N. W. 165; Sullivan v. Sullivan, 49 Wash. 508, 95 Pac. 1095.

[64]Rohrback v. Rohrback, 75 Md. 317, 23 Atl. 610.

[65]Casteel v. Casteel, 38 Ark. 477; Hecht v. Hecht, 28 Ark. 92; Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709; People v. Circuit Court, 169 Ill. 201, 48 N. E. 717; Blake v. Blake, 80 Ill. 523; Gamble v. Gamble, 57 Ill. App. 183; Blair v. Blair, 74 Iowa 311, 37 N. W. 385; Lochnane v. Lochnane, 78 Ky. 467; State v. Seddon, 93 Mo. 520, 6 S. W. 342; Golding v. Golding, 74 Mo. 123; In re Finklestein, 13 Mont. 425, 34 Pac. 847; King v. King, 38 Ohio St. 370; Reed v. Reed, 17 Ohio St. 563; Williams v. Williams, 29 Wis. 517.

her, from an order denying her temporary alimony when she has made out a proper case.[66]

But there has been a great diversity of opinion as to which court, the trial or appellate, has jurisdiction to make such order. In many jurisdictions it is held still to remain in the trial court, even after an appeal has been taken;[67] and that the jurisdiction

[66]Friend v. Friend, 65 Wis. 412, 27 N. W. 34.

[67]Ex parte King, 27 Ala. 387; Holleman v. Holleman, 69 Ga. 676; Hunter v. Hunter, 100 Ill. 477; Eward v. Eward, 72 Ind. App. 638, 125 N. E. 468; Miller v. Miller, 43 Iowa 325; Chaffee v. Chaffee, 14 Mich. 463; Goldsmith v. Goldsmith, 6 Mich. 285, Motley v. Motley, 93 Mo. App. 473, 67 S. W. 741; Watkins v. Watkins, 66 Mo. App. 468; Callahan v. Callahan, 7 Nebr. 38; Oldham v. Oldham, (N. Mex.), 208 Pac. 886; McBride v. McBride, 119 N. Y. 519, 23 N. E. 1065; Forrest v. Forrest, 18 N. Y. Super. Ct. 672; Middletown v. Middletown, 19 Pa. Co. Ct. 353. Trial court. Bernsdorff v. Bernsdorff, 26 App. D. C. 228; Sparks v. Sparks, 25 App. D. C., 356; Ex parte King, 27 Ala. 387; Gay v. Gay, 146 Cal. 237, 79 Pac. 885; Wolff v. Wolff, (Cal.), 37 Pac. 858; Storke v. Storke, 99 Cal. 621, 34 Pac. 339; Bohnert v. Bohnert, 91 Cal. 428, 27 Pac. 732; Larkin v. Larkin, 71 Cal. 330, 12 Pac. 227; Reilly v. Reilly, 60 Cal. 624; State v. Phillips, 32 Fla. 403, 13 So. 920; Roby v. Roby, 9 Idaho 371, 74 Pac. 957, 3 Ann. Cas. 50; Harding v. Harding, 205 Ill. 105, 68 N. E. 754; People v. Circuit Court, 169 Ill. 201, 48 N. E. 717; Jenkins v. Jenkins, 91 Ill. 167; Miles v. Miles, 102 Ill. App. 130; Earle v. Earle, 75 Ill. App. 351; Razor v. Razor, 42 Ill. App. 504; Peavey v. Peavey, 76 Iowa 443, 41 N. W. 67; Miller v. Miller, 43 Iowa 325; State ex rel. v. Judge, 114 La. 44, 38 So. 14; Rohrback v. Rohrback, 75 Md. 317, 23 Atl. 610; Smith v. Smith, 184 Mass. 394, 68 N. E. 846; Schuster v. Schuster, 84 Minn. 403, 87 N. W. 1014; Plattner v. Plattner, (Mo. App.), 91 S. W. 459; State v. St. Louis Court of Appeals, 99 Mo. 216, 12 S. W. 661; State v. Seddon, 93 Mo. 520, 6 S. W. 342; State v. St. Louis Court of Appeals, 88 Mo. 135; Lawlor v. Lawlor, 76 Mo. App. 293; Lewis v. Lewis, 20 Mo. App. 546; State ex rel. v. Dist. Court, 31 Mont. 511, 79 Pac. 13; Bordeaux v. Bordeaux, 29 Mont. 478, 75 Pac. 359; McBride v. McBride, 119 N. Y. 510, 23 N. E. 1065; Haddock v. Haddock, 75 App. Div. 565, 78 N. Y. S. 304; Halsted v. Halsted, 11 Misc. 592, 32 N. Y. S. 1080; Cohen v. Cohen, 11 Misc. 704, 32 N. Y. S. 1082, 1 Ann. Cas. 226; Mosher v. Mosher, 16 N. Dak. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820, 125 Am. St. 654; Tonn v. Tonn, 16 N. Dak. 17, 111 N. W. 609; McNeil v. McNeil, 19 Pa. Co. Ct. 353; Shy v. Shy, 7 Heisk, (Tenn.) 125; Maxwell v. Maxwell, 67 W. Va. 119, 67 S. E. 379, 27 L. R. A. (N. S.) 712; Jones v. Jones, L. R. 2 P. & M. 333. It is said in Pemberton v. Pemberton, 169 Ky. 476, 184 S. W. 378, that an action is pending whether in the circuit court, or here on appeal. A suit for divorce is still pending in the lower court after appeal until the appeal is disposed of. Snow v. Duxstad, 23 Wyo. 82, 147 Pac. 174. The power of the trial court to order the payment of temporary alimony where the statute empowers it to enter such order

of the trial court is exclusive.[68] It may be said generally that statutes granting power to the trial court to award alimony pending or during an action, authorize such court to do so pending an appeal.[69] But by the weight of authority, or at least in the majority of the jurisdictions, the appellate court is held to have such power after an appeal has been perfected by the filing of a transcript, such power being inherent in aid of the jurisdiction.[70]

"pending the action" is not taken away by the perfecting of an appeal to the appellate court as the jurisdiction remains to take action authorized by law in the cause for the protection of persons or property in the control of the court, the necessity of which may arise after the judgment has been pronounced and the proper exercise of which may be entirely consistent with the final judgment and therefore not affected by the rule that a final judgment after the term expires can not be altered by the trial court. Ex parte Lohmuller, 103 Tex. 474, 129 S. W. 834, 29 L. R. A. (N. S.) 303. In Maxwell v. Maxwell, 67 W. Va. 119, 67 S. E. 379, 27 L. R. A. (N. S.) 712, the court said: "Our powers are made by the Constitution itself. It has not granted this court power to make an original order in a divorce case. In such cause it can act only in review of an order made below,—exercise appellate jurisdiction. Whenever this court proceeds to act upon a cause, or some branch of a cause that involves an issue made for the first time here, it begins to act originally. It begins to create a cause, not to review one. It begins to exercise original, and not appellate jurisdiction." In Robey v. Robey, 9 Idaho 371, 74 Pac. 957, 3 Ann. Cas. 50, the court, in denying that the lower court lost its jurisdiction by appeal, says: "The allowance or disallowance of suit money and attorney's fees for the prosecution of such an appeal is not a part of the 'judgment appealed from' nor is it a 'matter embraced therein.'"

[68]Reilly v. Reilly, 60 Cal. 624; Hunter v. Hunter, 100 Ill. 477; Muir v. Muir, 27 Ky. L. 1162, 87 S. W. 1070; State v. St. Louis Court of Appeals, 88 Mo. 135; Welday v. Welday (Mo. App.), 232 S. W. 1045; State ex rel. Kranke v. Calhoun, 206 Mo. App. 298, 227 S. W. 1080; Kaplun v. Kaplun (Mo. App.), 227 S. W. 894; Viertel v. Viertel, 99 Mo. App. 710, 75 S. W. 187; Bordeaux v. Bordeaux, 26 Mont. 533, 69 Pac. 103; Tonn v. Tonn, 16 N. Dak. 17, 111 N. W. 609; O'Brien v. O'Brien, 36 Ore. 92, 57 Pac. 374, 58 Pac. 892; Weishaupt v. Weishaupt, 27 Wis. 621.

[69]Larkin v. Larkin, 71 Cal. 330, 12 Pac. 227; Rilly v. Rilly, 60 Cal. 624; Robey v. Robey, 9 Idaho 371, 74 Pac. 957, 3 Ann. Cas. 50; State v. Seventh District Judge, 22 La. 264; McCarthy v. McCarthy, 137 N. Y. 500, 33 N. E. 550; McBride v. McBride, 119 N. Y. 519, 23 N. E. 1065; Greenburg v. Greenburg, 134 App. Div. 419, 119 N. Y. S. 227; Haddock v. Haddock, 75 App. Div. 565, 78 N. Y. S. 304; Halsted v. Halsted, 11 Misc. 592, 32 N. Y. S. 1080; Rogers v. Rogers, 4 Sw. & Tr. 82.

[70]Prine v. Prine, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87; Enders v. Enders, 34 Idaho 381, 201 Pac. 714, 18 A. L. R. 1492; Van Duzer v. Van Duzer, 70 Iowa 614, 31 N. W. 956;

Heskamp v. Heskamp, (Ky.), 242 S. W. 857; Riggins v. Riggins, 192 Ky. 500, 234 S. W. 5; Napier v. Napier, 186 Ky. 558, 217 S. W. 683; Chaffee v. Chaffee, 14 Mich. 463, Eberhart v. Eberhart, 149 Minn. 192, 183 N. W. 140; Wagoner v. Wagoner, 36 Minn., 239, 30 N. W. 766; Clarkson v. Clarkson, 20 Mo. App. 94; Lake v. Lake, 17 Nev. 230, 30 Pac. 878; Disborough v. Disborough, 51 N. J. Eq. 306, 28 Atl. 3; Hansing v. Hansing, 76 Okla. 34, 183 Pac. 978; Spradling v. Spradling (Okla.), 181 Pac. 148; White v. White, 100 Ore. 387, 190 Pac. 969, 197 Pac. 1080; Krause v. Krause, 23 Wis. 354; Appellate Court; Pending Appeal. Lane v. Lane, 26 App. D. C. 235, 6 Ann. Cas. 683; Hart v. Hart, 31 Colo. 333, 73 Pac. 35; Mercer v. Mercer, 19 Colo. App.51, 73 Pac. 662; Pleyte v. Pleyte, 15 Colo. 125, 25 Pac. 25; Prine v. Prine, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87; Shors v Shors, 133 Iowa 22, 110 N. W. 16; Simpson v. Simpson, 91 Iowa 235, 59 N. W. 22; Day v. Day, 84 Iowa 221, 50 N. W. 979; Peavey v. Peavey, 76 Iowa 443, 41 N. W. 67; Blair v. Blair, 74 Iowa 311, 37 N. W. 385; Vanduzer v. Vanduzer, 70 Iowa 614, 31 N. W. 956; Van Voorhis v. Van Voorhis, 90 Mich. 276, 51 N. W. 281; Ross v. Griffin, 53 Mich. 5, 18 N. W. 534; Whitmore v. Whitmore, 49 Mich. 417, 13 N. W. 800; Holthoefer v. Holthoefer, 47 Mich. 260, 11 N. W. 150; Zeigenfuss v. Zeigenfuss, 21 Mich. 414; Chaffee v. Chaffee, 14 Mich. 463; Goldsmith v. Goldsmith, 6 Mich. 285; Wagner v. Wagner, 36 Minn. 239, 30 N. W. 766; Hall v. Hall, 77 Miss. 741, 27 So. 636; Viertel v. Viertel, 99 Mo. App. 710, 75 S. W. 187; Clarkson v. Clarkson, 20 Mo. App. 94; Willits v. Willits, 76 Nebr. 228, 107 N. W. 379, 5 L. R. A. (N. S.) 767; Callahan v. Callahan, 7 Nebr. 38; Lake v. Lake, 17 Nev. 230, 30 Pac. 878; Disborough v. Disborough, 51 N. J. Eq. 306, 28 Atl. 3; Drake v. Drake, 21 S. Dak. 182, 110 N. W. 270; Pollock v. Pollock, 7 S. Dak. 331, 64 N. W. 165; Grant v. Grant, 5 S. Dak. 17, 57 N. W. 1130; Sullivan v. Sullivan, 49 Wash. 508, 95 Pac. 1095; Holcomb v. Holcomb, 49 Wash. 498, 95 Pac. 1091; Bachelor v. Bachelor, 30 Wash. 203, 70 Pac. 491; Willey v. Willey, 22 Wash. 115, 60 Pac. 145, 79 Am. St. 923; Kimble v. Kimble, 17 Wash. 75, 49 Pac. 216; Friend v. Friend, 65 Wis. 412, 27 N. W. 34; Varney v. Varney, 54 Wis. 422, 11 N. W. 694; Weishaupt v. Weishaupt, 27 Wis. 621; Phillips v. Phillips, 27 Wis. 252; Krause v. Krause, 23 Wis. 354; Duxstad v. Duxstad, 16 Wyo. 396, 94 Pac. 463, 15 Ann. Cas. 228. In Pleyte v. Pleyte, 15 Colo. 125, 25 Pac. 25, the court said: "The allowance for alimony and suit money, may be extended to the pendency of the case on appeal or error, whenever it is made to appear to the appellate court that the cause is prosecuted in good faith, and that error has probably been committed to her prejudice." In Lake v. Lake, 16 Nev. 363, the court said: "Among the rights to which the wife is entitled, there is no one more important to her and the court than that of having the aid of counsel, learned in the law, and acquainted with her case. Without such aid, the court must perform the double and inconsistent functions of court and counsel, * * * without counsel the statute of the state and the rules of the court would not be complied with." In Prine v. Prine, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87, the court said: "If the wife has not the means to live and to employ counsel to present her cause to the court, so that it may be fully advised as to the merits of her side of the controversy, how can it be said that there is a fair, even-handed, impar-

There are cases which hold that when the appeal has been perfected, the trial court is ousted of further jurisdiction,[71] and in others that the appellate court has sole jurisdiction.[72]

In still other jurisdictions the alimony may be fixed by the appellate court or the case may be remanded for the purpose of having the fees determined.[73]

It may be said generally that the power of the trial court and the appellate court to allow temporary alimony pending the appeal is concurrent in most jurisdictions.[74] Appellate courts claiming the jurisdiction have held that the better practice is to make the application for the allowance in the trial court;[75] and they usually

tial administration of justice between her and the appellant, who has abundance of means of support, and to employ able and ingenious counsel to present his case in its most favorable aspects." Said the court in Mosher v. Mosher, 16 N. Dak. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820, 125 Am. St. 654: "We are agreed that this court has the inherent power at all times after appeal to allow the wife, from the estate of the husband, the means necessary to enable her to prosecute or defend the action. The power is incident to divorce cases. The statute on this subject is confirmatory of the common law."

[71]State v. Phillips, 32 Fla. 403, 13 So. 920; Shors v. Shors, 133 Iowa 22, 110 N. W. 16; Lake v. Lake, 16 Nev. 363; Cralle v. Cralle, 81 Va. 773.

[72]Shors v. Shors, 133 Iowa 22, 110 N. W. 16; Cralle v. Cralle, 81 Va. 773.

[73]Taylor v. Taylor, 144 Tenn. 311, 232 S. W. 445. See also Rice v. Rice, 88 W. Va. 54, 106 S. E. 237.

[74]Lane v. Lane, 26 App. D. C. 235, 6 Ann. Cas. 683; Roby v. Roby, 9 Idaho 371, 74 Pac. 957, 3 Ann. Cas. 50; Willets v. Willets, 76 Nebr. 228, 107 N. W. 379, 5 L. R. A. (N. S.) 767, 14 Ann. Cas. 883; Mosher v. Mosher, 16 N. Dak. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820, 125 Am. St. 654; Duxstad v. Duxstad, 16 Wyo. 396, 94 Pac. 463, 15 Ann. Cas. 228.

[75]Bernsdorff v. Bernsdorff, 26 App. D. C. 228; Mosher v. Mosher, 16 N. Dak. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820, 125 Am. St. 654. In Mosher v. Mosher, 16 N. Dak. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820, 125 Am. St. 654, the appellate court, although allowing suit money, said: "This action must not, however, be taken to indicate that this court will take jurisdiction of such applications a a matter of course. Whenever there is a reasonable opportunity to intelligently present them to the district court before an appeal is perfected, they should be heard in that court." See also Morgan v. Morgan, 25 App. D. C. 389; Holcomb v. Holcomb, 49 Wash. 498, 95 Pac. 1091. In Roby v. Roby, 9 Idaho 371, 74 Pac. 957, 3 Ann. Cas. 50, the court said: "The trial judge is in a better position than this court to know the amount of money necessary for the payment of costs and disbursements in the prosecution of an appeal, and the ability of the husband to meet such requirements. He knows all the facts in the case, and the situation and condition of the parties." In Ex Parte Lohmuller, 103 Tex. 474, 129 S. W. 834, 29 L. R. A.

require some reason to be shown why an order for temporary alimony was not obtained in the trial court.[76]

The allowance of temporary alimony in a court of appeal is not as a matter of course, and it is usually required that proof be supplied both of the wife's necessity and the husband's ability to pay,[77] and also that the appeal is taken or contested in good faith, and for a reasonable cause.[78] If it appears to have been taken without reasonable cause, it will be denied.[79] If the trial court has found there was no legal marriage between the parties, temporary alimony will be denied on appeal.[80] Temporary alimony has been allowed pending the appeal, notwithstanding the wife's marriage after the divorce.[81]

An order for the payment of permanent alimony entered in a final judgment in the trial court is not superseded by an appeal.[82] So an order for temporary alimony remains in force notwithstanding the husband's appeal therefrom.[83] A husband may be denied a reversal or modification of a judgment for permanent alimony until he has paid the arrears of temporary alimony allowed by the trial court.[84]

(N. S.) 303, it was said: "In all ordinary cases the lower court is the one which should be called upon to act. To it parties can have ready access, and easily procure evidence, the production of which before an appellate court would often be both inconvenient and costly."

[76]Lane v. Lane, 26 App. D. C. 235, 6 Ann. Cas. 683. See also Haddock v. Haddock, 75 App. Div. 565, 78 N. Y. S. 304.

[77]Prine v. Prine, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87.

[78]Dinet v. Pfirshing, 86 Ill. 83; Harding v. Harding, 180 Ill. 592, 54 N. E. 604; Call v. Call, 65 Maine 407; Holthoefer v. Holthoefer, 47 Mich. 260, 643, 11 N. W. 150; Zeigenfuss v. Zeigenfuss, 21 Mich. 414; Chaffee v. Chaffee, 14 Mich. 463; Disborough v. Disborough, 51 N. J. Eq. 306, 28 Atl. 3; Halsted v. Halsted, 11 Misc. 592, 32 N. Y. S. 1080; Anonymous, 15 Abb. Pr. N. S. (N. Y.) 307.

[79]Gansz v. Gansz, 59 N. Y. S. 955; Friend v. Friend, 65 Wis. 412, 27 N. W. 34; Varney v. Varney, 54 Wis. 422, 11 N. 694; Krause v. Krause, 23 Wis. 354.

[80]Eickhoff v. Eickhoff, 29 Colo. 295, 68 Pac. 237; Taylor v. Taylor 7 Colo. App. 549, 44 Pac. 675.

[81]King v. King, 38 Ohio St. 370.

[82]State v. Phillips, 32 Fla. 403, 13 So. 920; Miles v. Miles, 102 Ill. App. 130; State v. Judge, 114 La. 44, 38 So. 14; Smith v. Smith, 184 Mass. 394, 68 N. E. 846; Lewis v. Lewis, 20 Mo. App. 546.

[83]Kerr v. Kerr, 236 Mass. 353, 128 N. E. 409; Ponthus v. Ponthus, 70 Pa. Super. Ct. 39. See also Black v. Black, 150 Ga. 672, 104 S. E. 775.

[84]State v. St. Louis Court of Appeals, 99 Mo. 216, 12 S. W. 661; Williams v. Williams, 6 S. Dak. 284, 61 N. W. 38.

The appellate court may punish a violation of its order for the payment of temporary alimony.[85]

§ 686. **Effect of discharge of bankruptcy on liability.**—The United States statute of 1903 provided that a discharge in bankruptcy shall not release a bankrupt from his liability for "alimony due or to become due;"[86] and this was the purpose of the decision even before that time,[87] so that the amendment of 1903 was merely declaratory of the true meaning and sense of the earlier decisions.[88]

The principal ground for many of the decisions was that a decree for alimony is subject to modification by the court in which it was entered, according to the varying circumstances of the parties;[89] and hence not a debt which has been put in the form of a

[85]Tolman v. Leonard, 6 App. D. C. 224.

[86]32 U. S. Stat. at Large, p. 798, § 5, Barnes Fed. Code 1919, § 9101. A decree for alimony by a foreign court is not merged in a judgment thereon so as to take the debt for the second judgment out of the operation of the bankruptcy act, exempting debts due for alimony from discharge, the court having power to look behind the judgment to determine the nature and extent of the liability. The obligation enforced is still of the same character notwithstanding the second judgment. In re Williams, 208 N. Y. 32, 101 N. E. 853, 46 L. R. A. (N. S.) 719.

[87]Wetmore v. Markoe, 196 U. S. 68, 49 L. ed. 390, 25 Sup. Ct. 172, 2 Ann. Cas. 265; Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. 735; In re Garrett, 2 Hughes (U. S.) 235, 11 Nat. Bank Reg. 493, Fed. Cas. 5252; Turner v. Turner, 108 Fed. 785; In re Nowell, 99 Fed. 931; In re Challoner, 98 Fed. 82; In re Shepard, 97 Fed. 187; In re Anderson, 97 Fed. 391; In re Van Orden, 96 Fed. 86; Deen v. Bloomer, 191 Ill. 416, 61 N. E. 131; Barclay v. Barclay, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351; Welty v. Welty, 195 Ill. 335, 63 N. E. 161, 88 Am. St. 208; People v. Grell, 65 N. Y. S. 522; Maisner v. Maisner, 62 App. Div. 286, 70 N. Y. S. 1107; Young v. Young, 35 Misc. 335, 71 N. Y. S. 944; Arrington v. Arrington, 131 N. Car. 143, 42 S. E. 554, 92 Am. St. 769; Lemert v. Lemert, 72 Ohio St. 364, 74 N. E. 194, 106 Am. St. 621, 2 Ann. Cas. 914; Newhouse v. Commonwealth, 5 Whart. (Pa.) 82; Commonwealth v. Miller, 12 Phila. (Pa.) 569; Noyes v. Hubbard, 64 Vt. 302, 23 Atl. 727, 15 L. R. A. 394, 33 Am. St. 928; Linton v. Linton, 15 Q. B. D. 239; In re Robinson, 27 Chan. Div. 160.

[88]Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. 735. In Wetmore v. Markoe, 196 U. S. 68, 49 L. ed. 390, 25 Sup. Ct. 172, the court suggests that the amendment of 1903 in this particular may have been passed with a view to settling the law upon this subject and to put at rest the controversy that had arisen from the conflicting decisions of the courts, both State and Federal upon this question.

[89]Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. 735; Welty v. Welty, 195 Ill. 335, 63 N. E. 161, 88 Am. St. 208; Barclay v.

judgment. It is rather a legal means of enforcing the obligation of the husband and father to support and maintain his wife and children.[90] This duty does not arise from any business transaction or any contractual obligation. It is due from him because of the policy of the law which imposes the obligation upon him, and if he fails to perform it, the law interferes and forces it against him by means of legal proceedings.[91] It has been held that a claim under an agreement by a bankrupt to pay an annuity to his divorced wife during her life or until she remarries may be enforced notwithstanding a discharge in bankruptcy.[92]

Barclay, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351.

[90]Wetmore v. Markoe, 196 U. S. 68, 49 L. ed. 390, 25 Sup. Ct. 172; Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. 735; In re Williams, 208 N. Y. 32, 101 N. E. 853.

[91]Wetmore v. Markoe, 196 U. S. 68, 49 L. ed. 390, 25 Sup. Ct. 172; Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. 735.

[92]Dunbar v. Dunbar, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. 757.

CHAPTER 44

TEMPORARY ALIMONY, SUIT MONEY, COUNSEL FEES AND EXPENSES

Section

690. Temporary alimony or alimony pendente lite in general.
691. Jurisdiction of court to grant temporary alimony.
692. Proceedings in which allowed.
693. Allowance in annulment suits.
694. Discretion of court.
695. Necessity of existence of marital relation.
696. Husband's ability.
697. Right of husband to allowance.
698. Wife's good faith.
699. Effect of agreements between the parties as to support on separation.
700. Defenses and objections.
701. Effect of wife's ownership of property on right to temporary alimony.
702. Necessity of notice of proceedings.
703. Application for temporary alimony.
704. Hearing and determination.
705. Evidence to establish marital relation.
706. Order for temporary alimony.
707. Conditional orders.
708. Amount of allowance.
709. Commencement and termination of temporary alimony.
710. Vacation or revision of order by trial court.
711. Suit money allowance in general.
712. In what proceedings suit money allowed.
713. When allowance of suit money to be made.
714. Allowance of suit money as dependent on wife's necessities and husband's ability to pay.
715. Allowance of suit money as dependent on merits of action.
716. For what purposes suit money may be allowed.
717. In whose name suit money to be allowed.
718. Right to suit money on dismissal of action.

Section

719. Suit money allowance—Amount.
720. Counsel fees in general.
721. Counsel fees—Proceedings in which allowed.
722. Counsel fees—Time of allowance.
723. Counsel fees—Amount.
724. Counsel fees—Allowance—Order.
725. Counsel fees—Allowance in case of wife's adultery or other fault.
726. Counsel fees—Effect of death of party.
727. Counsel fees—Allowance where parties have become reconciled.
728. Counsel fees—Contingent fees.
729. Counsel fees—Number of counsel.
730. Counsel fees—Allowance on appeal.
731. Counsel fees—Independent suit therefor.
732. Liability of husband and wife for legal services to wife in divorce suit.
733. Costs.

§ 690. **Temporary alimony or alimony pendente lite in general.**—Temporary alimony, also called "alimony pendente lite" and "interim money," is an allowance in support of a wife pending the proceedings, and is allowed to her whether the suit be by or against her and generally regardless of her guilt or innocence; and although affidavits and testimony may be heard pro and con on the question of a wife's necessity and the husband's ability to pay, the court will not ordinarily go into the merits of the main controversy.[1] Such order may be enforced by execution and

[1]Alexander v. Alexander, 13 App. D. C. 334, 45 L. R. A. 806; Glenn v. Glenn, 44 Ark. 46; Countz v. Countz, 30 Ark. 73; Hecht v. Hecht, 28 Ark. 92; Bowman v. Worthington, 24 Ark. 522; Anderson v. Anderson, 137 Cal. 225, 69 Pac. 1061; Cupples v. Cupples, 31 Colo. 443, 72 Pac. 1056; Cowan v. Cowan, 10 Colo. 540, 16 Pac. 215; Daniels v. Daniels, 9 Colo. 133, 10 Pac. 657; Mercer v. Mercer, 19 Colo. App. 51, 73 Pac. 662; Conley v. Conley, 152 Ga. 184, 108 S. E. 777; Griffith v. Griffith, 151 Ga. 411, 107 S. E. 485; Combs v. Combs, 146 Ga. 112, 90 S. E. 862; McLauchlin v. McLauchlin, 128 Ga. 653, 58 S. E. 156; Kendrick v. Kendrick, 105 Ga. 38, 31 S. E. 115; Roseberry v. Roseberry, 17 Ga. 139; Methvin v. Methvin, 15 Ga. 97, 60 Am. Dec. 664; McGee v. McGee, 10 Ga. 478; Paul v. Paul, 278 Ill. 196, 115 N. E. 860; Cooper v. Cooper, 185 Ill. 163, 56 N. E. 1059; Jenkins v. Jenkins, 91 Ill. 167; Newman v. Newman, 69 Ill. 167; Armstrong v. Armstrong, 35 Ill. 109; Thomas v. Thomas, 109 Ill.

proceedings as in cases of contempt. The amount which the court will require of a husband, to enable his wife to defend a suit for divorce, is not to exceed a reasonable amount for compensation of counsel and other expenses, under all the circumstances of the case, without regard to the amount that might properly be charged between counsel and client by counsel actually employed.[2]

App. 352; Harding v. Harding, 79 Ill. App. 621; Millowitsch v. Millowitsch, 44 Ill. App. 357; Burgess v. Burgess, 25 Ill. App. 525; Wooley v. Wooley, 24 Ill. App. 431; Bowman v. Bowman, 24 Ill. App. 165; McCue v. McCue, 149 Ind. 466, 49 N. E. 382; Sellers v. Sellers, 141 Ind. 305, 40 N. E. 699; Harrell v. Harrell, 39 Ind. 185; Litowich v. Litowich, 19 Kans. 451, 27 Am. Rep. 145; Dugan v. Dugan, 1 Duv. (Ky.) 289; Meyar v. Meyar, 3 Metc. (Ky.) 298; Ballard v. Carperton, 2 Metc. (Ky.) 412; Farwell v. Farwell, 31 Maine 591; Hood v. Hood, 138 Md. 355, 113 Atl. 895, 15 A. L. R. 774; Wygodsky v. Wygodsky, 134 Md. 344, 106 Atl. 698; McCurley v. McCurley, 60 Md. 185, 45 Am. Rep. 717; Tayman v. Tayman, 2 Md. Ch. 393; Coles v. Coles, 2 Md. Ch. 341; Daiger v. Daiger, 2 Md. Ch. 335; Ross v. Griffin, 53 Mich. 5, 18 N. W. 534; Haines v. Haines, 35 Mich. 138; Chaffee v. Chaffee, 14 Mich. 463; Porter v. Porter, 41 Miss. 116; Tyrrell v. Tyrrell, 3 Atl. (N. J.) 266; Vreeland v. Vreeland, 18 N. J. Eq. 43; Amos v. Amos, 4 N. J. Eq. 171; Lamy v. Catron, 5 N. Mex. 373, 23 Pac. 773; Rublinsky v. Rublinsky, 24 N. Y. S. 920; Bucki v. Bucki, 70 Hun 598, 24 N. Y. S. 374; Denton v. Denton, 1 Johns. Ch. (N. Y.) 364; Mix v. Mix, 1 Johns. Ch. (N. Y.) 108; Osgood v. Osgood, 2 Paige (N. Y.) 261; Leslie v. Leslie, 6 Abb. Pr. (N. S.) (N. Y.) 193; Allen v. Allen, 8 Abb. N. Cas. (N. Y.) 175, 58 How. Prac. 381, 59 How. Prac. 27; Morrell v. Morrell, 2 Barb. (N. Y.) 480; Jones v. Jones, 2 Barb. Ch. (N. Y.) 146; Hammond v. Hammond, Clarke Ch. (N. Y.) 151; Huffman v. Huffman, 47 Ore. 610, 86 Pac. 593, 114 Am. St. 943; Henderson v. Henderson, 37 Ore. 141, 60 Pac. 597, 61 Pac. 136, 48 L. R. A. 766, 82 Am. St. 741; Breinig v. Breinig, 26 Pa. St. 161; Smith v. Smith, 11 Pa. Co. Ct. 465; Banes v. Banes, 3 Brewst. (Pa.) 612; Downing v. Downing, 7 Kulp. (Pa.) 138; Melizet v. Melizet, 1 Pars. Eq. Cas. (Pa.) 77; Ormsby v. Ormsby, 1 Phila. (Pa.) 578; Reeves v. Reeves, 1 Weekly Note Cas. (Pa.) 123; Gilbert v. Hayward, 37 R. I. 303, 92 Atl. 625; Sanford v. Sanford, 2 R. I. 64; Smith v. Smith, 51 S. Car. 379, 29 S. E. 227; Warne v. Warne, 36 S. Dak. 573, 156 N. W. 60; Johnson v. Johnson, (Tenn.), 49 S. W. 305; Thompson v. Thompson, 3 Head. (Tenn.) 527; Boyd v. Boyd, 22 Tex. Civ. App. 200, 54 S. W. 380; Arey v. Arey, 22 Wash. 261, 60 Pac. 724; Wright v. Wright, 1 Edw. 62; Stanford v. Stanford, 1 Edw. 317; Crampton v. Crampton, 32 L. J. P. & M. 142; Fitzgerald v. Fitzgerald, 1 Lee Ecc. 649; Bird v. Bird, 1 Lee Ecc. 572; Bird v. Bird, 1 Lee Ecc. 209; Brisco v. Brisco, 2 Hag. Con. 199; Otway v. Otway, 2 Phil. Ecc. 109; Cooke v. Cooke, 2 Phil. Ecc. 40; Stone v. Stone, 3 Curt. Ecc. 341; Mellor v. Mellor, 11 British Columbia 327; Smith v. Smith, 4 Swab. & Tr. 228; Weber v. Weber, 1 Swab. & Tr. 219; Young v. Young, 2 Cent. L. J. 204.

[2]Baldwin v. Baldwin, 72 Mass.

The presumption of the wife's innocence entitles her to temporary support and counsel fees whether she is the plaintiff or defendant.[3]

Alimony pending the suit should not be asked for before the defendant has been summoned.[4]

§ 691. **Jurisdiction of court to grant temporary alimony.**—Generally it is the court with jurisdiction of the cause, and in which it is pending, that may award temporary alimony;[5] and where a change of venue is demanded the court will retain jurisdiction until the order granting the change is entered.[6] So, where two suits for divorce are pending, one by each of the spouses, in different courts, the court first acquiring jurisdiction has exclusive power to grant temporary alimony.[7]

Jurisdiction to allow temporary alimony exists only with jurisdiction to allow relief on the merits of the main controversy.[8] A court which has no jurisdiction to award alimony has no jurisdiction to find facts upon which alimony may be based, and such findings are therefore not entitled to full faith and credit.[9]

Temporary alimony will be allowed when the jurisdiction of the court over either the plaintiff or defendant, so far as domicil is concerned, is denied.[10]

§ 692. **Proceedings in which allowed.**—The power to allow temporary alimony to the wife is incidental to the power to act in matrimonial actions, but is limited to proceedings involving the assertion of the marital relation, such as divorce, separate maintenance actions, and actions to annul a marriage, especially where

341; Tayman v. Tayman, 2 Md. Ch. 393.

[3]Crane v. Crane, 128 Md. 214, 97 Atl. 535; Coles v. Coles, 2 Md. Ch. 341; Gundry v. Gundry, 11 Okla. 426, 68 Pac. 509.

[4]Stallings v. Stallings, 127 Ga. 464, 56 S. E. 469, 9 L. R. A. (N. S.) 593; Daiger v. Daiger, 2 Md. Ch. 335; Weishaupt v. Weishaupt, 27 Wis. 621. This allowance is frequently called "suit money" in this country and costs in England. Brown v. Brown, 135 Mich. 141, 97 N. W. 396; Motley v. Motley, 93 Mo. App. 473, 67 S. W. 741; Kiser v. Kiser, 108 Va. 730, 62 S. E. 937. See note, 60 Am Dec. 673.

[5]Bennett v. Southard, 35 Cal. 688; McGee v. McGee, 10 Ga. 477.

[6]Moe v. Moe, 39 Wis. 308.

[7]Mahn v. Mahn, 63 Mo. App. 375.

[8]People v. District Court, 66 Colo. 438, 182 Pac. 5.

[9]McCoy v. McCoy, 191 Iowa 973, 183 N. W. 377.

[10]Dahne v. Superior Court, 31 Cal. App. 664, 161 Pac. 280; Odum v. Odum, 132 Ga. 437, 64 S. E. 470.

the husband is the complaining party;[11] and is independent of statute,[12] although it is very generally sanctioned by statutes.[13]

The existence of marital relations is the controlling fact which justifies the allowance of temporary alimony;[13a] hence it may not be granted in an action to set aside a decree of divorce either a vinculo or from bed and board,[14] even when the decree was obtained by fraud.[15] But this rule does not obtain where the court granting the divorce was without jurisdiction.[16]

It is essential that proceedings involving in some form the marriage tie, or the marital obligations, be actually pending.[17] The allowance, however, may be authorized after the decree has been set aside.[18] The allowance is held proper in a suit to set

[11]Richardson v. Richardson, 4 Port (Ala.) 467, 30 Am. Dec. 538; Bauman v. Bauman, 18 Ark. 320, 68 Am. Dec. 171; Spooner v. Spooner, 149 Ga. 467, 100 S. E. 571; Frith v. Frith, 18 Ga. 273, 63 Am. Dec. 289; McGee v. McGee, 10 Ga. 477; Jones v. Jones, 18 Maine 308, 36 Am. Dec. 723; Tayman v. Tayman, 2 Md. Ch. 393; Goldsmith v. Goldsmith, 6 Mich. 285; Porter v. Porter, 41 Miss. 116; Ryan v. Ryan, 9 Mo. 539; Vroom v. Marsh, 29 N. J. Eq. 15; Bray v. Bray, 6 N. J. Eq. 27; Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460; Griffin v. Griffin, 47 N. Y. 134; Allen v. Allen, 8 Abb. N. C. (N. Y.) 175, 58 How. Prac. 381, 59 How. Prac. 27; North v. North, 1 Barb. Ch. N. Y. 241, 43 Am. Dec. 778; Ford v. Ford, 10 Abb. Pr. N. S. (N. Y.) 78, 41 How. Pr. 169; Leckney v. Leckney, 26 R. I. 441, 59 Atl. 311. See however Kelley v. Kelley, 161 Mass. 111, 36 N. E. 837, 25 L. R. A. 806, 42 Am. St. 389.

[12]Daniels v. Daniels, 9 Colo. 134, 10 Pac. 657; North v. North, 1 Barb. Ch. (N. Y.) 241, 43 Am. Dec. 778; Ford v. Ford, 10 Abb. Pr. N. S. (N. Y.) 78, 41 How. Pr. 169; Kinzey v. Kinzey, 7 Daly. (N. Y.) 463.

[13]Stallings v. Stallings, 127 Ga. 464, 56 S. E. 469, 9 L. R. A. (N. S.) 593; Webber v. Webber, 79 N. Car. 572; Chapman v. Parsons, 66 W. Va. 307, 66 S. E. 461, 24 L. R. A. (N. S.) 1015, 135 Am. St. 1033, 19 Ann. Cas. 453.

[13a]McKenna v. McKenna, 70 Ill. App. 340; Lake v. Lake, 194 N. Y. 179, 87 N. E. 87.

[14]McFarland v. McFarland, 51 Iowa 565, 2 N. W. 269; Wilson v. Wilson, 49 Iowa 544; Lake v. Lake, 194 N. Y. 179, 87 N. E. 87; Chapman v. Parsons, 66 W. Va. 307, 66 S. E. 461, 24 L. R. A. (N. S.) 1015, 135 Am. St. 1033, 19 Ann. Cas. 453.

[15]McKenna v. McKenna, 70 Ill. App. 340; Wilson v. Wilson, 99 Iowa 688, 68 N. W. 910; McFarland v. McFarland, 51 Iowa 565, 2 N. W. 269; Lake v. Lake, 194 N. Y. 170, 87 N. E. 87; Corder v. Speake, 37 Ore. 105, 51 Pac. 647; Chapman v. Parsons, 66 W. Va. 307, 66 S. E. 461, 24 L. R. A. (N. S.) 1015, 135 Am. St. 1033, 19 Ann. Cas. 453. But see Stewart v. Stewart, 101 Ark. 86, 141 S. W. 193.

[16]Ex parte Smith, 34 Ala. 455; Shrader v. Shrader, 36 Fla. 502, 18 So. 672. See also Lake v. Lake, 194 N. Y. 179, 87 N. E. 87.

[17]Downing v. Downing, 7 Kulp. (Pa.) 138.

[18]Golden v. Golden, 102 Ala. 353, 14 So. 638.

aside articles of separation,[19] in an action to enforce a marriage settlement,[20] and on the intervention of the wife in a cause in which the validity of her marriage may be affected by a judgment in the case.[21] This form of alimony may be allowed during the period following the final decree and before compliance with its terms as to permanent alimony,[22] or after a decree of divorce pending the husband's motion to modify such decree as to permanent alimony,[23] or where there is a decree nisi for divorce until such decree is made final,[24] or where there is an undisposed ground of demurrer to the complaint,[25] even though the demurrer is for want of jurisdiction.[26]

§ 693. **Allowance in annulment suits.**—The wife necessarily disclaims a valid marriage by her action to annul the marriage and hence the putative husband is under no obligation to support her, and consequently temporary alimony will be denied, for the right to alimony depends on a valid marriage.[27] Very generally however, temporary alimony will be allowed where the action is brought by the husband who seeks to have the marriage ceremony annulled and the wife denies the invalidity of the marriage, and he proceeds on the ground that the marriage was forced[28]

[19]Daniels v. Daniels, 9 Colo. 134, 10 Pac. 657.

[20]Wilson v. Wilson, 1 Desaus. (S. Car.) 219.

[21]Anonymous, 15 Abb. Pr. N. S. (N. Y.) 307.

[22]Delor v. Donovan, 157 Mich. 587, 122 N. W. 196.

[23]Smith v. Smith, 151 Mo. App. 649, 132 S. W. 312.

[24]Brigham v. Brigham, 147 Mass. 159, 16 N. E. 780; Ellis v. Ellis, 52 L. J. P. 99.

[25]Langan v. Langan, 91 Cal. 654, 27 Pac. 1092; Disborough v. Disborough, 48 N. J. Eq. 646, 25 Atl. 20.

[26]Ex parte King, 27 Ala. 387; Miller v. Miller, 33 Fla. 453, 15 So. 222, 24 L. R. A. 137; Gray v. Gray, 143 N. Y. 354, 38 N. E. 301; Turrel v. Turrel, 2 Johns. Ch. (N. Y.) 391; Mix v. Mix, 1 Johns. Ch. (N. Y.) 108; Ronalds v. Ronalds, 3 P. & M. 259.

[27]Taylor v. Taylor, 7 Colo. App. 549, 45 Pac. 675. Brown v. Brown, 18 Ill. App. 445; Jones v. Brinsmade, 183 N. Y. 258, 76 N. E. 22, 3 L. R. A. (N. S.) 192, 111 Am. St. 746, 5 Ann. Cas. 378; Bloodgood v. Bloodgood, 59 How. Pr. (N. Y.) 42; Bartlett v. Bartlett, Clarke Ch. (N. Y.) 460; Meo v. Meo, 22 Abb. N. C. (N. Y.) 58, 15 Civ. Proc. (N. Y.) 308, 2 N. Y. S. 569; Lea v. Lea, 104 N. Car. 603, 10 S. E. 488, 17 Am. St. 692; Stewart v. Vanderwort, 34 W. Va. 524, 12 S. E. 736, 12 L. R. A. 50.

[28]Allen v. Super. Ct. 133 Cal. 504, 65 Pac. 977; Poole v. Wilbur, 95 Cal. 339, 30 Pac. 548; Prine v. Prine, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87; Webb v. Wayne Cir. Judge, 144 Mich. 674, 108 N. W. 358; Blankenmiester v. Blankenmiester, 106 Mo. App. 390, 8 S. W. 706; Willits v.

under duress, or was due to the fraud of the wife,[29] or that the wife had a husband living at the time of the marriage;[30] or on account of his then insanity,[31] or intoxication,[32] or his non-age.[33] It will not, however, be allowed against a guardian ad litem;[34] or next friend.[35] And so in a mother's suit to annul her son's marriage on account of his non-age, temporary alimony and counsel fees can not be allowed against her personally.[36]

The alimony will not be ordered in actions brought by the husband where the wife admits there was no valid marriage.[37]

§ 694. **Discretion of court.**—Whether temporary alimony may be allowed at all, as well as the amount thereof, is a matter resting in the discretion of the trial court;[38] although the former

Willits, 76 Nebr. 228, 107 N. W. 379, 5 L. R. A. (N. S.) 767, 14 Ann. Cas. 883; Vandegrift v. Vandegrift, 30 N. J. Eq. 76; Vroom v. Marsh, 29 N. J. Eq. 15; Higgins v. Sharp, 164 N. Y. 4, 58 N. E. 9; Griffin v. Griffin, 47 N. Y. 134; Wabberson v. Wabberson, 27 Misc. 125, 57 N. Y. S. 405; Lee v. Lee, 66 How. Pr. (N. Y.) 207; North v. North, 1 Barb. Ch. (N. Y.) 241, 43 Am. Dec. 778; O'Dea v. O'Dea, 31 Hun (N. Y.) 441, reversed 101 N. Y. 23, 4 N. E. 110; Cline v. Cline, 1 Phill. 383, 9 Leg. Int. 130.

[29]Allen v. Superior Court, 133 Cal. 504, 65 Pac. 977; Frith v. Frith, 18 Ga. 273, 63 Am. Dec. 289; DiLorenzo v. DiLorenzo, 78 App. Div. 577, 79 N. Y. S. 566; Bardin v. Bardin, 4 S. Dak. 305, 56 N. W. 1069, 46 Am. St. 791; Eliot v. Eliot, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568.

[30]Wabberson v. Wabberson, 27 Misc. 125, 57 N. Y. S. 405; O'Dea v. O'Dea, 31 Hun (N. Y.) 441; reversed, 101 N. Y. 23, 4 N. E. 110; North v. North, 1 Barb. Ch. (N. Y.) 241, 43 Am. Dec. 778. But see to the contrary, Freeman v. Freeman, 49 N. J. Eq. 102, 23 Atl. 113. Where in an action by a husband against the wife for annulment of the marriage tie because of her former marriage, the court upon the final hearing and a decision in favor of the wife, awarded her extra expenses for counsel fees beyond the taxable costs. Griffin v. Griffin, 47 N. Y. 134.

[31]Jones v. Brinsmade, 183 N. Y. 258, 76 N. E. 22, 3 L. R. A. (N. S.) 192, 111 Am. St. 746, 5 Ann. Cas. 378; Portsmouth v. Portsmouth, 3 Add. Ecc. 63; Smyth v. Smyth, 2 Add. Ecc. 254.

[32]Prine v. Prine, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87.

[33]Eliot v. Eliot, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568.

[34]Stivers v. Wise, 18 App. Div. 316, 46 N. Y. S. 9.

[35]Osgood v. Osgood, 2 Paige (N. Y.) 621; Thayer v. Thayer, 9 R. I. 377.

[36]Stivers v. Wise, 18 App. Div. 316, 46 N. Y. S. 9.

[37]Appleton v. Warner, 51 Barb. (N. Y.) 270.

[38]Snider v. Snider, 179 Ind. 583, 102 N. E. 32; Main v. Main, 168 Iowa 353, 150 N. W. 590; Wills v. Wills, 168 Ky. 35, 181 S. W. 619; Winkler v. Winkler, 104 Miss. 1, 61 So. 1, Ann. Cas. 1915C, 1250; Collett v. Collett, 170 Mo. App. 590, 157 S. W. 90; Smith v. Smith, 33 N. J. Eq. 458; Vroom v. Marsh, 29 N. J.

question has been held to be a matter of law, and only the latter a matter of discretion.[39] A safer position is that in neither case is the discretion an arbitrary one, but it is a sound, or as it is sometimes called, a judicial discretion to be exercised in accordance with well established principles of law,[40] and being judicial, it is subject to review.[41] But in the absence of gross abuse the order of the trial court in fixing the amount of temporary alimony will not be disturbed.[42]

In exercising its discretion, the court may consider the cause of separation,[43] the circumstances of the parties,[44] and the circumstances of each particular case.[45]

§ 695. **Necessity of existence of marital relation.**—The right to temporary alimony depends on the establishment[46] of the mari-

Eq. 15; Rudasill v. Rudasill (Tex. Civ. App.), 206 S. W. 983.

[39]Schonwald v. Schonwald, 62 N. Car. (Phil. Eq.) 215.

[40]Arendall v. Arendall, 61 Fla. 496, 54 So. 857, Ann. Cas. 1913A, 662; Haddon v. Haddon, 36 Fla. 413, 18 So. 779; Foss v. Foss, 100 Ill. 576; Small v. Small, 42 Iowa 111; Harrison v. Harrison, 49 Mich. 240; Collins v. Collins, 80 N. Y. 1; Leslie v. Leslie, 6 Abb. Pr. N. S. (N. Y.) 193; Summer v. Summer, 54 Wis. 642.

[41]Hecht v. Hecht, 28 Ark. 92; Turner v. Turner, 80 Cal. 141, 22 Pac. 72; Kendrick v. Kendrick, 105 Ga. 38; Cooper v. Cooper, 85 Ill. App. 575; Peck v. Peck, 113 Ind. 168, 15 N. E. 12; Aldrich v. Aldrich, 74 Hun 638, 26 N. Y. S. 344, 56 N. Y. St. Rep. 345.

[42]Methvin v. Methvin, 15 Ga. 97, 60 Am. Dec. 664; Sadler v. Sadler, 115 S. Car. 217, 105 S. E. 285; Hennis v. Hennis, 180 N. Car. 606, 105 S. E. 274. In Loveren v. Loveren, 100 Cal. 493, 35 Pac. 87, it is stated that no better evidence can be adduced of her ability to support herself than the fact that she has been able to incur expenses and pay them with money borrowed by her entirely on the strength of her own credit.

[43]Spooner v. Spooner, 149 Ga. 467, 100 S. E. 571.

[44]Keefer v. Keefer, 140 Ga. 18, 78 S. E. 462, 46 L. R. A. (N. S.) 527.

[45]Singletary v. Singletary, 130 Ga. 435, 60 S. E. 1048; Nissen v. Farquhar, 121 La. 642, 46 So. 679; Mulhall v. Mulhall, 120 Md. 22, 87 Atl. 490. Scism v. Scism, 184 Mo. App. 543, 167 S. W. 455; Brunson v. Brunson, 94 S. Car. 11, 77 S. E. 704.

[46]Fountain v. Fountain, 80 Ark. 481, 97 S. W. 656, 10 Ann. Cas. 557; Kiefer v. Kiefer, 4 Colo. App. 506, 36 Pac. 621; Arendall v. Arendall, 61 Fla. 496, 54 So. 957, Ann. Cas. 1913A, 662; Wood v. Wood, 56 Fla. 882, 47 So. 560; Banks v. Banks, 42 Fla. 362, 29 So. 318; Swearingen v. Swearingen, 18 Ga. 316; Methvin v. Methvin, 15 Ga. 97; McGee v. McGee, 10 Ga. 477; Paul v. Paul, 201 Ill. App. 595; McKenna v. McKenna, 70 Ill. App. 340; Wilson v. Wilson, 49 Iowa 544; Strode v. Strode, 3 Bush. (Ky.) 227, 96 Am. Dec. 211; Kellogg v. Donovan, 167 Mich. 95, 132 N. W. 501; Lapp v. Lapp, 43 Mich. 287, 5 N. W. 317; Reed v. Reed, 85 Miss. 126, 37 So. 642; Carroll v. Carroll,

tal relation, the burden of proof of which is upon the wife.[47] A prima facie showing of such relation will usually suffice.[48] A less degree of proof is required than on the final hearing of the cause,[49] and when there is a fair probability at such hearing that the marriage will be proven, temporary alimony will be allowed.[50] There is a presumption of validity of a formal marriage, which has been consummated.[51] A marriage de jure need not be shown,[52] as temporary alimony may be allowed where the marriage is simply de facto,[53] as in the case of common-law marriage.[54] But temporary alimony will be denied where it is clear that the marriage was void ab initio,[55] and the wife knew it to be

68 Mo. App. 190; Lake v. Lake, 194 N. Y. 179, 87 N. E. 87; Collins v. Collins, 80 N. Y. 1; Collins v. Collins, 71 N. Y. 269; Chapman v. Parsons, 66 W. Va. 307, 66 S. E. 461, 19 Ann. Cas. 453; Blackmore v. Mills, 16 W. R. 893, 18 L. T. (N. S.) 586.

[47]Robinson v. Robinson, 82 N. J. Eq. 466, 88 Atl. 951.

[48]Ex parte Jones, 172 Ala. 186, 55 So. 491; Fountain v. Fountain, 80 Ark. 681, 97 S. W. 656; Hite v. Hite, 124 Cal. 389, 57 Pac. 227, 45 L. R. A. 793, 71 Am. St. 82; Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; Daniels v. Daniels, 9 Colo. 133, 10 Pac. 657; Webb v. Webb, 150 Ga. 670, 104 S. E. 637; Bowman v. Bowman, 24 Ill. App. 165; McFarland v. McFarland, 51 Iowa 565, 2 N. W. 269; Litowich v. Litowich, 19 Kans. 451, 27 Am. Rep. 145; Fisk v. Fisk, 22 La. Ann. 401; Ascher v. Ascher, 202 Mo. App. 622, 216 S. W. 576; Brinkley v. Brinkley, 50 N. Y. 184; Lau v. Lau, 156 App. Div. 912, 140 N. Y. S. 310, 141 N. Y. S. 1128; Herforth v. Herforth, 2 Abb. Pr. N. S. (N. Y.) 483; Smith v. Smith, 1 Edw. Ch. (N. Y.) 255; Bardin v. Bardin, 4 S. Dak. 305, 56 N. W. 1059, 46 Am. St. 791; Smyth v. Smyth, 2 Add. Ecc. 254; Bradley v. Bradley, 3 Chan. Chamb. (Ont.) 329; McGrath v. McGrath, 2 Chan. Chamb. (Ont.) 411. The prima facie showing by the wife may be defeated by evidence. Vincent v. Vincent, 16 Daly (N. Y.) 535, 17 N. Y. S. 497.

[49]Sharon v. Sharon, 75 Cal. 43, 16 Pac. 345; Bardin v. Bardin, 4 S. Dak. 305, 56 N. W. 1069, 46 Am. St. 791.

[50]Hochreiter v. Hochreiter, 138 Ill. App. 373; Bowman v. Bowman, 24 Ill. App. 165; Brinkley v. Brinkley, 47 N. Y. 184, 10 Am. Rep. 460.

[51]Harris v. Harris, 8 Ill. App. 57; Lau v. Lau, 156 App. Div. 912, 140 N. Y. S. 310.

[52]Eickhoff v. Eickhoff, 29 Colo. 295, 68 Pac. 237, 93 Am. St. 64; Frith v. Frith, 18 Ga. 273, 63 Am. Dec. 289; Brown v. Brown, 18 Ill. App. 445; Blythe v. Blythe, 25 Iowa 266; Vroom v. Marsh, 29 N. J. Eq. 15; Bird v. Bird, 1 Lee Ecc. 209.

[53]Eickhoff v. Eickhoff, 29 Colo. 295, 68 Pac. 237, 93 Am. St. 64.

[54]Bowman v. Bowman, 24 Ill. App. 165; Vincent v. Vincent, 16 Daly (N. Y.) 534, 17 N. Y. S. 497.

[55]Kott v. Kott, (N. J.), 51 Atl. 15; Freeman v. Freeman, 49 N. J. Eq. 102, 23 Atl. 113; Collins v. Collins, 80 N. Y. 1; Collins v. Collins, 71 N. Y. 269; Leckney v. Leckney, 26 R. I. 441, 59 Atl. 311. Brown v. Brown (Va.), 24 S. E. 238.

so.[56] So, it will be denied where the wife admits in her answer that the marriage is a nullity.[57]

§ 696. **Husband's ability.**—In order to allow the court to grant alimony pendente lite, the husband must admit, or it must be proved to the satisfaction of the court, that he is able to pay,[58] but mere poverty is no defense,[59] especially if the suit is by him.[60] Even when suing for a divorce in forma pauperis he has been ordered to pay alimony pendente lite;[61] and if he is an able-bodied man,[62] with vigor, business ability, and earning capacity,[63] the court will compel him to exert such ability if he has no other resources.[64]

Temporary alimony may be allowed where he receives a voluntary allowance from his father.[65]

[56]Robinson v. Robinson, 82 N. J. Eq. 466, 88 Atl. 951; Dye v. Dye, 140 App. Div. 309, 125 N. Y. S. 242.

[57]Appleton v. Warner, 51 Barb. (N. Y.) 270.

[58]Glenn v. Glenn, 44 Ark. 46; Arendall v. Arendall, 61 Fla. 496, 54 So. 957, Ann. Cas. 1913A, 662; Ayres v. Ayres, 99 Ga. 325, 25 S. E. 674; Vinson v. Vinson, 94 Ga. 492, 19 S. E. 898; Burgess v. Burgess, 25 Ill. App. 525; Cignoni v. Cignoni, 139 La. 978, 72 So. 707; Ross v. Ross, 47 Mich. 185, 10 N. W. 193; Weber v. Weber, 195 Mo. App. 126, 189 S. W. 577; Nathan v. Nathan, 102 Nebr. 59, 165 N. W. 955; Gaylord v. Gaylord, 57 N. Car. 74; Fowler v. Fowler, 61 Okla. 280, 161 Pac. 227; Deemer v. Deemer, 7 Pa. Co. Ct. 554; Lynn v. Lynn, 76 Pa. Super. Ct. 428; Battey v. Battey, 1 R. I. 212; Pollock v. Pollock, 7 S. Dak. 331, 64 N. W. 165; Beavan v. Beavan, 8 Jur. (N. S.) 1110.

[59]Burghoffer v. Burghoffer, 46 Ill. App. 396; Rublinsky v. Rublinsky, 24 N. Y. S. 920; Cohen v. Cohen, 11 Misc. 704, 32 N. Y. S. 1082, 1 N. Y. Ann. Cas. 226, 66 N. Y. St. Rep. 336; Kittle v. Kittle, 8 Daly (N. Y.) 72; Hallock v. Hallock, 4 How. Pr. (N. Y.) 160; Muse v. Muse, 84 N. Car. 35; Miller v. Miller, 75 N. Car. 70. In Lane v. Lane, 22 Ill. App. 529, it is said: "The allowance is but temporary and is subject to modification, and its enforcement is under the control of the court. It is not to be assumed that the court would punish for contempt when the showing was clear that the defendant was really unable to perform." See note, 60 Am. Dec. 676.

[60]Morton v. Morton, 33 Mo. 614; Mangels v. Mangels, 6 Mo. App. 481; Hallock v. Hallock, 4 How. Pr. 160; Laurie v. Laurie, 9 Paige (N. Y.) 234; Lewis v. Lewis, 3 Johns. (N. Y.) 519; Bird v. Bird, 1 Lee Ecc. 575.

[61]Moon v. Moon, 43 N. J. Eq. 403, 3 Atl. 350.

[62]Muse v. Muse, 84 N. Car. 35.

[63]O'Hern v. O'Hern, 206 Mo. App. 651, 228 S. W. 533; Ex Parte Messervy, 80 S. Car. 285, 61 S. E. 445.

[64]Foote v. Foote, 22 Ill. 425; Muse v. Muse, 84 N. Car. 35; Bailey v. Bailey, 21 Grat. (Va.) 43; Campbell v. Campbell, 37 Wis. 206.

[65]Moss v. Moss, 15 W. R. 532.

§ 697. **Right of husband to allowance.**—A husband can not claim allowance under a statute which allows alimony to the wife exclusively,[66] but he may have such right under a general statute,[67] or in equity.[68]

§ 698. **Wife's good faith.**—Generally a wife is not entitled to temporary alimony unless she can show a prima facie good cause for divorce,[69] and it may accordingly be denied where she is at fault,[70] or the action has been brought or is defended in bad faith.[71] In some jurisdictions, allowance pendente lite is made to the wife without inquiry into the merits, and as a matter of course,[72] whether the wife is plaintiff or defendant.[73] So where the wife is the defendant she may be entitled to alimony if she denies the allegations of the complaint,[74] or files a cross-complaint asking for affirmative relief.[75] When the action is by the wife the merits may be considered to determine the good faith of the action;[76] but unless there is an issue of marriage in the

[66]State v. Templeton, 18 N. Dak. 525, 123 N. W. 283, 25 L. R. A. (N. S.) 234.

[67]Small v. Small, 42 Iowa 111.

[68]Livingston v. Superior Ct., 117 Cal. 633, 49 Pac. 836, 38 L. R. A. 175; Hagert v. Hagert, 22 N. Dak. 290, 133 N. W. 1035, 38 L. R. A. (N. S.) 966, Ann. Cas. 1914B, 925.

[69]Standley v. Standley, 143 Ill. App. 278; Heyman v. Heyman, 119 App. Div. 182, 104 N. Y. S. 227; Post v. Post, 55 Misc. 538, 105 N. Y. S. 910; Ensign v. Ensign, 54 Misc. 289, 291, 105 N. Y. S. 917.

[70]Singletary v. Singletary, 130 Ga. 435, 60 S. E. 1048; George v. George, 130 Ga. 608, 61 S. E. 401; Wills v. Wills, 168 Ky. 35, 181 S. W. 619; Scism v. Scism, 184 Mo. App. 543, 167 S. W. 455.

[71]Hite v. Hite, 124 Cal. 389, 57 Pac. 227, 45 L. R. A. 793, 71 Am. St. 82; Storke v. Storke, 99 Cal. 621, 34 Pac. 339; Poole v. Wilbur, 95 Cal. 339, 30 Pac. 548; Langan v. Langan, 91 Cal. 654, 27 Pac. 1092; Swearingen v. Swearingen, 18 Ga. 316; Methvin v. Methvin, 15 Ga. 97, 60 Am. Dec. 674; Litowitch v. Litowitch, 19 Kans. 451, 27 Am. Rep. 145; Bradford v. Bradford, 80 Miss. 467, 31 So. 963 (suit brought to compel husband to convey property to her); Kirrigan v. Kirrigan, 15 N. J. Eq. 146.

[72]Sparks v. Sparks, 25 App. D. C. 356; Methvin v. Methvin, 15 Ga. 97, 60 Am. Dec. 664; Wygodsky v. Wygodsky, 134 Md. 344, 106 Atl. 698; Dicus v. Dicus, 131 Md. 87, 101 Atl. 697. See note, 63 Am. Dec. 290.

[73]Vroom v. Marsh, 29 N. J. Eq. 15; McFarland v. McFarland, 51 Iowa 565, 2 N. W. 269.

[74]Suydam v. Suydam, 79 N. J. Eq. 144, 80 Atl. 1057; Brown v. Brown, 83 Misc. 597, 145 N. Y. S. 471.

[75]Nissen v. Farquhar, 121 La. 642, 46 So. 679; Welsh v. Badeaux, 131 La. 469, 59 So. 905.

[76]Gay v. Gay, 146 Cal. 237, 79 Pac 885; Kowalsky v. Kowalsky, 145 Cal. 374, 78 Pac. 877; Cooper v. Cooper, 85 Ill. App. 575, affd. 185 Ill. 163, 56 N. E. 1059.

proceedings, the court may go no further into the merits of the case than to determine that the wife is proceeding in good faith.[77]

§ 699. **Effect of agreements between the parties as to support on separation.**—A properly executed agreement[78] between husband and wife, upon their separation, for her support is valid and binding,[79] provided it is free from fraud and imposition, or the wife has not been over reached.[80] But if such agreement is not fair and equitable, temporary alimony may be allowed.[81] And it has been allowed, notwithstanding such agreement and where no question was raised as to its fairness, but in such case prior advances thereon may be deducted from such alimony after allowance.[82] Such a contract is dissolved when the husband repudiates it, and the wife brings a suit against him for divorce and accepts alimony therein ordered.[83]

A release by the wife pending her action for alimony from all claims therefor does not bar a subsequent application by her for temporary alimony for the support of their child in a suit for divorce brought by him.[84]

§ 700. **Defenses and objections.**—As a general rule temporary alimony will be denied where the defendant admits the charges in the complaint,[85] or by her laches in making the appli-

[77]Kowalsky v. Kowalsky, 145 Cal. 394, 78 Pac. 877; Cooper v. Cooper, 85 Ill. App. 575, affd. in 185 Ill. 163, 56 N. E. 1059.

[78]Bulke v. Bulke, 173 Ala. 138, 55 So. 490; Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; Campbell v. Campbell, 73 Iowa 482, 35 N. W. 522; Bailey v. Dillon, 186 Mass. 244, 71 N. E. 538, 66 L. R. A. 427; Silverman v. Silverman, 140 Mass. 560, 5 N. E. 639; Cooper v. Cooper, 17 Mich. 205, 97 Am. Dec. 182; McCloskey v. McCloskey, 68 Mo. App. 199; Collins v. Collins, 80 N. Y. 1; Bartlett v. Bartlett, Clarke Ch. (N. Y.) 460; Miller v. Miller, 43 How. Pr. (N. Y.) 125; Rose v. Rose, 11 Paige (N. Y.) 166; Archbell v. Archbell, 158 N. Car. 408, 74 S. E. 327, Ann. Cas. 1913D, 261; Powell v. Powell, 3 P. & M. 186.

[79]Wilson v. Wilson, 40 Iowa 230; Wright v. Wright, 162 Mich. 445, 127 N. W. 328; Randolph v. Field, 84 Misc. 403, 146 N. Y. S. 247; Dennison v. Dennison, 52 Misc. 37, 102 N. Y. S. 621.

[80]Bulke v. Bulke, 173 Ala. 138, 55 So. 490; Daniels v. Daniels, 9 Colo. 133, 10 Pac. 657; Lee v. Lee, 55 Mont. 426, 178 Pac. 173; Bloom v. Bloom, 8 Pa. Dist. R. 563, 22 Pa. Co. Ct. 433.

[81]Hill v. Hill, 70 Colo. 47, 197 Pac. 236.

[82]Pinckard v. Pinckard, 22 Ga. 31, 68 Am. Dec. 481.

[83]Randolph v. Field, 165 App. Div. 279, 150 N. Y. S. 822.

[84]Norrell v. Norrell, 138 Ga. 64, 74 S. E. 757.

[85]Scott v. Scott, 17 Ind. 309.

cation,[86] or where it appears that she has sufficient income to support herself during the trial, and to employ and advance the necessary costs and expenses,[87] or where friends and relatives are assisting her,[88] or where she is living in adultery with a paramour,[89] or where she is living with a second husband under a void marriage,[90] or it is asked for debts already incurred on the wife's credit,[91] or where she has deserted her husband for insufficient cause, at least until she offers to return to him, and he has refused to receive her.[92]

The good faith of the wife in the belief that she had a right to marry after her divorce from her former husband who was then living and known by her to be so, will not entitle her to temporary alimony from a second husband seeking annulment where under the statute she was prohibited from entering into a marriage contract.[93] Temporary alimony may be allowed though the wife may have been unchaste before marriage if this was known to the husband at the time of the marriage.[94]

§ 701. **Effect of wife's ownership of property on right to temporary alimony.**—Prior to the enactment of the married woman's acts which give the wife the right to control her own property, and enjoy her own earnings, temporary alimony was allowed[95] al-

[86]Verbeeck v. Verbeeck (N. J.), 115 Atl. 136.

[87]Turner v. Turner, 80 Cal. 141, 22 Pac. 72; Harding v. Harding, 40 Ill. App. 202; Rawson v. Rawson, 37 Ill App. 491; Kenemer v. Kenemer, 26 Ind. 330; Westerfield v. Westerfield, 36 N. J. Eq. 195; Morrell v. Morrell, 2 Barb. (N. Y.) 480; George v. George, 1 P. & M. 554; Thompson v. Thompson, 1 P. & M. 553. A husband will not be compelled to pay temporary alimony to the wife when she gives away rents accruing from her own property. Abrams v. Rosenthal, 151 La. 987, 92 So. 567.

[88]Zeigenfuss v. Zeigenfuss, 21 Mich. 414; Bradstreet v. Bradstreet, 6 Mackey (17 D. C.) 502; Eaton v. Eaton, 2 P. & M. 51.

[89]Griffin v. Griffin, 21 How. Prac. (N. Y.) 364; Griffin v. Griffin, 23 How. Pr. (N. Y.) 189; Miller v. Miller, 2 Kulp. (Pa.) 309; Holt v. Holt, 1 P. & M. 610.

[90]Stillman v. Stillman, 99 Ill. 196, 39 Am. Rep. 21; Coad v. Coad, 40 Wis. 392.

[91]Bohnert v. Bohnert, 91 Cal. 428, 27 Pac. 732; Beadleston v. Beadleston, 103 N. Y. 402, 8 N. E. 735; Emerson v. Emerson, 26 N. Y. S. 292; Atherton v. Atherton, 82 Hun 179, 31 N. Y. S. 977.

[92]Begbie v. Begbie, 7 N. J. Eq. 98.

[93]Hopper v. Hopper, 92 Hun 415, 36 N. Y. S. 610.

[94]West v. West, 126 Va. 696, 101 S. E. 876.

[95]Ross v. Ross, 47 Mich. 185, 10 N. W. 193; Rutledge v. Rutledge, 177 Mo. App. 466, 119 S. W. 489; Johnson v. Johnson, 4 N. J. L. 241; Dougherty v. Dougherty, 8 N. J. Eq. 540; Davis v. Davis, 75 N. Y. 221; Bissell v. Bissell, 1 Barb. (N. Y.)

most as a matter of course, and as a matter of right.[96] Under these laws there is less reason for granting temporary alimony as a matter of right,[97] and now very generally temporary alimony will be denied the wife if it is found that she has sufficient separate property or means of her own to provide for her separate maintenance during the litigation.[98]

It is very generally required she must affirmatively show that the necessity for an allowance exists on account of her poverty,[99] for there is no presumption of law that the wife has no property.[1] But the allowance may be made notwithstanding ownership of

430; Hollerman v. Hollerman, 1 Barb. (N. Y.) 64; Boubon v. Boubon, 26 N. Y. Super. Ct. 715; Leslie v. Leslie, 6 Abb. Pr. N. S. (N. Y.) 193; Wright v. Wright, 1 Edw. Ch. (N. Y.) 62; Hammond v. Hammond, Clarke Ch. (N. Y.) 151.

[96]Gibson v. Gibson, 203 Ala. 466, 83 So. 478; Rast v. Rast, 113 Ala. 319, 21 So. 34; Methvin v. Methvin, 15 Ga. 97, 60 Am. Dec. 664.

[97]Wooley v. Wooley, 24 Ill. App. 431; Verner v. Verner, 62 Miss. 260; Suydam v. Suydam, 79 N. J. Eq. 144, 80 Atl. 1057; Marker v. Marker, 11 N. J. Eq. 256; Abramowitz v. Abramowitz, 140 N. Y. S. 275; Greenburg v. Greenburg, 134 App. Div. 419, 119 N. Y. S. 227; State v. Superior Court, 55 Wash. 347, 104 Pac. 771, 25 L. R. A. (N. S.) 387.

[98]Turner v. Turner, 44 Ala. 437; Pinckard v. Pinckard, 22 Ga. 31, 68 Am. Dec. 481; Stillman v. Stillman, 99 Ill. 196, 39 Am. Rep. 21; Kenemer v. Kenemer, 26 Ind. 330; Morse v. Morse, 25 Ind. 156; Logan v. Logan, 2 B. Mon. (Ky.) 142; Hood v. Hood, 138 Md. 355, 113 Atl. 895, 15 A. L. R. 774; Coles v. Coles, 2 Md. Ch. 341; Daiger v. Daiger, 2 Md. Ch. 335; Brown v. Brown, 22 Mich. 242; Evans v. Evans, 126 Miss. 1, 88 So. 481; Ross v. Ross, 89 Miss. 66, 42 So. 382; Porter v. Porter, 41 Miss. 116; Speiser v. Speiser, 188 Mo. App 328, 175 S. W. 122; Smith v. Smith, (Mo. App.), 144 S. W. 1199; Rutledge v. Rutledge, 177 Mo. App. 460, 119 S. W. 489; Libbey v. Libbey, 157 Mo. App. 701, 138 S. W. 685; Rumpring v. Rumpring, 41 Mont. 33, 108 Pac. 10; Verbuck v. Verbuck (N. J. Ch.), 115 Atl. 136; Suydun v. Suydun, 79 N. J. Eq. 144, 80 Atl. 1057; Westerfield v. Westerfield, 36 N. J. Eq. 195; Ashbrooke v. Ashbrooke, 132 App. Div. 907, 116 N. Y. S. 1100; Maxwell v. Maxwell, 28 Hun (N. Y.) 566; Miller v. Miller, 75 N. Car. 70; Lishey v. Lishey, 2 Tenn. Ch. 1; Coad v. Coad, 40 Wis. 392. Since the Married Woman's Act, a question now properly is—whether the wife has property independent of her husband and the court will exercise its discretion in the allowance of alimony and costs, having reference to the respective pecuniary circumstances of the parties. Marker v. Marker, 11 N. J. Eq. 256.

[99]Rawson v. Rawson, 37 Ill. App. 493; Ross v. Ross, 47 Mich. 185, 10 N. W. 193; Porter v. Porter, 41 Miss. 116; Marker v. Marker, 11 N. J. Eq. 256; Collins v. Collins, 80 N. Y. 1; Lawrence v. Lawrence, 3 Paige (N. Y.) 267. But see Nissen v. Farquhar, 121 La. 642, 46 So. 679.

[1]Ross v. Ross, 47 Mich. 185, 10 N. W. 193.

property if the wife's funds are unavailable at the time of the application,[2] or if her property is non-productive.[3]

§ 702. **Necessity of notice of proceedings.**—An order for temporary alimony is a judgment in personam and void where the husband has not been duly served with notice or has voluntarily appeared in the action.[4] But in some jurisdictions, special notice need not be given, after the return day of the summons, if he has been served, or the defendant has appeared,[5] he being obliged to take notice of all motions entered upon the record.[6]

In other jurisdictions, the practice is to obtain an order for the husband to show cause why an order for temporary alimony should not be entered, of which order to show cause, notice must be given.[7] And this rule to show cause, may be entered after service of summons and before the return day even though the defendant has not appeared in the cause.[8] No new notice is required after continuance of the application.[9] The notice should be reasonable under all the circumstances of the case as to time.[10] Notice before entering an order for temporary alimony would

[2]Hava v. Chavigny, 146 La. 84, 83 So. 417; Davis v. Davis, 174 Mo. App. 538, 160 S. W. 829; Robertson v. Robertson, 137 Mo. App. 93, 119 S. W. 533.

[3]Killiam v. Killiam, 25 Ga. 186; Campbell v. Campbell, 73 Iowa 482, 35 N. W. 522; Briggs v. Briggs, 36 Iowa 383; Potts v. Potts, 68 Mich. 492, 36 N. W. 240; Rose v. Rose, 53 Mich. 585, 19 N. W. 195; Ross v. Griffin, 53 Mich. 5, 18 N. W. 534; Hoffman v. Hoffman, 30 N. Y. Super. Ct. 474.

[4]Reed v. Reed, 40 Cal. App. 102, 180 Pac. 43; Stallings v. Stallings, 127 Ga. 464, 56 S. E. 469, 9 L. R. A. (N. S.) 593; Madden v. Fielding, 19 La. Ann. 505; Wilde v. Wilde, 2 Nev. 306; Longfellow v. Longfellow, Clarke Ch. (N. Y.) 344; Lea v. Lea, 104 N. Car. 603, 10 S. E. 488, 17 Am. St. 692; Keller v. Keller, 58 W. Va. 325, 52 S. E. 318.

[5]Ex parte Joutsen, 154 Cal. 540, 98 Pac. 391; Baker v. Baker, 136 Cal. 302, 68 Pac. 971; Reed v. Reed, 40 Cal. App. 102, 180 Pac. 43; Pitts v. Pitts, 144 Ga. 423, 87 S. E. 391; Jones v. Jones, 111 Ill. App. 396; Becker v. Becker, 15 Ill. App. 247; Morick v. Morick, (Mo. App.), 196 S. W. 1029; Zimmerman v. Zimmerman, 113 N. Car. 432, 18 S. E. 334; Gundry v. Gundry, 11 Okla. 423, 68 Pac. 509.

[6]Reed v. Reed, 40 Cal. App. 102, 180 Pac. 43; Jones v. Jones, 111 Ill. App. 396; Becker v. Becker, 15 Ill. App. 247.

[7]Mudd v. Mudd, 98 Cal. 320, 33 Pac. 114; Williams v. Williams, 137 Ga. 791, 74 S. E. 242; Goss v. Goss, 29 Ga. 109; Fletcher v. Henly, 13 La. Ann. 150; Bailey v. Bailey, 22 N. Dak. 553, 134 N. W. 747; Corbin v. Corbin, 16 Pa. Co. Ct. 448.

[8]Corbin v. Corbin, 16 Pa. Co. Ct. 448.

[9]Moore v. Moore, 130 N. Car. 333, 41 S. E. 943.

[10]Bailey v. Bailey, 22 N. Dak. 553, 134 N. W. 747.

seem superfluous where the husband is fraudulently disposing of his property in order to defeat the claim.[11]

§ 703. **Application for temporary alimony.**—In a wife's action for divorce or separate maintenance, the application for temporary alimony may appear in the original complaint or it will be allowed on petition or motion and affidavit, depending upon the practice in the particular jurisdiction;[12] but however made, it should be under oath,[13] and should show a pending cause[14] in which the right to the relief prayed is at least presumptively made out,[15] and also the necessities of the wife,[16] and the husband's faculties.[17] Vagueness as to this is unsatisfactory,[18] but a misjudgment in her original complaint as to the amount needed, will not conclude her.[19] Nor is her application invalid or the order based thereon reversible because the application is coupled with a prayer for a writ of ne exeat in which an error had been made.[20]

The issues in a divorce case may, by the pleadings, be taken as a whole, and if it appears from this that the plaintiff is entitled to temporary alimony, upon proper proof it will be allowed her, not-

[11]Barker v. Barker, 136 N. Car. 316, 48 S. E. 733.

[12]Kirsch v. Kirsch, 81 N. Y. S. 447; Reeves v. Reeves, 82 N. Car. 348; Gaylord v. Gaylord, 57 N. Car. 74.

[13]Daniels v. Daniels, 9 Colo. 133, 10 Pac. 657; Bray v. Bray, 6 N. J. Eq. 27; Wright v. Wright, 3 Tex. 168.

[14]King v. King, 128 Ga. 54, 57 S. E. 227; Stallings v. Stallings, 127 Ga. 464, 56 S. E. 469, 9 L. R. A. (N. S.) 593; Carroll v. Carroll, 42 La. Ann. 1071, 8 So. 400; Weishaupt v. Weishaupt, 27 Wis. 621.

[15]Wood v. Wood, 59 Ark. 441, 27 S. W. 641, 28 L. R. A. 157, 43 Am. St. 42; Howell v. Howell, 104 Cal. 45, 37 Pac. 770, 43 Am. St. 70; Langan v. Langan, 91 Cal. 654, 27 Pac. 1092; Rawson v. Rawson, 37 Ill. App. 493; Strong v. Strong (Mo. App.), 216 S. W. 543; Mackintosh v. Mackintosh, 44 App. Div. 118, 60 N. Y. S. 679; Itzkowitz v. Itzkowitz, 33 App. Div. 244, 53 N. Y. S. 356; Carpenter v. Carpenter, 19 How. Pr. (N. Y.) 539; Ferrier v. Ferrier, 4 Edw. Ch. (N. Y.) 296; Cardwell v. Cardwell, 5 N. Y. Week. Dig. 332; Rose v. Rose, 11 Paige (N. Y.) 166; Wood v. Wood, 2 Paige (N. Y.) 454; Weishaupt v. Weishaupt, 27 Wis. 621. See Mix v. Mix, 1 Johns. Ch. (N. Y.) 108; Chaffee v. Chaffee, 14 Mich. 463.

[16]Ross v. Ross, 47 Mich. 185, 10 N. W. 193; Poillon v. Poillon, 75 App. Div. 536, 78 N. Y. S. 323.

[17]Lawrence v. Lawrence, 141 Ala. 356, 37 So. 379; Glenn v. Glenn, 44 Ark. 46; Poillon v. Poillon, 75 App. Div. 536, 78 N. Y. S. 323; Damon v. Damon, 28 Wis. 510.

[18]Gaylord v. Gaylord, 57 N. Car. 74; Baer v. Baer, 7 Kulp. (Pa.) 244.

[19]Rose v. Rose, 109 Cal. 544, 42 Pac. 452.

[20]Nipper v. Nipper, 129 Ga. 450, 59 S. E. 226; Shipley v. Shipley, 187 Iowa 1295, 175 N. W. 51.

withstanding an inartificially drawn complaint.[21] The application may be amended,[22] or a supplemental application may be made a part of the original suit by amendment.[23]

In some jurisdictions the application is by motion,[24] but it is immaterial whether the application is called a petition or a motion.[25]

In her application the wife should state the items and amounts of her needs.[26] A motion for temporary alimony denied because of the present ample means of the wife, may afterwards be renewed.[27]

Persons supplying the wife with necessaries can not come into court for an order for temporary alimony to pay therefor.[28]

§ 704. **Hearing and determination.**—While in an application for temporary alimony, the merits are not an issue,[29] yet it will be denied upon the pleadings and supporting evidence, whether

[21]Willey v. Willey, (Cal. App.), 196 Pac. 101.

[22]Barrett v. Barrett, 130 Ga. 365, 60 S. E. 863.

[23]Waters v. Waters, 138 Ga. 805, 76 S. E. 48.

[24]Swearingen v. Swearingen, 19 Ga. 265; Becker v. Becker, 15 Ill. App. 247; Finn v. Finn, 62 Iowa 482, 17 N. W. 739; Litowich v. Litowich, 19 Kans. 451; Vandegrift v. Vandegrift, 30 N. J. Eq. 76; Marker v. Marker, 11 N. J. Eq. (3 Stockt.) 256; Reeves v. Reeves, 82 N. Car. 348.

[25]Jellison v. Jellison, 70 N. H. 633, 47 Atl. 612. In Becker v. Becker, 15 Ill. App. 247, it is said: "While perhaps it is a better practice that a separate petition should be filed for alimony pendente lite, containing averments of the necessary and particular facts, the statute does not require it to be done; more especially is this so where the original bill shows all the facts necessary, or that might be alleged in a separate petition.

[26]Tremper v. Tremper, 39 Cal. App. 62, 177 Pac. 868.

[27]Spatz v. Spatz, 189 App. Div. 438, 178 N. Y. S. 567; Sawyer v. Sawyer, 108 Misc. 447, 178 N. Y. S. 472.

[28]Holmes v. Hamburger, 67 Ill. App. 121.

[29]Sparks v. Sparks, 25 App. D. C. 356; Countz v. Countz, 30 Ark. 73; Frith v. Frith, 18 Ga. 273, 63 Am. Dec. 289; Slack v. Slack, Dud. (Ga.) 165; Burgess v. Burgess, 25 Ill. App. 525; Wooley v. Wooley, 24 Ill. App. 431; Bowman v. Bowman, 24 Ill. App. 165; Gruhl v. Gruhl, 123 Ind. 86, 23 N. E. 1101; Litowich v. Litowich, 19 Kans. 451; Cravens v. Cravens, 4 Bush. (Ky.) 435; Wygodsky v. Wygodsky, 134 Md. 344, 106 Atl. 698; Dicus v. Dicus, 131 Md. 87, 101 Atl. 697; Coles v. Coles, 2 Md. Ch. 341; Vandegrift v. Vandegrift, 30 N. J. Eq. 76; Dougherty v. Dougherty, 8 N. J. Eq. 540; Begbie v. Begbie, 7 N. J. Eq. 98; Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460; Ensign v. Ensign, 54 Misc. 289, 105 N. Y. S. 917; Frickel v. Frickel, 4 Misc. 382, 24 N. Y. S. 483; Longfellow v. Longfellow, Clarke Ch. (N. Y.) 344; Monk v. Monk, 30 N. Y. Super. Ct. 153; Sparks v. Sparks,

by affidavits or oral testimony, unless a prima facie case upon the merits,[30] or a reasonable probability that the wife will succeed, is shown.[31]

In other words when the wife is complainant, if her pleadings do not state a cause of action, or, if when she is defendant they do not state a defense to the action, temporary alimony[32] will be

69 N. Car. 319; Edwards v. Edwards, Wright (Ohio) 308; Sturgis v. Sturgis, 51 Ore. 10, 93 Pac. 696, 15 L. R. A. (N. S.) 1034, 131 Am. St. 724; Heilbron v. Heilbron, 158 Pa. St. 297, 27 Atl. 967, 38 Am. St. 845; Brooks v. Brooks, 18 Wkly. Notes Cas. (Pa.) 115; Brenner v. Brenner, 5 Kulp. (Pa.) 6; Nolan v. Nolan, 1 Chan. Chamb. (Ont.) 368; Campbell v. Campbell, 6 Practice Rep. (Ont.) 128.

[30]Suydam v. Suydam, 79 N. J. Eq. 144, 80 Atl. 1057; Begbie v. Begbie, 7 N. J. Eq. 98; Lewis v. Lewis, 3 Johns. Ch. (N. Y.) 519.

[31]Wood v. Wood, 140 Ark. 361, 215 S. W. 681; Standley v. Standley, 143 Ill. App. 278; Suydam v. Suydam, 79 N. J. Eq. 144, 80 Atl. 1057; Domb v. Domb, 195 App. Div. 526, 186 N. Y. S. 306; Abramowitz v. Abramowitz, 140 N. Y. S. 275; Dimond v. Dimond, 124 N. Y. S. 493; Greenburg v. Greenburg, 134 App. Div. 419, 119 N. Y. S. 227; Heyman v. Heyman, 119 App. Div. 182, 104 N. Y. S. 227; Post v. Post, 55 Misc. 538, 105 N. Y. S. 910; Monk v. Monk, 30 N. Y. Super. Ct. 153; Hollerman v. Hollerman, 1 Barb. (N. Y.) 64; McDonough v. McDonough, 26 How. Pr. (N. Y.) 193. In Harding v. Harding, 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310, it was said that "To hold that the mere denial by the defendant of the matters alleged would put the complainant upon proof would be subversive of the whole theory upon which the allowance of temporary alimony is based;" citing McGee v. McGee, 10 Ga. 477. Litowich v. Litowich, 19 Kans. 451; Daiger v. Daiger, 2 Md. Ch. 335; Porter v. Porter, 41 Miss. 116. The reason given by the courts for not closely scrutinizing the merits of a cause before awarding temporary alimony was that it was better to wait until the trial, when both parties could be heard and the case fully investigated before they undertook to reject the claim for alimony. Methvin v. Methvin, 15 Ga. 97, 60 Am. Dec. 664. In Wooley v. Wooley, 24 Ill. App. 431, the court said "This probable ground for divorce was shown upon the hearing of a motion by affidavit by the appellee herself * * * * the fact that a large number of counter affidavits were filed does not necessarily show the order for alimony was improperly made. The court could not assume, upon a preliminary motion and upon ex parte and contradictory affidavits, to determine the issues made upon bills and answers. The requirement of showing probable ground for divorce is dictated by considerations of public policy for the preservation of the marital and family relations from rupture or disturbance by ill-founded suits, brought by the wife against the husband." Rawson v. Rawson, 37 Ill. App. 494; citing Wheeler v. Wheeler, 18 Ill. App. 330.

[32]Methvin v. Methvin, 15 Ga. 97, 60 Am. Dec. 664; Rawson v. Rawson, 37 Ill. App. 491; Ballentine v. Ballentine, 5 N. J. Eq. (1 Halt.) 471;

denied. The strength of the showing is usually for the judicial discretion of the chancellor.[33]

In a jurisdiction where the uncorroborated testimony of the wife is insufficient to warrant a decree of divorce temporary alimony can not be allowed simply on her sworn statement of the commission of the offense complained of.[34] But if the wife is defendant, temporary alimony will generally be allowed, where she denies guilt under oath or alleges condonation or recrimination, unless the court is satisfied she is altogether in the wrong, or has no reasonable ground of defense;[35] or unless the record is so clearly against her innocence as to practically exclude any probability of sustaining a defense.[36] The court should receive offered evidence of the respondent with reference to his pecuniary condition.[37]

In New York this alimony will not be allowed unless the merits of the cause are shown by affidavits,[38] and in Illinois both pleadings and affidavits are examined in determining the prob-

Kennedy v. Kennedy, 73 N. Y. 369; Bucki v. Bucki, 70 Hun 598, 24 N. Y. S. 374; Worden v. Worden, 3 Edw. Ch. (N. Y.) 387; Robertson v. Robertson, 1 Edw. Ch. (N. Y.) 360; Jones v. Jones, 2 Barb. Ch. (N. Y.) 146; Rose v. Rose, 11 Paige (N. Y.) 166; Wood v. Wood, 2 Paige (N. Y.) 454; Desbrough v. Desbrough, 29 Hun (N. Y.), 592; Carpenter v. Carpenter, 19 How. Pr. (N. Y.) 539; Shearin v. Shearin, 58 N. Car. (5 Jones' Eq.) 233; Erwin v. Erwin, 57 N. Car. (4 Jones' Eq.) 82; Burrow v. Burrow, 6 Lea. (74 Tenn.) 499; Lishey v. Lishey, 2 Tenn. Ch. 1; Ward v. Ward, 1 Tenn. Ch. 262; Friend v. Friend, 65 Wis. 412, 27 N. W. 34; Weishaupt v. Weishaupt, 27 Wis. 621; Browne v. Burns, 5 Scotch Sess. Cas. (2d Ser.) 1288.

[33]Slocum v. Slocum, 86 Ark. 469, 111 S. W. 806.

[34]Earl v. Earl, 79 N. J. Eq. 517, 81 Atl. 575.

[35]Suydam v. Suydam, 79 N. J. Eq. 144, 80 Atl. 1057; Tyrrell v. Tyrrell (N. J. Ch.), 3 Atl. 266; Bray v. Bray, 6 N. J. Eq. 27; Morrell v. Morrell, 2 Barb. (N. Y.) 480; Strong v. Strong, 1 Abb. Pr. (N. S.) 358, 28 N. Y. Super. Ct. 612; Lewis v. Lewis, 3 Johns. Ch. (N. Y.) 519; Hallock v. Hallock, 4 How. Pr. (N. Y.) 160; Osgood v. Osgood, 2 Paige (N. Y.) 621; Wood v. Wood, 2 Paige (N. Y.) 108.

[36]Israel v. Israel, 28 Misc. 57, 59 N. Y. S. 800.

[37]Jenkins v. Jenkins, 69 Ga. 483.

[38]Frickel v. Frickel, 4 Misc. 382, 24 N. Y. S. 483; Walsh v. Walsh, 4 Misc. 448, 24 N. Y. S. 335, 54 N. Y. St. 158; Scragg v. Scragg, 63 Hun 633, 18 N. Y. S. 487, 44 N. Y. St. 845; Thomas v. Thomas, 18 Barb. (N. Y.) 149; Jones v. Jones, 2 Barb. Ch. (N. Y.) 146; Bissell v. Bissell, 1 Barb. (N. Y.) 430; Snyder v. Snyder, 3 Barb. (N. Y.) 621; Hollerman v. Hollerman, 1 Barb. (N. Y.) 64; Boubon v. Boubon, 26 N. Y. Super. Ct. 715; Solomon v. Solomon, 26 N. Y. Super. Ct. 669, 2 How. Pr. 218; Worden v. Worden, 3 Edw. Ch. (N. Y.) 387;

able cause.[39] Very generally the application may be heard and granted in chambers,[40] although the marriage is denied,[41] and during vacation,[42] but whether in chambers or in vacation, depends upon code provisions or the rules of the court.[43]

In the absence of the change of venue, the application may not be heard outside of the county in which the suit is pending.[44]

Refusal to continue the hearing until pending proceedings as to the applicant's insanity are determined is not an abuse of the discretion of the court.[45]

§ 705. **Evidence to establish marital relation.**—The marital relation may be proved by the declarations and acts of the parties;[46] or their public acknowledgment;[47] or an admission of the existence of the relation in the pleadings may dispense with proof of the fact.[48]

Cohabitation and repute may be prima facie evidence[49] of mar-

Laurie v. Laurie, 9 Paige (N. Y.) 234; Osgood v. Osgood, 2 Paige (N. Y.) 621; Douglas v. Douglas, 13 Abb. Pr. N. S. (N. Y.) 291; Fowler v. Fowler, 4 Abb. Pr. (N. Y.) 411; Whitney v. Whitney, 22 How. Pr. (N. Y.) 175; Carpenter v. Carpenter, 19 How. Pr. (N. Y.) 539; Meldora v. Meldora, 6 N. Y. Super. (4 Sandf.) 721; Shore v. Shore, 4 N. Y. Super. (2 Sandf.) 715; Wood v. Wood, 8 Wend. (N. Y.) 357.

[39]Jenkins v. Jenkins, 91 Ill. 167; Hardin v. Hardin, 40 Ill. App. 202; Rawson v. Rawson, 37 Ill. App. 491; Burgess v. Burgess, 25 Ill. App. 525; Wooley v. Wooley, 24 Ill. App. 431; Umlauf v. Umlauf, 22 Ill. App. 580; Johnson v. Johnson, 20 Ill. App. 495; Brown v. Brown, 18 Ill. App. 445; Wheeler v. Wheeler, 18 Ill. 39.

[40]Rembert v. Rembert, 84 S. Car. 9, 65 S. E. 831. But see Arendall v. Arendall, 61 Fla. 496, 54 So. 957, Ann. Cas. 1913A, 662.

[41]Messervy v. Messervy, 80 S. Car. 277, 61 S. E. 442.

[42]Ray v. Ray, 106 Ga. 260, 32 S. E. 91.

[43]Moore v. Moore, 130 N. Car. 333, 41 S. E. 943.

[44]State ex rel. v. Neal, 19 Wash. 642, 54 Pac. 31.

[45]Arnold v. Arnold, 141 Ga. 158, 80 S. E. 652.

[46]White v. Lowe, 1 R. E. D. F. 37.

[47]Kansas Pac. R. Co. v. Miller, 2 Colo. 442; McFarland v. McFarland, 51 Iowa 565, 2 N. W. 269; Barnum v. Barnum, 42 Md. 251; Commonwealth v. Hurley, 14 Gray (Mass.) 411; Chamberlain v. Chamberlain, 71 N. Y. 423; Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460; In re Taylor, 9 Paige (N. Y.) 611; Jones v. Reddick, 79 N. Car. 290.

[48]Paul v. Paul, 201 Ill. App. 595; Cope v. Cope, 103 Mo. App. 260, 77 S. W. 92; Collins v. Collins, 80 N. Y. 1; Purcell v. Purcell, 4 Hen. & M. (Va.) 507.

[49]Jewell v. Jewell, 1 How (U. S.) 219, 11 L. ed. 108; Blodget v. Thornton, 3 Cranch, C. C. 176, Fed. Cas. 1554; Holmes v. Holmes, 1 Abb. (U. S.) 525, 1 Sawy. 99, Fed. Cas. 6638; Green v. State, 59 Ala. 68; White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; People v. Anderson, 26 Cal. 129; Case v. Case, 17 Cal.

riage, where it is uniform and general.[50] The cohabitation alone without the matrimonial repute is insufficient, and so is reputation alone. Both must concur.[51]

It has been held that reputation is important only as circumstantial evidence as to whether the parties themselves regarded each other as husband and wife.[52] Where no celebration is neces-

598; Kansas Pac. R. Co. v. Miller, 2 Colo. 442; Budington v. Munson, 33 Conn. 481; Burns v. Burns, 13 Fla. 369; Lowry v. Coster, 91 Ill. 182; Miller v. White, 80 Ill. 580; Myatt v. Myatt, 44 Ill. 474; Harman v. Harman, 16 Ill. 85; Bowers v. Van Winkle, 41 Ind. 432; Nossaman v. Nossaman, 4 Ind. 648; Blanchard v. Lambert, 43 Iowa 228, 22 Am. Rep. 245; State v. Wilson, 22 Iowa 364; Sneed v. Ewing, 5 J. J. Marsh. (Ky.) 460; Donnelly v. Donnelly, 8 B. Mon. (Ky.) 113; Holmes v. Holmes, 6 La. 463, 26 Am. Dec. 482; Blasini v. Blasini, 30 La. Ann. 1388; Taylor v. Robinson, 29 Maine 323; Damon's Case, 6 Greenl. (Maine) 148; Jones v. Jones, 45 Md. 144; Barnum v. Barnum, 42 Md. 251; Boone v. Purnell, 28 Md. 607, 92 Am. Dec. 713; Commonwealth v. Holt, 121 Mass. 61; Commonwealth v. Hurley, 14 Gray (Mass.) 411; Proctor v. Bigelow, 38 Mich. 282; Spears v. Burton, 31 Miss. 547; Henderson v. Cargill, 31 Miss. 367; Cargile v. Wood, 63 Mo. 501; Emerson v. Shaw, 56 N. H. 418; Stevens v. Reed, 37 N. H. 49; Pettingill v. McGregor, 12 N. H. 179; Chamberlain v. Chamberlain, 71 N. Y. 423; O'Gara v. Eisenlohr, 38 N. Y. 296; Clayton v. Wardell, 4 N. Y. 230; In re Taylor, 9 Paige (N. Y.) 611; Jones v. Reddick, 79 N. Car. 290; Reading Fire Ins. & Trust Co., Appeal of, 113 Pa. 204, 6 Atl. 60, 57 Am. St. 448; Richard v. Brehm, 73 Pa. 140, 13 Am. Rep. 733; Commonwealth v. Stump, 53 Pa. 132, 91 Am. Dec. 198; Guardians of the Poor v. Nathans, 2 Brewst. (Pa.) 149; State v. Whaley, 10 S. Car. 500; Jackson v. State, 8 Tex. App. 60; Northfield v. Vershire, 33 Vt. 110; Mitchell v. Mitchell, 11 Vt. 134; Oneale v. Commonwealth, 17 Grat. (Va.) 582; Williams v. Williams, 46 Wis. 464; Rex v. Twyman, 2 Barn & Ald. 386; Breadalbane Case, L. R. 1. H. L. Sc. 182; Cunningham v. Cunningham, 2 Dow, P. C. 482; Wilkinson v. Payne, 4 T. & R. 468; Breakey v. Breakey, 2 U. C. Q. B. 349.

[50]Jones v. Hunter, 2 La. Ann. 254; Barnum v. Barnum, 42 Md. 251; Commonwealth v. Stump, 53 Pa. 132, 91 Am. Dec. 198; Hamilton v. Hamilton, 1 Bell, App. Cas. 736, 9 Clark & F. 327; Cunningham v. Cunningham, 2 Dow. P. C. 482.

[51]Ford v. Ford, 4 Ala. 142; Hammick v. Bronson, 5 Day (Conn.) 290; Kuhl v. Knauer, 7 B. Mon. (Ky.) 130; Cross v. Cross, 55 Mich. 280, 21 N. W. 309; Cargile v. Wood, 63 Mo. 501; Rose v. Clark, 8 Paige (N. Y.) 579; Foster v. Hawley, 8 Hun (N. Y.) 68; Jenkins v. Bisbee, 1 Edw. Ch. (N. Y.) 377; Whitehead v. Clinch, 3 N. Car. 3; Commonwealth v. Stump, 53 Pa. 132, 91 Am. Dec. 198; Smyth's Estate, 1 Leg. Gaz Rep. (Pa.) 210; Guardians of the Poor v. Nathans, 2 Brewst. (Pa.) 149; Physick's Estate, 2 Brewst. (Pa.) 179; Hervey v. Hervey, 2 W. Bl. 877; Birt v. Barlow, 1 Doug. 171; Reed v. Passer, 1 Esp. 213; Leader v. Barry, 1 Esp. 353; Doe v. Fleming, 4 Bing. 266; Smith v. Huson, 1 Phillim. 294.

[52]Cross v. Cross, 55 Mich. 280, 21 N. W. 309.

sary, repute and cohabitation are sufficient of themselves to raise the presumption of a valid marriage.[53]

But the presumption may be rebutted by showing that the cohabitation was not matrimonial, and was in its origin meretricious, in which case it is presumed to continue so, until that presumption is overcome by distinct proof of marriage.[54] A

[53]Commonwealth v. Jackson, 11 Bush. (Ky.) 679, 21 Am. Rep. 225; Blasini v. Blasini, 30 La. Ann. 1388; Cayford's Case, 7 Greenl. (Maine) 57; Henderson v. Cargill, 31 Miss. 367; Davis v. Davis, 1 Abb. N. C. (N. Y.) 140; Forney v. Hallacher, 8 Serg. & R. (Pa.) 159, 11 Am. Dec. 590; State v. Hilton, 3 Rich. Law. 434, 45 Am. Dec. 783.

[54]Darling v. Dent, 82 Ark. 76, 100 S. W. 747; Klipfel's Estate v. Klipfel, 41 Colo. 40, 92 Pac. 26, 124 Am. St. 96; Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451, 15 L. R. A. (N. S.) 190; Gorden v. Gorden, 283 Ill. 182, 119 N. E. 312; Bellinger v. Devine, 269 Ill. 72, 109 N. E. 666; Robinson v. Ruprecht, 191 Ill. 424, 61 N. E. 631; Cartwright v. McGown, 121 Ill. 388, 12 N. E. 737, 2 Am. St. 105; Pike v. Pike, 112 Ill. App. 243; Marks v. Marks, 108 Ill. App. 371; Compton v. Benham, 44 Ind. App. 51, 85 N. E. 365; Rockcastle Mining, Lumber & Oil Co. v. Baker, 167 Ky. 66, 179 S. W. 1070; Barnum v. Barnum, 42 Md. 251; Thompson v. Thompson, 114 Mass. 566; Howard v. Kelly, 111 Miss. 285, 71 So. 391; Floyd v. Calvert, 53 Miss. 37; Rundle v. Pegram, 49 Miss. 751; Bishop v. Brittain Inv. Co., 229 Mo. 699, 129 S. W. 668, Ann. Cas. 1912A, 868; Keen v. Keen, 184 Mo. 358, 83 S. W. 526; Cargile v. Wood, 63 Mo. 501; Badger v. Badger, 88 N. Y. 546, 42 Am. Rep. 263; Wilson v. Burnett, 105 Misc. 279, 172 N. Y. S. 673; Moller v. Sommer, 86 Misc. 110, 149 N. Y. S. 103; Spencer v. Spencer, 84 Misc. 264, 147 N. Y. S. 111; In re Eichler, 84 Misc. 667, 146 N. Y. S. 846; Dietrich v. Dietrich, 128 App. Div. 564, 112 N. Y. S. 968; Bell v. Clarke, 45 Misc. 272, 92 N. Y. S. 163; United States Trust Co. v. Maxwell, 26 Misc. 276, 57 N. Y. S. 53; Foster v. Hawley, 8 Hun (N. Y.) 68; Turpin v. Public Admr. 2 Bradf. Sur. (N. Y.) 424; McBean v. McBean, 37 Ore. 195, 61 Pac. 418; In re Fuller's Estate, 250 Pa. 78, 95 Atl. 382; In re Patterson's Estate, 237 Pa. 24, 85 Atl. 75; Reading F. Ins. & T. Co's App., 113 Pa. 204, 6 Atl. 60, 57 Am. Rep. 448; Hunt's App., 86 Pa. 294; Commonwealth v. Stump, 53 Pa. 132, 91 Am. Dec. 198; Commonwealth v. Gamble, 36 Pa. Super. Ct. 146; Physick's Estate, 2 Brewst. (Pa.) 179; Hantz v. Sealy, 6 Bin. (Pa.) 405; In re Svendsen's Estate, 37 S. Dak. 353, 158 N. W. 410; Henry v. Taylor, 16 S. Dak. 424, 93 N. W. 641; Elred v. Elred, 97 Va. 606, 34 S. E. 477; Reg. v. Millis, 10 Clark & F. 749. In Williams v. Williams, 46 Wis. 464, 1 N. W. 98, 32 Am. Rep. 722, the court quotes with approval from Foster v. Hawley, 8 Hun (N. Y.) 68, the following rule: "A cohabitation illicit in its origin, is to be presumed to be of that character, unless the contrary be proven, and can not be transformed into matrimony by evidence which falls short of establishing an actual contract of marriage. Such contract may be proven by circumstances, but they must be such as to exclude the inference or presumption that the

change from illicit to matrimonial relations may occur, and be satisfactorily established, although the precise time or occasion can not be clearly ascertained.[55] The presumption that when a connection between a man and woman is illicit, it continues as begun, is rebuttable.[56] The general presumption is that the intercourse between a man and woman is matrimonial, and not illicit,[57] but this presumption may be overcome by proof.[58]

Long continued cohabitation as man and wife, and an attempt by him to obtain a divorce, makes a prima facie case of marriage.[59]

§ 706. **Order for temporary alimony.**—The court should find as to basic facts essential to sustain the order.[60] The order should require payment to the wife and not to a person not a party to the suit,[61] unless this is deemed advisable for her pro-

former relation continues, and satisfactory proof is that it has been changed into that of actual matrimony by mutual consent." Harbeck v. Harbeck, 102 N. Y. 714, 7 N. E. 408, 1 Silv. App. 704 while the word "actual" is used in both these cases it is clear from the opinion in each case that a formal ceremony was not meant. The word is often used in this technical sense by text writers but so used has given rise to the apparent confusion in the decisions.

[55]Myatt v. Myatt, 44 Ill. 474; State v. Hodgkins, 19 Maine 155, 36 Am. Dec. 742; Badger v. Badger, 88 N. Y. 546, 42 Am. Rep. 263; Caujolle v. Ferrie, 23 N. Y. 90; Breadalbane Case, L. R. 1 H. L. Sc. 182.

[56]White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799.

[57]Budington v. Munson, 33 Conn. 481; Myatt v. Myatt, 44 Ill. 473; Cargile v. Wood, 63 Mo. 501; Star v. Peck, 1 Hill (N. Y.) 270; Felts v. Foster, 1 N. Car. 164, 3 N. Car. 102, Taylor 121; In re Brice's Estate, 11 Phila. 98; Fleming v. Fleming, 4 Bing. 266; Reed v. Passer, 1 Esp. 213; Cunningham v. Cunningham, 4 Dow. 482.

[58]Port v. Port, 70 Ill. 484; Myatt v. Myatt, 44 Ill. 473; Philbrick v. Spangler, 15 La. Ann. 46; Guardians of the Poor v. Nathans, 2 Brewst. (Pa.) 149.

[59]Finklestein v. Finklestein, 14 Mont. 1, 34 Pac. 1090.

[60]Methvin v. Methvin, 15 Ga. 97, 60 Am. Dec. 664; Adair v. Adair, 54 Ill. App. 502; Shaw v. Shaw, 92 Iowa 722, 61 N. W. 368; Madden v. Fielding, 19 La. Ann. 505; Walling v. Walling, 16 N. J. Eq. 389; Bissell v. Bissell, 1 Barb. (N. Y.) 430, 3 How. Pr. 242; Barker v. Barker, 136 N. Car. 316, 48 S. E. 733; Moody v. Moody, 118 N. Car. 926, 23 S. E. 933; Zimmerman v. Zimmerman, 113 N. Car. 432, 18 S. E. 334; Griffith v. Griffith, 89 N. Car. 113; Thompson v. Thompson, 3 Head (Tenn.) 527.

[61]Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; Miles v. Miles, 102 Ill. App. 130; Werres v. Werres, 102 Ill. App. 360; Lynch v. Lynch, 99 Ill. App. 454; Callies v. Callies, 91 Ill. App. 305; Parker v. Parker, 71 Miss. 164, 14 So. 459.

tection.[62] The order may run against a third person who has been made a party to the suit, and who has obtained the husband's property in fraud of the complainant's rights.[63]

But an order may not be made against the guardian of an insane defendant where he has not been made a party to the suit.[64] The order is not a debt of record upon which an independent action may be based.[65]

The sufficiency of the allowance may not be attacked collaterally by one seeking to hold the husband liable for necessaries furnished the wife.[66] The order in a husband's action for divorce is not binding on the court in a subsequent action by the wife.[67] The order is valid notwithstanding the court later determines there was no marriage between the parties.[68]

Where there is a conflict between the terms of the decree for temporary and permanent alimony, the latter will prevail.[69] It has been held that an order to pay accrued temporary alimony in installments is not affected by the subsequent dismissal of the cause although some of the installments extend beyond the time of dismissal.[70]

§ 707. **Conditional orders.**—The order may not be conditioned that the parties, or either of them should renounce any right,[71] such as waiving the right of trial by jury;[72] or consenting to a reference, or to require the payment of double the amount on failure to consent to such reference;[73] or on condition that the wife quit the husband's residence.[74] But in the wife's action it may be conditioned upon her waiving an allowance made in the husband's previous suit.[75]

[62]Blakely v. Blakely, 117 Minn. 482, 136 N. W. 3.

[63]Black v. Black, 5 Mont. 15, 2 Pac. 317.

[64]Tiffany v. Tiffany, 84 Iowa 122, 50 N. W. 554.

[65]Henry v. Henry, 74 W. Va. 563, 82 S. E. 522, L. R. A. 1915B, 1024.

[66]Crittenden v. Schermerhorn, 39 Mich. 661, 33 Am. Rep. 440; Hyde v. Leisenring, 107 Mich. 490, 65 N. W. 536.

[67]Davis v. Davis, 150 N. Y. S. 636.

[68]Varnum v. American Bonding & Trust Co., 156 Ill. App. 306.

[69]Driver v. Driver, 94 Ga. 449, 21 S. E. 154.

[70]Sheppard v. Sheppard, 99 App. Div. 308, 90 N. Y. S. 982.

[71]Patterson v. Patterson, 4 App Div. 146, 38 N. Y. S. 637.

[72]Lowenthal v. Lowenthal, 68 Hun 366, 22 N. Y. S. 858.

[73]Seigal v. Seigal, 19 N. Y. S. 906; Patterson v. Patterson, 4 App. Div. 146, 38 N. Y. S. 637; Strong v. Strong, 5 Robt. 612.

[74]Smith v. Smith, 92 App. Div. 442, 87 N. Y. S. 137.

[75]Davis v. Davis, 150 N. Y. S. 636.

§ 708. **Amount of allowance.**—The amount of the temporary allowance is within the sound discretion of the court,[76] but in exercising such discretion the court should look well to the cur-

[76]Dunnington v. Dunnington, 45 App. D. C. 277; Sparks v. Sparks, 25 App. D. C. 356; Lawrence v. Lawrence, 141 Ala. 356, 37 So. 379; Rast v. Rast, 113 Ala. 319, 21 So. 34; Plant v. Plant, 63 Ark. 128, 37 S. W. 308; Webb v. Webb, 150 Ga. 670, 104 S. E. 637; Helton v. Helton, 146 Ga. 48, 90 S. E. 381; Stallings v. Stallings, 127 Ga. 464, 56 S. E. 469, 9 L. R. A. (N. S.) 593; Pearson v. Pearson, 125 Ga. 132, 54 S. E. 194; Kendrick v. Kendrick, 105 Ga. 38, 31 S. E. 115; Heaton v. Heaton, 102 Ga. 578, 27 S. E. 677; Methvin v. Methvin, 15 Ga. 97, 60 Am. Dec. 664; Arado v. Arado, 281 Ill. 123, 117 N. E. 816, 4 A. L. R. 28; Harding v. Harding, 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310; Cooper v. Cooper, 85 Ill. App. 575; Gray v. Gray, 74 Ill. App. 509; Snider v. Snider, 179 Ind. 583, 102 N. E. 32; Corey v. Corey, 81 Ind. 469, (wife's agreement with attorneys not binding as to amount); Main v. Main, 168 Iowa 353, 150 N. W. 590; Campbell v. Campbell, 21 Ky. L. 19, 50 S. W. 849; Mulhall v. Mulhall, 120 Md. 22, 87 Atl. 490; Winkler v. Winkler, 104 Miss. 1, 61 So. 1, Ann. Cas. 1915C, 1250; State v. Seddon, 93 Mo. 520, 6 S. W. 342; Weber v. Weber, 195 Mo. App. 126, 189 S. W. 577; Bender v. Bender, 190 Mo. App. 572, 176 S. W. 284; Davis v. Davis, 174 Mo. App. 538, 160 S. W. 829; Collett v. Collett, 170 Mo. App. 590, 157 S. W. 90; Fullhart v. Fullhart, 109 Mo. App. 705, 83 S. W. 541; Reed v. Reed, 70 Nebr. 779, 98 N. W. 73; Brasch v. Brasch, 50 Nebr. 73, 69 N. W. 392; Bissell v. Bissell, 1 Barb. (N. Y.) 430; Barker v. Barker, 136 N. Car. 316, 48 S. E. 733; Moore v. Moore, 130 N. Car. 333, 41 S. E. 943; Swank v. Swank, 75 Pa. Super. Ct. 112; Adams v. Adams, 74 Pa. Super. Ct. 502; Lynn v. Lynn, 68 Pa. Super. Ct. 324; Sadler v. Sadler, 115 S. Car. 217, 105 S. E. 285; Brunson v. Brunson, 94 S. Car. 11, 77 S. E. 704; Bardin v. Bardin, 4 S. Dak. 305, 56 N. W. 1069, 46 Am. St. 791; Read v. Read, 28 Utah 297, 78 Pac. 675; Wass v. Wass. 42 W. Va. 460, 26 S. E. 440. In Williams v. Williams, 29 Wis. 517, it is said: "The discretion resting in the trial court in regard to the allowance of temporary alimony is to be exercised with reference to all the facts and circumstances of the case which will affect the amount of such allowance, and with due right to certain legal rules, which are almost universally recognized and applied by the court in such cases." In Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345, the courts said: "Where the income of the husband is very large, and the parties have publicly lived together in a style conformable to such income, a just allowance would seem to be one sufficient to enable the wife to continue the enjoyment of many luxuries which habit has made apparent necessities; this, however, subject to the limitation that, while her suit is pending, she is to live in the discreet and quiet manner appropriate to one whose domestic relations are being made the subject of public investigation, and without expenditure for mere display or the gratification of personal vanity. In the case now here the plaintiff never enjoyed a portion of the defendant's income accordant with the position of his recognized wife." Nothing so illustrates the fu-

rent needs of the wife, her ability to support herself and the means of the husband.[77]

The manner of living and family conditions afford criterion of amount,[78] but the wife is not to be placed in a better position than before the separation.[79] In this connection it may be stated that the husband's prospects are to be considered.[80] The alimony should be allowed only from the income of the husband and the body of his estate should not be interfered with beyond the actual wants and necessities of the wife.[81] A reasonable support is required,[82] and whatever is more than reasonable is excessive.[83]

Temporary alimony is allowed much more sparingly than permanent alimony.[84] So when the husband has a considerable estate,

tility of attempting to formulate any but the most general rules for guidance in fixing the amount of temporary alimony, than the efforts which have been made to base a rule on percentages of the husband's income, or the joint income of both husband and wife, inasmuch as these percentages have varied all the way from one-eighth to one-half, with one-fifth of the joint income as the favorite. It is obvious from the very purpose of the allowance, viz, to furnish the wife with support during the litigation only, which must be done at all events even to going into the corpus of the husband's estate, and that she be put in no better position than she was before the separation, that a rule of percentages is impracticable as well as unsound in reason. See note, 77 Am. St. 245.

[77]Coleman v. Coleman, 198 Ala. 225, 73 So. 473 (temporary alimony a matter of right); Tromper v. Tromper, 39 Cal. App. 62, 177 Pac 868; Paul v. Paul, 278 Ill. 196, 115 N. E. 860; McCue v. McCue, 149 Ind. 466, 49 N. E. 382; Nissen v Farquhar, 121 La. 642, 46 So. 679; Marker v. Marker, 11 N. J. Eq. 256; Percival v. Percival, 124 N. Y. 637. 26 N. E. 540: Ashbrooke v. Ashbrooke, 132 App. Div. 907, 116 N. Y. S. 1100; Richardson v. Richardson, 94 N. Y. S. 582; Gilbert v. Gilbert, 48 Hun. 618, 1 N. Y. S. 534, 15 N. Y. St. 822; Saunders v. Saunders, 2 Edw. Ch. (N. Y.) 491; Denton v. Denton, 1 Johns. Ch. (N. Y.) 364; Forrest v. Forrest, 18 N. Y. Super. Ct. 672; Germond v. Germond, 4 Paige (N. Y.) 643; Collins v. Collins, 2 Paige (N. Y.) 9; Williams v. Williams, 29 Wis. 517. The wife's necessities at the beginning of the action is the basis of the allowance of temporary alimony when the application therefor had been continued until the trial of the cause. Meyer v. Meyer, 184 Cal. 687, 195 Pac. 387.

[78]Spatz v. Spatz, 178 N. Y. S. 567.

[79]George v. George, 1 P. & M. 554.

[80]Muir v. Muir, 133 Ky. 125, 92 S. W. 314, 4 L. R. A. (N. S.) 909.

[81]Harding v. Harding, 144 Ill. 588, 32 N. E. 207, 21 L. R. A. 310.

[82]Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; Harding v. Harding, 144 Ill. 588, 32 N. E. 207, 21 L. R. A. 310, Robertson v. Robertson, 137 Mo. App. 93, 119 S. W. 533; Conklin v. Conklin, 186 N. Y. S. 191.

[83]Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345.

[84]Leslie v. Leslie, 6 Abb. Pr. N. S. (N. Y.) 193; Lawrence v. Lawrence, 3 Paige (N. Y.) 267.

the amount allowed will be less than what would be allowed as permanent alimony.[85] The allowance should not be made to pay debts already incurred unless such payment is necessary to enable the wife to further prosecute her action or defense.[86]

In fixing the amount the court may consider the wife's misconduct,[87] the nature of charges in the complaint and the allegations in the answer,[88] her condition of health,[89] and the amount of the wife's separate estate.[90]

The allowance of temporary alimony in actions for separate maintenance is placed upon the same footing as actions for divorce.[91] In some jurisdictions the question of the amount of the temporary alimony is submitted to a jury,[92] but in most jurisdictions, however, this is a question solely for the court.[93]

§ 709. **Commencement and termination of temporary alimony.**—Ordinarily an order for temporary alimony dates from the commencement of the suit,[94] especially where the wife has subsisted upon borrowed funds;[95] but it has been held that it can be allowed only from the time the notice for application for its payment is given.[96] The allowance continues throughout the litigation,[97] and ceases upon the entry of a final judgment,[98] or

[85]Harding v. Harding, 144 Ill. 588, 32 N. E. 207, 21 L. R. A. 310.

[86]Tremper v. Tremper, 39 Cal. App. 62, 177 Pac. 868; Germond v. Germond, 4 Paige (N. Y.) 643.

[87]Schammel v. Schammel, 74 Cal. 36, 15 Pac. 364; Lynde v. Lynde, 4 Sanf. Ch. (N. Y.) 373, 2 Barb. Ch. 72.

[88]Cooper v. Cooper, 160 Ill. App. 449; Chapman v. Chapman, 13 Ind. 396; Symington v. Symington, (N. J. Eq.), 36 Atl. 21; Leslie v. Leslie, 6 Abb. Pr. N. S. (N. Y.) 193.

[89]McCue v. McCue, 149 Ind. 466, 49 N. E. 382.

[90]Jeter v. Jeter, 36 Ala. 391; Killiam v. Killiam, 25 Ga. 186; Harding v. Harding, 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310; Corey v. Corey, 81 Ind. 469; Morse v. Morse, 25 Ind. 156; Conklin v. Conklin, 186 N. Y. S. 191; Williams v. Williams, 20 Wis. 517.

[91]Harding v. Harding, 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310.

[92]Swearingen v. Swearingen, 19 Ga. 265; Roseberry v. Roseberry, 17 Ga. 139; Garard v. Garard, 2 Barb. Ch. (N. Y.) 73.

[93]Forrest v. Forrest, 3 Abb. Pr. 144, 13 N. Y. Super. Ct. 102.

[94]Swearingen v. Swearingen, 19 Ga. 265; Russell v. Russell, 69 Maine 336; Forrest v. Forrest, 18 N. Y. Super. Ct. 672; Burr v. Burr, 7 Hill (N. Y.) 207; Ricketts v. Ricketts, 4 Gill. (Md.) 105; Leslie v. Leslie, 6 Abb. Pr. N. S. (N. Y.) 193; Corbin v. Corbin, 16 Pa. Co. Ct. 448.

[95]Reed v. Reed, 40 Cal. App. 102, 180 Pac. 43.

[96]Thrall v. Thrall, 83 Hun 188, 31 N. Y. S. 591.

[97]Halleman v. Halleman, 69 Ga. 476; Watkins v. Watkins, 56 Mo. App. 468.

[98]Langan v. Langan, 91 Cal. 654,

upon the death of either party;[99] but the order may be enforced for arrearages.[1]

Where the allowance is made for the support of the wife and children, it may be apportioned after her death, and that portion intended for the children may be continued.[2]

Again, the right to temporary alimony will terminate on the voluntary dismissal of the suit,[3] or on its dismissal for want of sufficient proof.[4] It can not be awarded after the final decree or the dismissal of the action for the reason that the suit is then no longer pending.[5]

§ 710. **Vacation or revision of order by trial court.**—An order allowing temporary alimony is subject to the supervisory power of the trial court,[6] and is always subject to modification at the

27 Pac. 1092; Weaver v. Weaver, 33 Ga. 172; Chestnut v. Chestnut, 77 Ill. 346; Dawson v. Dawson, 37 Mo. App. 207; Wood v. Wood, 7 Lans. (N. Y.) 204; Moncrief v. Moncrief, 15 Abb. Pr. (N. Y.) 187; Germond v. Germond, 1 Paige (N. Y.) 83; Stanford v. Stanford, 1 Edw. Ch. (N. Y.) 317; Heilbron v. Heilbron, 158 Pa. St. 297, 27 Atl. 967, 38 Am. St. 845; Fehl v. Fehl, 34 Pa. Co. Ct. 82; Wright v. Wright, 6 Tex. 29.

[99]O'Hagan v. O'Hagan, 4 Iowa 509; Gaines v. Gaines, 9 B. Mon. (Ky.) 295, 48 Am. Dec. 425; Kellogg v. Stoddard, 89 App. Div. 137, 84 N. Y. S. 1015; Millady v. Stein, 19 Misc. 652, 44 N. Y. S. 408.

[1]Gibson v. Patterson, 75 Ga. 549; Craig v. Craig, 163 Ill. 176, 45 N. E. 153; Stillman v. Stillman, 99 Ill. 196, 39 Am. Rep. 21; Dinet v. Eigenmann, 80 Ill. 274; Barney v. Barney, 14 Iowa 189; Gerrein v. Michie, 122 Ky. 250, 91 S. W. 252; Swallow v. Swallow, 84 N. J. Eq. 109, 92 Atl. 872; VanNess v. Ransom, 215 N. Y. 557, 109 N. E. 593, L. R. A. 1916B, 852, Ann. Cas. 1917A, 580; Wilson v. Hinman, 182 N. Y. 408, 75 N. E. 236, 2 L. R. A. (N. S.) 232, 108 Am. St. 820; Shepard v. Shepard, 99 App. Div. 308, 90 N. Y. S. 982; Coffman v. Finney, 65 Ohio St. 61, 61 N. E. 155, 55 L. R. A. 794; Clark v. Clark, 6 Watts & S. (Pa.) 85; Wright v. Wright, 6 Tex. 29. But see Walter v. Walter, 15 App. D. C. 333; Persons v. Persons, 7 Humph. (Tenn.) 183.

[2]Hazard v. Hazard, 197 Ill. App. 612; Gerrein v. Michie, 122 Ky. 250, 91 S. W. 252; Creyts v. Creyts, 143 Mich. 375, 106 N. W. 1111, 114 Am. St. 656.

[3]Mason v. Mason, 151 Ga. 468, 107 S. E. 331; Berry v. Berry, 98 Ga. 393, 25 S. E. 503; In re Thrall, 12 App. Div. 235, 42 N. Y. S. 439, affd. 153 N. Y. 644, 47 N. E. 11.

[4]Wright v. Wright, 6 Tex. 29; O'Haly v. O'Haly, 31 Tex. 502.

[5]Chestnut v. Chestnut, 77 Ill. 346; Newman v. Newman, 69 Ill. 167; Harrell v. Harrell, 39 Ind. 185; Waters v. Waters, 49 Mo. 385; Wilde v. Wilde, 2 Nev. 306; Kamp v. Kamp, 59 N. Y. 212. See Wood v. Wood, 7 Lans. (N. Y.) 204; Persons v. Persons, 7 Humph. (Tenn.) 183.

[6]Spooner v. Spooner, 149 Ga. 467, 100 S. E. 571; Osborne v. Osborne, 146 Ga. 334, 91 S. E. 61; Woodall v. Woodall, 136 Ga. 700, 71 S. E. 1099.

discretion of the court;[7] but it continues in force pending the suit, unless expressly modified or rescinded.[8] Where there has been a change of circumstances occurring since the order was granted, the allowance may be increased or diminished to correspond with such change.[9] The order may be vacated when an interlocutory decree of divorce is entered on the ground of the wife's adultery,[10] or on account of her adultery committed subsequent to such order or prior thereto, if not until later made known to the husband.[11]

It would seem that the voluntary dismissal by the plaintiff of an action wherein temporary alimony has been allowed would

Webster v. Martin, 115 Ga. 776, 42 S. E. 81; Pinkard v. Pinkard, 14 Tex. 356, 65 Am. Dec. 129. In Jennison v. Jennison, 136 Ga. 202, 71 S. E. 244, Ann. Cas. 1912C, 441, it was said, "The revision by the court of an order so entered does not abrogate the agreement between the parties but is an exercise of a discretion of the court to revise its own order, to whom such discretion is reserved by the statute. * * * (The agreement) will be presumed to have been made by the parties with the knowledge that the court had statutory power to revise decrees relating to temporary alimony." Nightingale v. Superior Court, 184 Cal. 583, 184 Pac. 1002; Jewel v. Jewel, 71 Colo. 470, 207 Pac. 991; Spooner v. Spooner, 149 Ga. 467, 100 S. E. 571; Jennison v. Jennison, 136 Ga. 202, 71 S. E. 244, Ann. Cas. 1912C, 441; Gordon v. Gordon, 111 Ga. 845, 36 S. E. 296; McGee v. McGee, 10 Ga. 477; Mengel v. Mengel, 157 Iowa 630, 138 N. W. 495; Wygodsky v. Wygodsky, 134 Md. 344, 106 Atl. 698; Stark v. Stark, 115 Mo. App. 436, 91 S. W. 413; Kapp v. District Court, 31 Nev. 444, 103 Pac. 235; Amos v. Amos, 4 N. J. Eq. 171; Brown v. Brown, 109 N. Y. S. 637; Leslie v. Leslie, 11 Abb. Pr. N. S. (N. Y.) 311; Collins v. Collins, 10 Hun (N. Y.) 272.

[7]Rickerson v. Rickerson, 203 Ala 203, 82 So. 453; Moe v. Moe, 39 Wis. 308.

[8]Black v. Black, 150 Ga. 672, 104 S. E. 775; Wain v. Barney, 219 Ill. App. 401.

[9]Brindley v. Brindley, 121 Ala. 429, 25 So. 751; Kurtz v. Kurtz, 38 Ark. 119; Sumner v. Sumner, 123 Ga. 118, 50 S. E. 1013; Sumner v. Sumner, 118 Ga. 408, 45 S. E. 315; McGee v. McGee, 10 Ga. 477; Stillman v. Stillman, 99 Ill. 196, 39 Am. Rep. 21; Umlauf v. Umlauf, 22 Ill. App. 580; Raymond v. Raymond, 13 Ill. App. 189; Waters v. Waters, 49 Mo. 385; Atkins v. Atkins, 13 Nebr. 271, 13 N. W. 285; Amos v. Amos, 4 N. J. Eq. 171; Richmond v. Richmond, 2 N. J. Eq. 90; Simonds v. Simonds, 57 Hun 290, 10 N. Y. S. 606; Sigel v. Sigel, 28 Abb. N. C. 308, 19 N. Y. S. 906; Forrest v. Forrest, 18 N. Y. Super Ct. 672; King v. King, 38 Ohio St. 370; Smith v. Smith, 51 S. Car. 379, 29 S. E. 227; Nary v. Braley, 41 Vt. 180; Moe v. Moe, 39 Wis. 308; Williams v. Williams, 29 Wis. 517; Cox v. Cox, 3 Add. Ecc. 276.

[10]Poss v. Poss, 164 App. Div. 213, 149 N. Y. S. 587.

[11]Jennison v. Jennison, 136 Ga. 202, 71 S. E. 244, Ann. Cas. 1912C, 441; Goldsmith v. Goldsmith, 6 Mich. 285.

ipso facto vacate the order therefor.[12] But it has been held that a dismissal of the complaint and answer interposed as a cross claim did not affect such order.[13] A discontinuance of the allowance would be warranted by delay of the wife in prosecuting her own action,[14] or where as defendant, she unreasonably delays the proceedings.[15] An unreasonable delay in bringing the cause to trial may raise a presumption of bad faith.[16]

§ 711. **Suit money allowance in general.**—Suit money, that is, the expenses necessary for the wife to carry on her own action for divorce or separation, or to defend the action against her for a divorce or annulment of the marriage; is usually allowed the wife.[17] The authority for this is, in most jurisdictions, held to exist under the common law[18] as it was in Eng-

[12]Berry v. Berry, 98 Ga. 393, 25 S. E. 503.

[13]Shepard v. Shepard, 99 App. Div. 308, 90 N. Y. S. 982.

[14]Miller v. Miller, 141 Ky. 681, 133 S. W. 588; Fowler v. Fowler, 4 Abb. Pr. (N. Y.) 411; Ward v. Ward, 1 Tenn. Ch. 262.

[15]Swank v. Swank, 75 Pa. Super. Ct. 112. See also Sigel v. Sigel, 28 Abb. N. C. 308, 19 N. Y. S. 906; Williams v. Williams, 29 Wis. 517; Walker v. Walker, 10 Prac. Rep. (Ont.) 633.

[16]Fowler v. Fowler, 4 Abb. Pr. (N. Y.) 411; Ward v. Ward, 1 Tenn. Ch. 262.

[17]Allen v. Superior Ct., 133 Cal. 504, 65 Pac. 977; McCurley v. McCurley, 60 Md. 185, 45 Am. Rep. 717; Ricketts v. Ricketts, 4 Gill (Md.) 105; Daiger v. Daiger, 2 Md. Ch. 335; Tayman v. Tayman, 2 Md. Ch. 393; Goldsmith v. Goldsmith, 6 Mich. 285; Story v. Story, Walk. Ch. (Mich.) 421; Stark v. Stark, 115 Mo. App. 436, 91 S. W. 413; North v. North, 1 Barb. Ch. (N. Y.) 241, 43 Am. Dec. 778; Kendall v. Kendall, 1 Barb. Ch. (N. Y.) 610; Mix v. Mix, 1 Johns. Ch. (N. Y.) 108; Graves v. Graves, 2 Paige (N. Y.) 62; Smith v. Smith, 3 Ore. 363; Waldron v. Waldron, 55 Pa. St. 231; Graves v. Cole, 19 Pa. St. 171; Thayer v. Thayer, 9 R. I. 377; Smith v. Smith, 51 S. Car. 379, 29 S. E. 227; Thompson v. Thompson, 3 Head (Tenn.) 527; Moe v. Moe, 39 Wis. 308.

[18]Larkin v. Larkin, 71 Cal. 330, 12 Pac. 227; Hart v. Hart, 31 Colo. 333, 73 Pac. 35; Petrie v. People, 40 Ill. 334; Finn v. Finn, 62 Iowa 482, 17 N. W. 739; McCurley v. McCurley, 60 Md. 185, 45 Am. Rep. 717; Daiger v. Daiger, 2 Md. Ch. 225; Coles v. Coles, 2 Md. Ch. 341; Tayman v. Tayman, 2 Md. Ch. 393; Story v. Story, Walk. Ch. (Mich.) 421; Wagner v. Wagner, 36 Minn. 239, 30 N. W. 766; State v. St. Louis, Court of Appeals, 88 Mo. 135; Dawson v. Dawson, 37 Mo. App. 207; Black v. Black, 5 Mont. 15, 2 Pac. 317; Lake v. Lake, 17 Nev. 230, 30 Pac. 878; Wuest v. Wuest, 17 Nev. 217, 30 Pac. 886; Lake v. Lake, 16 Nev. 363; Westerfield v. Westerfield, 36 N. J. Eq. 195; Collins v. Collins, 80 N. Y. 1; Kunze v. Kunze, 53 N. Y. S. 938, 5 N. Y. Ann. Cas. 8; North v. North, 1 Barb. Ch. (N. Y.) 241; Wright v. Wright, 1 Edw. Ch. (N. Y.) 62; Smith v. Smith, 1 Edw. Ch. (N. Y.)

land.[19] It has been held, however, that statutory authority is necessary,[20] and in some of the states it is so authorized.[21]

Like temporary alimony and counsel fees, whether suit money be allowed or not is within the discretion of the trial court.[22]

§ 712. **In what proceedings suit money allowed.**—Suit money may be allowed against the husband in the wife's action,[23] as well as in the husband's action for divorce,[24] or in his action to annul the marriage;[25] but a father who as next friend brings suit

255; Dorsey v. Goodenow, Wright (Ohio) 120; Power's Appeal, 120 Pa. St. 320, 14 Atl. 60; Waldron v. Waldron, 55 Pa. St. 231; Graves v. Cole, 19 Pa. St. 171; Melizet v. Melizet, 1 Pars. Eq. Cas. (Pa.) 77; Thompson v. Thompson, 3 Head (Tenn.) 527; D'Aguilar v. D'Aguilar, 1 Hag. Ecc. 773; Bird v. Bird, 1 Lee Ecc. 572; Fitzgerald v. Fitzgerald, 1 Lee Ecc. 649; Holmes v. Holmes, 2 Lee Ecc. 90; Belcher v. Belcher, 1 Curt. Ecc. 444.

[19]D'Aguilar v. D'Aguilar, 1 Hag. Ecc. 773; Holmes v. Holmes, 2 Lee Ecc. 90; Fitzgerald v. Fitzgerald, 1 Lee Ecc. 649; Bird v. Bird, 1 Lee Ecc. 572; Belcher v. Belcher, 1 Curt. Ecc. 444.

[20]Therkelsen v. Therkelsen, 35 Ore. 75, 54 Pac. 885, 57 Pac. 373; Thayer v. Thayer, 9 R. I. 377; Sanford v. Sanford, 2 R. I. 64.

[21]Day v. Day, 15 Idaho 107, 96 Pac. 431; Hilker v. Hilker, 153 Ind. 425, 55 N. E. 81; Reed v. Reed, 70 Nebr. 779, 98 N. W. 73; Brasch v. Brasch, 50 Nebr. 73, 69 N. W. 392.

[22]Tolman v. Tolman, 1 App. D. C. 299; Plant v. Plant, 63 Ark. 128, 37 S. W. 308; Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; Hart v. Hart, 31 Colo. 333, 73 Pac. 35; Earle v. Earle, 60 Ill. App. 360; Hilker v. Hilker, 153 Ind. 425, 55 N. E. 81; Yost v. Yost, 141 Ind. 584, 41 N. E. 11; Courtney v. Courtney, 4 Ind. App. 221, 30 N. E. 914; Campbell v. Campbell, 73 Iowa 482, 35 N. W. 522; Small v. Small, 42 Iowa 111; Harrison v. Harrison, 49 Mich. 240, 13 N. W. 581; Reed v. Reed, 70 Nebr. 775, 98 N. W. 76; Brasch v. Brasch, 50 Nebr. 73, 69 N. W. 392; Waldron v. Waldron, 55 Pa. St. 231; Von Trott v. Von Trott, 118 Wis. 29, 94 N. W. 798; Clarke v. Burke, 65 Wis. 359, 27 N. W. 22, 56 Am. Rep. 631; Sumner v. Sumner, 54 Wis. 642, 12 N. W. 21.

[23]Gamble v. Gamble, 57 Ill. App. 183; Gruhl v. Gruhl, 123 Ind. 86, 23 N. E. 1101; Harrell v. Harrell, 39 Ind. 185; Whetstone v. Whetstone, 31 Iowa 276; Russell v. Russell, 69 Maine 336; McCurley v. McCurley, 60 Md. 185, 45 Am. Rep. 717; Tayman v. Tayman, 2 Md. Ch. 393; Ricketts v. Ricketts, 4 Gill (Md.) 105; Story v. Story, 1 Walk. Ch. (Mich.) 421; Dorsey v. Goodenow, Wright (Ohio) 120; Paule v. Paule, 17 Pa. Co. Ct. 147; Denton v. Denton, 1 Johns. Ch. (N. Y.) 364; Desbrough v. Desbrough, 29 Hun (N. Y.) 592; Wood v. Wood, 8 Wend. (N. Y.) 357.

[24]Thomas v. Thomas, 109 Ill. App. 352; Harrell v. Harrell, 39 Ind. 185; Hart v. Hart, 11 Ind. 384; Day v. Day, 71 Kans. 385, 80 Pac. 974, 6 Ann. Cas. 169; DeMeli v. DeMeli, 5 Civ. Prac. R. 306, 67 How Pr. (N. Y.) 20 (affirmed 120 N. Y. 485, 24 N. E. 996, 17 Am. St. Rep. 652).

[25]Higgins v. Sharp, 164 N. Y. 4,

to annul the marriage of his minor son, is not to be charged with suit money.[26]

It may be allowed in the wife's action for separate maintenance,[27] in which it does not depend on statutory authority.[28] She may be allowed suit money in her husband's action to reduce her allowance of permanent alimony,[29] but not in her suit to enforce the payment of such alimony.[30] It has also been denied her in her action to set aside a decree of divorce.[31]

Suit money may not be awarded a wife in her independent action against her husband for a divorce on the ground of adultery where he has already instituted suit against her for the like cause, for the reason that she may have complete relief in his action.[32]

§ 713. **When allowance of suit money to be made.**—Suit money may be allowed after service of process and the return date thereof,[33] and from time to time as the exigencies of the cause may require.[34] It may be allowed pending a motion for a new trial,[35] or pending an appeal.[36] As a general rule the allowance for expenses incurred in the trial may not be made after the final decree,[37] even though the right to do so is reserved in the

58 N. E. 9; Griffin v. Griffin, 47 N. Y. 134; Eliot v. Eliot, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568.

[26]Thayer v. Thayer, 9 R. I. 377.

[27]Tolman v. Tolman, 1 App. D. C. 299; Poole v. Wilber, 95 Cal. 339, 30 Pac. 548; Smith v. Smith, 51 S. Car. 379, 29 S. E. 227.

[28]Finn v. Finn, 62 Iowa 482, 17 N. W. 739.

[29]O'Brien v. O'Brien, 19 Nebr. 584, 27 N. W. 640; Blake v. Blake, 70 Wis. 238, 35 N. W. 551; Helden v. Helden, 9 Wis. 557; Helden v. Helden, 11 Wis. 554.

[30]Schloemer v. Schloemer, 49 N. Y. 82; McQuien v. McQuien, 61 How. Pr. (N. Y.) 280.

[31]McFarland v. McFarland, 51 Iowa 565, 2 N. W. 269; Wilson v. Wilson, 49 Iowa 544.

[32]J. W. B. v. F. D. B., 11 N. Y. Leg. Obs. 350.

[33]Russell v. Russell, 69 Maine 336.

[34]Rose v. Rose, 109 Cal. 544, 42 Pac. 452; Davis v. Davis, 141 Ind. 367, 40 N. E. 803.

[35]Bordeaux v. Bordeaux, 29 Mont. 478, 75 Pac. 359.

[36]Pleyte v. Pleyte, 15 Colo. 125, 25 Pac. 25; Mercer v. Mercer, 19 Colo. App. 51, 73 Pac. 662; Elzas v. Elzas, 183 Ill. 160, 55 N. E. 669; Shors v. Shors, 133 Iowa 22, 110 N. W. 16; Van Voorhis v. Van Voorhis, 90 Mich. 276, 51 N. W. 281; Mahn v. Mahn, 70 Mo. App. 337; Bordeaux v. Bordeaux, 29 Mont. 478, 75 Pac. 359; Wass v. Wass, 42 W. Va. 460, 26 S. E. 440; Friend v. Friend, 65 Wis. 412, 27 N. W. 34.

[37]Newman v. Newman, 69 Ill. 167; Davis v. Davis, 141 Ind. 637, 40 N. E. 803; Wilde v. Wilde, 2 Nev. 306; Poillon v. Poillon, 75 App. Div. 536, 78 N. Y. S. 323.

final decree,[38] although it has otherwise been held.[39] But the allowance may be made after the judgment is vacated.[40] Whether suit money may be allowed on the final hearing, depends largely on the particular statute authorizing it. If the statute authorizes the allowance of suit money in case the wife is decreed a divorce, or the husband's action is dismissed for want of merit, this would seem to be direct authority for allowing suit money.[41]

§ 714. **Allowance of suit money as dependent on wife's necessities and husband's ability to pay.**—Like the allowance of temporary alimony, the right to suit money depends upon the wife's necessities,[42] and where her own means are sufficient to permit the preparation and trial of her own cause or her defense in a proper manner, it will not ordinarily be allowed.[43] On the other hand, it will be allowed when she lacks such means,[44] or when the expenditure would invade the capital of her estate.[45] After such necessity and the want of means are shown, it is necessary in order to so justify the award of suit money that the financial ability of the husband be shown.[46] It has, however, been held if

[38]Wagner v. Wagner, 34 Minn. 441, 26 N. W. 450.

[39]Therkelsen v. Therkelsen, 35 Ore. 75, 54 Pac. 885, 57 Pac. 373; Thayer v. Thayer, 9 R. I. 377; Sanford v. Sanford, 2 R. I. 64.

[40]Davis v. Davis, 141 Ind. 367, 40 N. E. 803.

[41]Hilker v. Hilker, 153 Ind. 425, 55 N. E. 81; Harrell v. Harrell, 39 Ind. 185; Johnson v. Johnson, 57 Kans. 343, 46 Pac. 700.

[42]Kenemer v. Kenemer, 26 Ind. 330; Campbell v. Campbell, 73 Iowa 482, 35 N. W. 522; Tayman v. Tayman, 2 Md. Ch. 393; Bordeaux v. Bordeaux, 29 Mont. 478, 75 Pac. 359; Waldron v. Waldron, 55 Pa. St. 231; Coad v. Coad, 40 Wis. 392.

[43]Chaires v. Chaires, 10 Fla. 308; Carlin v. Carlin, 65 Ill. App. 160; Rawson v. Rawson, 37 Ill. App. 491; Daiger v. Daiger, 2 Md. Ch. 335; Coles v. Coles, 2 Md. Ch. 341; Porter v. Porter, 41 Miss. 116; Penningroth v. Penningroth, 71 Mo. App. 438; Westerfield v. Westerfield, 36 N. J. Eq. 195; Collins v. Collins, 80 N. Y. 1; Richardson v. Richardson, 94 N. Y. S. 582; Maxwell v. Maxwell, 28 Hun (N. Y.) 566; Morrell v. Morrell, 2 Barb. (N. Y.) 480; Thompson v. Thompson, 3 Head. (Tenn.) 527.

[44]Harmon v. Harmon, 5 Penn. (Del.) 152, 58 Atl. 1042; Day v. Day, 12 Idaho 556, 86 Pac. 531, 10 Ann. Cas. 260; Logan v. Logan, 2 B. Mon. (Ky.) 142; Mahn v. Mahn, 70 Mo. App. 337; Grube v. Grube, 65 App. Div. 239, 72 N. Y. S. 529; Rose v. Rose, 11 Paige (N. Y.) 166; Collins v. Collins, 2 Paige (N. Y.) 9; Waldron v. Waldron, 55 Pa. St. 235; Kiser v. Kiser, 108 Va. 730, 62 S. E. 936.

[45]Miller v. Miller, 75 N. Car. 70.

[46]Van Voorhis v. Van Voorhis, 90 Mich. 276, 51 N. W. 281; Waldron v. Waldron, 55 Pa. St. 231; Baer v. Baer, 3 Pa. Dist. Ct. 379; Thayer v. Thayer, 9 R. I. 377; Freeman v. Freeman, 31 Wis. 235.

the husband can not furnish the wife with means to defend against his suit, he should not prosecute it.[47]

§ 715. **Allowance of suit money as dependent on merits of action.**—To justify the allowance of suit money, the wife's pleadings must show facts entitling her to the relief she has prayed,[48] but whether she be plaintiff or defendant, the court will not inquire into the merits of the action, for in matrimonial causes, it is often said the wife is a privileged litigant.[49] If, however, it appears probable from the papers that the wife can not succeed, suit money will not be awarded her,[50] and the rule is the same on her appeal, where the record discloses no merit in her suit.[51]

§ 716. **For what purposes suit money may be allowed.**—It is held that no allowance may be made for past expenses in carrying on her own or defending her husband's suit,[52] unless it is necessary to enable the wife to further prosecute her suit.[53] Where the amounts are reasonable, the court may make an allowance for her hotel and traveling expenses,[54] for investigating and acquir-

[47]Mangels v. Mangels, 6 Mo. App. 481; Eliot v. Eliot, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568.

[48]Banks v. Banks, 42 Fla. 362, 29 So. 318.

[49]Daniels v. Daniels, 9 Colo. 133, 10 Pac. 657; Gamble v. Gamble, 57 Ill. App. 183; Gruhl v. Gruhl, 123 Ind. 86, 23 N. E. 1101; McCurley v. McCurley, 60 Md. 185; Ricketts v. Ricketts, 4 Gill (Md.) 105; Coles v. Coles, 2 Md. Ch. 341; Tayman v. Tayman, 2 Md. Ch. 393; Rublinsky v. Rublinsky, 24 N. Y. S. 920; Denton v. Denton, 1 Johns. Ch. (N. Y.) 364; Mix v. Mix. 1 Johns. Ch. (N. Y.) 108.

[50]Desbrough v. Desbrough, 29 Hun (N. Y.) 592.

[51]VonTrott v. VonTrott, 118 Wis. 29, 94 N. W. 798; Friend v. Friend, 65 Wis. 412, 27 N. W. 34; Krause v. Krause, 23 Wis. 354.

[52]Anderson v. Steger, 173 Ill. 112, 50 N. E. 665; Lynch v. Lynch, 99 Ill. App. 454; Courtney v. Courtney, 4 Ind. App. 221, 30 N. E. 914; Poillon v. Poillon, 75 App. Div. 536, 78 N. Y. S. 323; Winkemeier v. Winkemeier, 11 App. Div. 199, 42 N. Y. S. 586.

[53]Loveren v. Loveren, 100 Cal. 493, 35 Pac. 87; Bohnert v. Bohnert, 91 Cal. 428, 27 Pac. 732; Schuster v. Schuster, 84 Minn. 403, 87 N. W. 1014; Bordeaux v. Bordeaux, 29 Mont. 478, 75 Pac. 359; McCarthy v. McCarthy, 137 N. Y. 500, 33 N. E. 550; Emerson v. Emerson, 26 N. Y. S. 291. In Beadleston v. Beadleston, 103 N. Y. 402, 8 N. E. 735, the court said, "The purpose of the statute is to furnish the wife means to carry on her action or to defend the same during the pendency thereof. The allowance looks to the future. There can be no necessity of an allowance to make a defense which has already been made or solely to pay expenses already incurred."

[54]Cairnes v. Cairnes, 29 Colo. 260, 68 Pac. 233, 93 Am. St. 55; Main v Main, (N. J.), 24 Atl. 1024; Smith v. Smith, 3 Ore. 363; Graves v. Cole, 19 Pa. St. 171; Fernald v. Fernald, 5 Pa. Super. Ct. 629.

ing information pertinent to the issues,[55] for the services of a stenographer,[56] for the fees of necessary witnesses,[57] for the cost of depositions,[58] for the expense of references,[59] and the printing of the record on appeal.[60] Prior contracted debts in procuring evidence of the husband's guilt, can not be considered in an allowance of suit money.[61]

§ 717. **In whose name suit money to be allowed.**—Generally speaking, the motion or application for suit money must be in the name of the wife and not in the name of her attorney,[62] and like counsel fees, the order for suit money should be made to the wife;[63] but the contrary has been held.[64]

§ 718. **Right to suit money on dismissal of action.**—Suit money may not be allowed where the wife voluntariiy dismisses her own action,[65] but a wife's right to suit money is not defeated by the husband's dismissing his suit pending her application for suit money.[66]

§ 719. **Suit money allowance—Amount.**—In determining the amount of suit money, the court should attempt to place each party in such a position that neither would have any advantage over the other in waging the suit, or in determining the truth or the falsity of the allegations made.[67] Under this principle, what-

[55]Day v. Day, 15 Idaho 107, 96 Pac. 434; Fernald v. Fernald, 5 Pa. Super. Ct. 629; Allen v. Allen, 2 Sw. & Tr. 107.

[56]Storke v. Storke, 116 Cal. 47, 47 Pac. 869, 48 Pac. 121; Herrmann v. Herrmann, 88 App. Div. 76, 84 N. Y. S. 736; Paule v. Paule, 17 Pa. Co. Ct. 147.

[57]Graves v. Cole, 19 Pa. 171; Allen v. Allen, 2 Sw. & Tr. 107; Stevenson v. Stevenson, 19 Ont. Pr. 48.

[58]Cairnes v. Cairnes, 29 Colo. 260, 68 Pac. 233, 93 Am. St. 55; Verbeeck v. Verbeeck, (N. J. Ch.), 115 Atl. 136; Shepherd v. Shepherd, 18 Pa. Co. Ct. 614.

[59]White v. White, 97 Cal. 604, 32 Pac. 600.

[60]Bernsdorff v. Bernsdorff, 26 App. D. C. 228; Shors v. Shors, 133 Iowa 22, 110 N. W. 16; Chaffee v. Chaffee, 14 Mich. 463; Sternberger v. Sternberger, 113 App. Div. 898, 98 N. Y. S. 946; Holcomb v. Holcomb, 49 Wash. 498, 95 Pac. 1091; Phillips v. Phillips, 27 Wis. 252.

[61]Conklin v. Conklin, 196 App. Div. 607, 188 N. Y. S. 141.

[62]Anderson v. Steger, 173 Ill. 112, 50 N. E. 665.

[63]Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; Lynch v. Lynch, 99 Ill. App. 454; Parker v. Parker, 71 Miss. 164, 14 So. 459.

[64]Chase v. Chase, 29 Hun (N. Y.) 527.

[65]Phillips v. Simmons, 11 Abb. Pr. (N. Y.) 287; Thompson v. Thompson, 3 Head (Tenn.) 527.

[66]Waters v. Waters, 69 Maine 336.

[67]Rose v. Rose, 109 Cal. 544, 42

ever the expense in prosecuting or defending the action, the husband should be compelled to pay.[68] The amount to be allowed is always within the discretion of the trial court.[69]

§ 720. **Counsel fees in general.**—Counsel fees and suit money are, as a general rule, of the same class of allowances, in divorce and separate maintenance proceedings, and in either they are allowed under the same rules and principles.[70]

The purpose of the allowance as well as the absolute necessity therefor is based upon the equitable proposition that when the wife in good faith, charges her husband with having violated his marital obligation, or in equal good faith, she defends against his charges that she has not herself observed her marital vows,

Pac. 452; Day v. Day, 15 Idaho 107, 96 Pac. 431; Davis v. Davis, 141 Ind. 367, 40 N. E. 803.

[68]Earle v. Earle, 75 Ill. App. 351. Kendall v. Kendall, 1 Barb. Ch. (N. Y.) 610; Germond v. Germond, 1 Paige (N. Y.) 83; Thompson v. Thompson, 3 Head (Tenn.) 527; Holcomb v. Holcomb, 49 Wash. 498, 95 Pac. 1091.

[69]Tolman v. Tolman, 1 App. D. C. 299; Plant v. Plant, 63 Ark. 128, 37 S. W. 308; Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; Hart v. Hart, 31 Colo. 333, 73 Pac. 35; Earle v. Earle, 60 Ill. App. 360; Hilker v. Hilker, 153 Ind. 425, 55 N. E. 81; Yost v. Yost, 141 Ind. 584, 41 N. E. 11; Courtney v. Courtney, 4 Ind. App. 221, 30 N. E. 914; Campbell v. Campbell, 73 Iowa 482, 35 N. W. 522; Small v. Small, 42 Iowa 111; Harrison v. Harrison, 49 Mich. 240, 13 N. W. 581; Reed v. Reed, 70 Nebr. 775, 98 N. W. 76; Brasch v. Brasch, 50 Nebr. 73, 69 N. W. 392; Waldron v. Waldron, 55 Pa. St. 231; Von Trott v. Von Trott, 118 Wis. 29, 94 N. W. 798; Clarke v. Burke, 65 Wis. 359, 27 N. W. 22, 56 Am. Rep. 631; Sumner v. Sumner, 54 Wis. 642, 12 N. W. 21.

[70]Lane v. Lane, 26 App. D. C. 235, 6 Ann. Cas. 683; Bernsdorff v. Bernsdorff, 26 App. D. C. 288; Sparks v. Sparks, 25 App. D. C. 356; Gay v. Gay, 146 Cal. 237, 79 Pac. 885; Mercer v. Mercer, 19 Colo. App. 51, 73 Pac. 662; Dinet v. Pfirshing, 86 Ill. 83; Harding v. Harding, 79 Ill. App. 621, affirmed 180 Ill. 592, 54 N. E. 604; Call v. Call, 65 Maine 407; Chaffee v. Chaffee, 14 Mich. 463; Plattner v. Plattner, (Mo.), 91 S. W. 459; Behrle v. Behrle, 120 Mo. App. 677, 97 S. W. 1005; Ray v. Adden, 5 N. H. 82, 9 Am. Rep. 175; Disborough v. Disborough, 51 N. J. Eq. 306, 28 Atl. 3; Sternberger v. Sternberger, 113 App. Div. 898, 98 N. Y. S. 946; Haddock v. Haddock, 109 App. Div. 502, 96 N. Y. S. 522; Gansz v. Gansz, 59 N. Y. S. 955; Anonymous, 15 Abb. Pr. N. S. (N. Y.) 307; Halsted v. Halsted, 11 Misc. 592, 1 N. Y. Ann. Cas. 230, 32 N. Y. S. 1080, 66 N. Y. St. 335; Drake v. Drake, 21 S. Dak. 182, 110 N. W. 270; Mosher v. Mosher, 16 N. Dak. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820, 125 Am. St. 654; Sullivan v. Sullivan, 49 Wash. 508, 95 Pac. 1095; Holcomb v. Holcomb, 49 Wash. 498, 95 Pac. 1091, citing State v. St. Louis Ct. of Appeals, 99 Mo. 216, 12 S. W. 661.

she should, from a pecuniary standpoint, be placed upon an equal footing with him.[71]

Such sum or sums as may be necessary from time to time to insure an efficient preparation and prosecution of her own cause, or a defense against her husband's from the beginning to the end of the litigation should be allowed.[72] Where statutes have been enacted in the aid of the wife in matrimonial actions employing such phrases as "expenses of litigation"[73] or "reasonable expenses,"[74] or "any money necessary to enable the wife,"[75] they have been construed to include counsel fees.

In Kentucky, the word "costs" in the statute includes counsel fees,[76] but in Missouri[77] and Texas[78] it does not.

Counsel fees and suit money are allowed the wife in New Hampshire only when she is libellee.[79]

There must be at least prima facie evidence of a marriage de facto before counsel fees may be allowed.[80] As a general rule counsel fees are not allowed a wife who has ample means of her

[71]Methvin v. Methvin, 15 Ga. 97, 60 Am. Dec. 664; McGee v. McGee, 10 Ga. 477; Jenkins v. Jenkins, 91 Ill. 167; Dow v. Eyster, 79 Ill. 254; Petrie v. People, 40 Ill. 334; McClelland v. McClelland, (Tex.), 37 S. W 350.

[72]Richardson v. Richardson, 4 Port (Ala.) 467, 30 Am. Dec. 538; Cooke v. Newell, 40 Conn. 596; Hinton v. Hinton, 117 Ga. 547, 43 S. E. 983; Glenn v. Hill, 50 Ga. 94; Sprayberry v. Merk, 30 Ga. 81, 76 Am. Dec. 637; Dow v. Eyster, 79 Ill. 254; Petrie v. People, 40 Ill. 334; Day v. Day, 71 Kans. 385, 80 Pac. 974, 6 Ann. Cas. 169; Cooper v. Cooper, 17 Mich. 205, 97 Am. Dec. 182; Ray v. Adden, 50 N. H. 82, 9 Am. Rep. 175; Dorsey v. Goodenow, Wright (Ohio) 120; Carden v. Carden, (Tenn.), 37 S. W. 1022; Sumner v. Sumner, 54 Wis. 642, 12 N. W. 21.

[73]Sweat v. Sweat, 123 Ga. 801, 51 S. E. 716, 1 L. R. A. 386; Cremer v. Cremer, 36 Ga. 618.

[74]Yost v. Yost, 141 Ind. 584, 41 N. E. 11; Musselman v. Musselman, 44 Ind. 106.

[75]Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; Winter v. Superior Court, 70 Cal. 295, 11 Pac. 633; Anderson v. Steger, 173 Ill. 112, 50 N. E. 665; Lynch v. Lynch, 99 Ill. App. 454; Page v. Page, 124 App. Div. 421, 108 N. Y. S. 864.

[76]Steele v. Steele, 119 Ky. 466, 84 S. W. 516; Barth v. Barth, 102 Ky. 56, 42 S. W. 1116, 80 Am. St. 335.

[77]Waters v. Waters, 49 Mo. 385.

[78]McClelland v. McClelland, (Tex.), 37 S. W. 350.

[79]Wallace v. Wallace, 75 N. H. 217, 72 Atl. 1033.

[80]Hite v. Hite (Cal.), 55 Pac. 900; Banks v. Banks, 42 Fla. 362, 29 So. 318; Freeman v. Freeman, 49 N. J. Eq. 102, 23 Atl. 113; Lake v. Lake, 194 N. Y. 179, 87 N. E. 87; Hopper v. Hopper, 92 Hun 415, 36 N. Y. S. 610.

own,[81] and in cases where the counsel has an agreement with the wife for a contingent fee.[82]

§ 721. **Counsel fees—Proceedings in which allowed.**—In whatever action the existence of the marital relation is involved, and its obligations asserted, counsel fees will be allowed, and this will include separate maintenance suits, wherein a divorce is not sought,[83] although there is a contrary ruling where there was no statute specifically authorizing them in such actions.[84] The right is generally independent of statute.[85] They are clearly authorized in actions for divorce where the wife is either the plaintiff[86] or the defendant,[87] and either in the trial court or on

[81]Verbeeck v. Verbeeck, (N. J. Ch.), 115 Atl. 136.

[82]Brindley v. Brindley, 121 Ala. 429, 25 So. 751; White v. White, 86 Cal. 212, 24 Pac. 1030; Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; Van Vleck v. Van Vleck, 21 App. Div. 272, 47 N. Y. S. 470.

[83]Lesh v. Lesh, 21 App. D. C. 475; Tolman v. Tolman, 1 App. D. C. 299; Brindley v. Brindley, 115 Ala. 474, 22 So. 448; Winter v. Superior Court, 70 Cal. 295, 11 Pac. 633; Clark v. Clark, 78 Ga. 79; Anderson v. Steger, 173 Ill. 112, 50 N. E. 665; Breen v. Breen, 28 Ky. L. 1216, 91 S. W. 251; Verner v. Verner, 62 Miss. 260; Vreeland v. Vreeland, 18 N. J. Eq. 43.

[84]In Therkelsen v. Therkelsen, 35 Ore. 75, 54 Pac. 885, 57 Pac. 373, a statute authorizing in an action for separate maintenance "after hearing," a sum to support the wife and children was construed not to include counsel fees pendente lite, or temporary alimony.

[85]Milliron v. Milliron, 9 S. Dak. 181, 68 N. W. 286, 62 Am. St. 863.

[86]Turner v. Turner, 44 Ala. 437; Pearson v. Darrington, 32 Ala. 227; Lowell v. Lowell, 55 Cal. 316; Methvin v. Methvin, 15 Ga. 97, 60 Am. Dec. 664; Anderson v. Steger, 173 Ill. 112, 50 N. E. 665; Newman v. Newman, 69 Ill. 167; Armstrong v. Armstrong, 35 Ill. 109; Brown v. Brown, 18 Ill. App. 445; Gruhl v. Gruhl, 123 Ind. 86, 23 N. E. 1101; McFarland v. McFarland, 51 Iowa 565, 2 N. W. 269; Donnelly v. Donnelly, 25 Ky. L. 1543, 78 S. W. 182; Vaughn v. Vaughn, 89 App. Div. 611, 85 N. Y. S. 443; Shaw v. Shaw, 5 Misc. 497, 26 N. Y. S. 715; Ober v. Ober, 54 Hun (N. Y.), 639, 7 N. Y. S. 843; Bloom v. Bloom, 17 Pa. Co. Ct. 478; Shy v. Shy, 7 Heisk. (Tenn.) 125; Lishey v. Lishey, 6 Lea (Tenn.) 418; Thompson v. Thompson, 3 Head (Tenn.) 527; Sumner v. Sumner, 54 Wis. 642, 12 N. W. 21.

[87]Rast v. Rast, 113 Ala. 319, 21 So. 34; Ex parte Perkins, 18 Cal. 60; Cooke v. Newell, 40 Conn. 596; McLauchlin v. McLauchlin, 128 Ga. 653, 58 S. E. 156; Kendrick v. Kendrick, 105 Ga. 38, 31 S. E. 115; Umlauf v. Umlauf, 22 Ill. App. 580; Waters v. Waters, 49 Mo. 385; Amos v. Amos, 4 N. J. Eq. 171; Schmalholz v. Schmalholz, 111 App. Div. 543, 98 N. Y. S. 510; Masey v. Masey, 58 App. Div. 619, 68 N. Y. S. 994; Bailie v. Bailie, 5 N. Y. Ann. Cas. 193, 53 N. Y. S. 866; Levy v. Levy, 29 Misc. 374, 60 N. Y. S. 485; Shepherd v. Shepherd, 18 Pa. Co. Ct. 614; Shy v. Shy, 7 Heisk (Tenn.) 125.

appeal from its decisions.[88] They may be awarded in a proceeding by the husband to secure a reduction of the alimony allowed.[89] A divorced wife has been refused counsel fees on her application for a modification of the decree,[90] and on her petition in such case for the custody of her children;[91] but by virtue of a statute in an action by her to enforce the payment of alimony awarded in a decree of divorce, they will be allowed.[92] In an action by her to set aside a decree of divorce they have both been allowed,[93] and denied.[94]

But counsel fees may be allowed in such case where the decree of divorce is absolutely void, as the reason for not allowing them does not exist in such case.[95] The rule is the same with reference to an action by the wife to set aside articles of separation alleged to have been executed by her under duress.[96]

But the marital relation not being in question in a habeas corpus proceeding to release the husband from imprisonment under a writ of ne exeat sued out by the wife, in an action by her for separate maintenance, they will be denied.[97] Pending new trial and motion for new trial counsel fees may be allowed.[98]

[88]People v. Circuit Ct., 169 Ill. 201, 48 N. E. 717; Harding v. Harding, 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310; Graves v. Graves, 36 Iowa 310, 14 Am. Rep. 525; Long v. Long, 78 Mo. App. 32; Kiddle v. Kiddle, 90 Nebr. 248, 133 N. W. 181, 36 L. R. A. (N. S.) 1001, Ann. Cas. 1913A, 796.

[89]Stillman v. Stillman, 99 Ill. 196, 39 Am. Rep. 21; Thurston v. Thurston, 38 Ill. App. 464; Blake v. Blake, 70 Wis. 238, 35 N. W. 551; Helden v. Helden, 11 Wis. 554. But see Corder v. Speake, 37 Ore. 105, 51 Pac. 647.

[90]Barish v. Barish, 190 Iowa 493, 180 N. W. 724.

[91]Nelson v. Nelson, 146 Ark. 362, 225 S. W. 619.

[92]Czarra v. Czarra, 128 Ill. App. 433.

[93]McKenna v. McKenna, 70 Ill. App. 340; McFarland v. McFarland, 51 Iowa 565, 2 N. W. 269; Wilson v. Wilson, 49 Iowa 544; Corder v. Speake, 37 Ore. 105, 51 Pac. 647; Quelin v. Quelin, 11 Pa. Co. Ct. 265, Chapman v. Parsons, 66 W. Va. 307, 66 S. E. 461, 24 L. R. A. (N. S.) 1015, 135 Am. St. 1033, 19 Ann. Cas. 453.

[94]Lake v. Lake, 194 N. Y. S. 179, 87 N. E. 87, where it was said, "The statute does not warrant the allowance, and the relation of husband and wife being wholly severed, there is no inherent jurisdiction in the court under its general equity powers."

[95]Ex parte Smith, 34 Ala. 455; Shrader v. Shrader, 36 Fla. 502, 18 So. 672.

[96]Dean v. Dean, 48 Misc. 149, 96 N. Y. S. 472; Beuter v. Beuter, 1 S. Dak. 94, 45 N. W. 208, 8 L. R. A. 562.

[97]Bronk v. State, 43 Fla. 461, 31 So. 248, 99 Am. St. 119.

[98]Bordeaux v. Bordeaux, 29 Mont. 478, 75 Pac. 359; Halsted v. Halsted, 21 App. Div. 589, 47 N. Y. S. 814.

As temporary alimony may be allowed the wife in her husband's action to annul the marriage, so may counsel fees be allowed.[99] But it is not so where she is the plaintiff, as she necessarily admits no legal obligation upon the part of her reputed husband.[1] Counsel fees have been denied on appeal from an order granting temporary alimony.[2]

§ 722. **Counsel fees—Time of allowance.**—As in the case of temporary alimony, counsel fees may be allowed at any time, and from time to time while the action is pending, depending entirely upon the necessity,[3] but it is usual to allow them at the beginning of the action upon the appearance of the defendant, or the return day of the summons.[4] The court may order counsel fees paid in a stated sum though payable in installments.[5]

In some jurisdictions the allowance of counsel fees incurred during the trial can not be made in the final judgment,[6] nor after the final decree of divorce,[7] or a decree of separation,[8] unless the right to do so is reserved therein.[9] The weight of authority is, however, that counsel fees are allowed the wife[10] at the final

[99]Higgins v. Sharp, 164 N. Y. 4, 58 N. E. 9; Griffin v. Griffin, 47 N. Y. 134; Herron v. Herron, 28 Misc. 323, 59 N. Y. S. 861. But see Hopper v. Hopper, 92 Hun 415, 36 N. Y. S. 610.

[1]Czarra v. Czarra, 128 Ill. App. 433.

[2]Tonn v. Tonn, 16 N. Dak. 17, 111 N. W. 609.

[3]Rose v. Rose, 109 Cal. 544, 42 Pac. 452; Gould v. Gould, 61 Misc. 120, 114 N. Y. S. 331.

[4]Bauman v. Bauman, 18 Ark. 320, 68 Am. Dec. 171; Cooke v. Newell, 40 Conn. 596; Hinton v. Hinton, 117 Ga. 547, 43 S. E. 983; Glenn v. Hill, 50 Ga. 94; Sprayberry v. Merk, 30 Ga. 81, 76 Am. Dec. 637; Dow v. Eyster, 79 Ill. 254; Petrie v. People, 40 Ill. 334; Waters v. Waters, 49 Mo. 385; Ray v. Adden, 50 N. H. 82, 9 Am. Rep. 175; Dorsey v. Goodenow, Wright (Ohio), 120; McKennon v. McKennon, 10 Okla. 400, 63 Pac. 704; Carden v. Carden, (Tenn.), 37 S. W. 1022; Sumner v. Sumner, 54 Wis. 642, 12 N. W. 21.

[5]Waldron v. Waldron, 151 Ga. 549, 107 S. E. 483.

[6]Stampfli v. Stampfli (Cal. App.), 199 Pac. 829; Lacey v. Lacey, 108 Cal. 45, 40 Pac. 1056; Loveren v. Loveren, 100 Cal. 493, 35 Pac. 87; Mudd v. Mudd, 93 Cal. 320, 33 Pac. 114; Poillon v. Poillon, 75 App. Div. 536, 78 N. Y. S. 323; Crim v. Crim, 80 Ore. 88, 155 Pac. 175; Jones v. Jones, 59 Ore. 308, 117 Pac. 414.

[7]Newman v. Newman, 69 Ill. 167; Page v. Page, 195 N. Y. 540, 88 N. E. 1127.

[8]Baier v. Baier, 91 Minn. 165, 97 N. W. 671.

[9]Pike v. Pike, 123 Ill. App. 553.

[10]Van Dyke v. Van Dyke, 125 Ga. 491, 54 S. E. 537; Anderson v. Steger, 173 Ill. 112, 50 N. E. 665; Dinet v. Pfirshing, 86 Ill. 83; Armstrong v. Armstrong, 35 Ill. 109; Ricketts v. Ricketts, 4 Gill (Md.) 105; Wagner v. Wagner, 34 Minn. 441, 26 N.

hearing, where the decree is in her favor, but in some jurisdiction, they are not allowed if she fails.[11]

In Wisconsin, counsel fees may be allowed both before and after judgment.[12] Of course they may be allowed in the final decree by stipulation.[13]

§ 723. **Counsel fees—Amount.**—A reasonable amount should be allowed as counsel fees,[14] which the judge of the court may determine from his own experience, having in mind the character of the services to be performed,[15] the ability of the husband to pay,[16] and the necessity of a litigation,[17] in accordance with the policy and practice in such particular jurisdiction;[18] but there are

W. 450; Graves v. Graves, 2 Paige (N. Y.) 62.

[11]Stockman v. Whitmore, 140 Iowa 378, 118 N. W. 403; Wald v. Wald, 124 Iowa 183, 99 N. W. 720.

[12]Sumner v. Sumner, 54 Wis. 642, 12 N. W. 21; Williams v. Williams, 29 Wis. 517.

[13]Farrar v. Farrar, 41 Cal. App. 452, 182 Pac. 989.

[14]Jeter v. Jeter, 36 Ala. 391; Rose v. Rose, 109 Cal. 544, 42 Pac. 452; Turner v. Turner, 80 Cal. 141, 22 Pac. 72; Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; Blake v. Blake, 70 Ill. 618; White v. White, 50 Ill. App. 149; Dugan v. Dugan, 1 Duv. (Ky.) 289; Baldwin v. Baldwin, 6 Gray (Mass.) 341; Chaffee v. Chaffee, 14 Mich. 463; Parker v. Parker, 71 Miss. 164, 14 So. 459; Graves v. Graves, 2 Paige (N. Y.) 62.

[15]Jeter v. Jeter, 36 Ala. 391; Rose v. Rose, 109 Cal. 544, 42 Pac. 452; Mudd v. Mudd, 98 Cal. 320, 33 Pac. 114; Peyre v. Peyre, 79 Cal. 336, 21 Pac. 838; Reynolds v. Reynolds, 130 Ga. 460, 60 S. E. 1053; Sweat v. Sweat, 123 Ga. 801, 51 S. E. 716; Brown v. Georgia Min. Co., 106 Ga. 516, 32 N. E. 601; Baker v. Richmond Mill Works, 105 Ga. 225, 31 S. E. 426; Campbell v. Campbell, 67 Ga. 423; Dicken v. Dicken, 38 Ga. 663; Sprayberry v. Merk, 30 Ga. 81, 76 Am. Dec. 637; Collins v. Collins, 29 Ga. 517; Harding v. Harding, 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310; Hutchinson v. Hutchinson, 105 Ill. App. 349; Blair v. Blair, 74 Iowa 311, 37 N. W. 385; Baldwin v. Baldwin, 6 Gray (Mass.) 341; McCloskey v. McCloskey, 68 Mo. App. 199; De Llamosas v. De Llamosas, 62 N. Y. 618; Gould v. Gould, 61 Misc. 120, 114 N. Y. S. 331; Williams v. Williams, 29 Wis. 517.

[16]Baer v. Baer, 3 Pa. Dist. Ct. 379.

[17]Jeter v. Jeter, 36 Ala. 391; Harding v. Harding, 144 Ill. 588, 32 N. E. 206, 21 L. R. A. 310; Baldwin v. Baldwin, 6 Gray (Mass.) 341; Parker v. Parker, 71 Miss. 164, 14 So. 459; Atherton v. Atherton, 82 Hun 179, 31 N. Y. S. 977, 64 N. Y. St. 798; Uhlman v. Uhlman, 51 N. Y. Super. Ct. 361. The petition for the allowance of counsel fees need not allege that the wife was compelled to employ an attorney. Gaskin v. Gaskin, 150 Ga. 756, 105 S. E. 369.

[18]Pearson v. Darrington, 32 Ala. 227; Lowell v. Lowell, 55 Cal. 316; Weaver v. Weaver, 33 Ga. 172; Collins v. Collins, 29 Ga. 517; Blake v. Blake, 70 Ill. 618; Dugan v. Dugan, 1 Duv. (Ky.) 289; Meyar v. Meyar, 3 Metc. (Ky.) 298; Prescott v. Prescott, 59 Maine 146; Coffin v. Dunham, 8 Cush. (Mass.) 404, 54 Am. Dec. 769; Chaffee v. Chaffee, 14

holdings that evidence of the value of such services should be established by evidence.[19] On such hearing, the court may hear expert witnesses thereon, but he is not bound thereby.[20]

The amount of the allowance of counsel fees rests largely in the sound discretion of the trial court, and it is only when such discretion is abused that an appellate court will disturb the allowance.[21]

§ 724. **Counsel fees—Allowance—Order.**—As in the case of suit money, the motion or application for counsel fees should be

Mich. 463; Waters v. Waters, 49 Mo. 385; De Llamosas v. De Llamosas, 62 N. Y. 618; Thompson v. Thompson, 3 Head (Tenn.) 527; Williams v. Williams, 29 Wis. 517; Sopwith v. Sopwith, 3 Sw. & Tr. 105.

[19]Jeter v. Jeter, 36 Ala. 391; Rose v. Rose, 109 Cal. 544, 42 Pac. 452; Blake v. Blake, 80 Ill. 523; Glynn v. Glynn, 139 Ill. App. 185; Hunter v. Hunter, 121 Ill. App. 380; Blair v. Blair, 74 Iowa 311, 37 N. W. 385; Schneider v. Kohn, 24 Ky. L. 924, 70 S. W. 287; Whitney v. Whitney, 7 Bush (Ky.) 520.

[20]Sweat v. Sweat, 123 Ga. 801, 51 S. E. 716; Campbell v. Campbell, 67 Ga. 423; Dicken v. Dicken, 38 Ga. 663. In the following cases, the amounts allowed as counsel fees were held not excessive: Wood v. Wood, 140 Ark. 361, 215 S. W. 681; Phinizy v. Phinizy, 151 Ga. 393, 107 S. E. 53; Spooner v. Spooner, 149 Ga. 467, 100 S. E. 571; Deeds v. Deeds, 108 Kans. 770, 196 Pac. 1109; Riggins v. Riggins, 192 Ky. 500, 234 S. W. 5; McKee v. McKee, 191 Ky. 669, 231 S. W. 213; Walter v. Walter, 190 Ky. 49, 226 S. W. 374; Hoffman v. Hoffman, 190 Ky. 13, 226 S. W. 119; Raspberry v. Raspberry, 189 Ky. 502, 225 S. W. 148; Johnson v. Johnson, 183 Ky. 421, 209 S. W. 385; Wygodsky v. Wygodsky, 134 Md. 244, 106 Atl. 698; Thompson v. Thompson, 205 Mich. 124, 171 N. W. 347; O'Hern v. O'Hern, 206 Mo. App. 651, 228 S. W. 533; Ascher v Ascher, 202 Mo. App. 622, 216 S. W. 576; Fisher v. Fisher (Mo. App.), 207 S. W. 261; Stillman v. Stillman, 115 Misc. 106, 187 N. Y. S. 383; Spatz v. Spatz, 189 App. Div. 438, 178 N. Y. S. 567; Lynn v. Lynn, 76 Pa. Super. Ct. 440; Sadler v. Sadler, 115 S. Car. 217, 105 S. E. 285; Twohy v. Twohy, 130 Va. 557, 107 S. E. 642; Yoder v. Yoder, 105 Wash. 491, 178 Pac. 474; Fitzpatrick v. Fitzpatrick, 105 Wash. 394, 177 Pac. 790. And in the following cases they have been increased: Koehler v. Koehler, 137 Ark. 302, 209 S. W. 283; Mitchell v. Mitchell, 193 Iowa 153, 185 N. W. 62; Prochaska v. Prochaska (Iowa), 183 N. W. 417; Nolan v. Nolan, 214 Mich. 49, 181 N. W. 971.

[21]Reed v. Reed, 40 Cal. App. 102, 180 Pac. 43; Gaskin v. Gaskin, 150 Ga. 756, 105 S. E. 369; Taylor v. Taylor, 33 Idaho 445, 196 Pac. 211; Swalp v. Swalp, 104 Kans. 171, 178 Pac. 415; Larson v. Larson, (Minn.), 179 N. W. 723; Conklin v. Conklin, 186 N. Y. S. 191; Lynn v. Lynn, 76 Pa. Super. Ct. 440; Swank v. Swank, 75 Pa. Super. Ct. 112; Adams v. Adams, 74 Pa. Super. Ct. 502; Sadler v. Sadler, 115 S. Car. 217, 105 S. E. 285; Wilson v. Wilson (Tex. Civ. App.), 231 S. W. 830; Pierce v. Pierce, 107 Wash. 125, 181 Pac. 24.

the name of the wife,[22] although it has been held it must be in the name of the attorney himself.[23] Unless the statute is otherwise,[24] the order may direct them to be paid to the wife[25] for the use of her counsel.[26]

§ 725. **Counsel fees—Allowance in case of wife's adultery or other fault.**—Where a husband is charged with adultery in the wife's answer to his suit against her, she is entitled to counsel fees and suit money notwithstanding her own adultery.[27] And where she commits adultery pending her suit, for which the suit is dismissed, she will be entitled to costs awarded to her up to the time she is found guilty,[28] but they cease after the ascertainment of the wife's guilt in an action by the husband.[29]

A wife charged with adultery and denied by her under oath, may be allowed counsel fees unless the proof of her guilt is cogent and convincing to the last degree.[30] Counsel fees may be allowed a wife notwithstanding her illicit relations with other men prior to the marriage if that fact was known to the husband at the time of the marriage.[31] They may also be allowed in a defeated action for divorce by the wife.[32]

[22]Creamer v. Creamer, 36 Ga. 618; Anderson v. Steger, 173 Ill. 112, 50 N. E. 665; Harris v. Harris, 109 Ill. App. 148; Lynch v. Lynch, 99 Ill. App. 454; Holmes v. Hamburger, 67 Ill. App. 121; Tayman v. Tayman, 2 Md. Ch. 393; Yoder v. Yoder, 105 Wash. 491, 178 Pac. 474.

[23]Chase v. Chase, 29 Hun (N. Y.) 527.

[24]Nunn v. Page, 134 Ky. 698, 121 S. W. 442, 135 Am. St. 429.

[25]Farrell v. Betz, 16 Ala. App. 668, 81 So. 188; Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; Firman v. Firman, 109 Ill. 63; Miles v. Miles, 102 Ill. App. 130; Lynch v. Lynch, 99 Ill. App. 454; Parker v. Parker, 71 Miss. 164, 14 So. 459; Mercer v. Mercer, 73 Hun 192, 25 N. Y. S. 867.

[26]Pike v. Pike, 123 Ill. App. 553; Berg v. Berg, 119 Ill. App. 422; Blakely v. Blakely, 117 Minn. 482, 136 N. W. 3.

[27]Shaw v. Shaw, 5 Misc. 497, 26 N. Y. S. 715; Clark v. Clark, 30 N. Y. Super Ct. 284; Miller v. Miller, 43 How. Pr. (N. Y.) 125.

[28]Scott v. Scott, 8 Pa. Dist. Ct. 548; Whitmore v. Whitmore, Eng. Law. Reports, 1 Prob. & Div. 96, 13 Law Times (N. S.) 723, 35 L. J. P. (N. S.) 39.

[29]Dawson v. Dawson, 37 Mo. App. 207.

[30]Eisenbrock v. Eisenbrock, 187 App. Div. 85, 175 N. Y. S. 67. In Gutman v. Gutman, 178 N. Y. S. 833, where the wife was charged with adultery, and the jury had disagreed, counsel fees were allowed, although the court was not impressed from the testimony heard on the trial that she would be successful in establishing her innocence.

[31]West v. West, 126 Va. 696, 101 S. E. 876.

[32]Towson v. Towson, 49 App. D. C. 45, 258 Fed. 517; Schmalholz v. Schmalholz, 111 App. Div. 543, 98

A wife charged with desertion which she denies is entitled to counsel fees.[33] So, she may be allowed counsel fees to defend a divorce suit for desertion, notwithstanding a prior separation agreement, in which she, for a consideration, released him from all marital obligations. Such a contract implies a continuance of the marriage relation.[34]

Counsel fees are allowed in Kentucky although the wife is at fault, if she is not able to pay them herself.[35]

§ 726. **Counsel fees—Effect of death of party.**—Generally the suit abates upon the death of either of the spouses, and counsel fees can not be allowed against the personal representatives of the deceased.[36] They are not necessaries which may be charged to the estate of the husband or against him.[37] But where counsel fees were held to be included in the word "costs," they were allowed after the death of the wife for services already rendered.[38]

A wife is not entitled to an allowance for counsel fees for services in prosecuting the appeal where pending such appeal the husband dies.[39]

§ 727. **Counsel fees—Allowance where parties have become reconciled.**—Whether upon reconciliation of the parties in a divorce or separate maintenance suit, counsel fees may be allowed, there is much disagreement among the authorities; but

N. Y. S. 510; Masey v. Masey, 58 App. Div. 619, 68 N. Y. S. 994.

[33]Pitel v. Pitel, 90 N. J. Eq. 366, 107 Atl. 145.

[34]Phinizy v. Phinizy, 151 Ga. 393, 107 S. E. 53; Goodspeed v. Goodspeed, 204 Mich. 44, 170 N. W. 90.

[35]Sanders v. Sanders, 184 Ky. 119, 211 S. W. 425.

[36]Pearson v. Darrington, 32 Ala. 227; Dow v. Eyster, 79 Ill. 254; Shafer v. Shafer, 30 Mich. 163; Kellogg v. Stoddard, 89 App. Div. 137, 84 N. Y. S. 1015; Millady v. Stein, 19 Misc. 652, 44 N. Y. S. 408. McCurley v. McCurley, 60 Md. 185, 45 Am. Rep. 717, in which the husband had died, pending the divorce proceedings; the court held the action was abated and that the allowance of money to pay the wife's counsel fees was in furtherance of the procedure to obtain or prevent the divorce. When therefore the jurisdiction to pass a decree is ended, no jurisdiction can survive as to matters purely ancillary to that object.

[37]Shelton v. Pendleton, 18 Conn. 417; Dow v. Eyster, 79 Ill. 254; Johnson v. Williams, 3 G. Greene (Iowa) 97, 54 Am. Dec. 491; Williams v. Monroe, 18 B. Mon. (Ky.) 514; Morrison v. Holt, 42 N. H. 478, 80 Am. Dec. 120; Wing v. Hurlburt, 15 Vt. 607, 40 Am. Dec. 695.

[38]Ballard v. Caperton, 2 Metc (Ky.) 412.

[39]Strickland v. Strickland, 80 Ark. 451, 97 S. W. 659.

that such an allowance may be made seems to be supported by a majority of the cases, as it certainly is by the soundest principles of justice and fair dealing.[40]

The contrary view, however, has been taken by several of the courts, which refuse to make orders for counsel fees[41] after recon-

[40]Davis v. Davis, 141 Ind. 367, 40 N. E. 803; McMakin v. Wickliffe, 16 Ky. L. 240; Burgess v. Burgess, 1 Duv. (Ky.) 287; Kiddle v. Kiddle, 90 Nebr. 248, 133 N. W. 181, 36 L. R. A. (N. S.) 1001, Ann. Cas. 1913A, 796; Sumner v. Sumner, 54 Wis. 642, 12 N. W. 21. In Sprayberry v. Merk, 30 Ga. 81, 76 Am. Dec. 637, the court said: "As to the settlement which took place in this case between the husband and the wife, after she had used the services of her counsel, it is scarcely necessary to remark that the counsel, after having acquired the right to compensation for his services by rendering them at the request of the wife, could not be settled of that right by arrangements to which he was not a party." Beaulieu v. Beaulieu, 114 Minn. 511, 131 N. W. 481. In this case it is said: "Reconciliation of the parties, however, is not the legal equivalent of a dismissal of the action, and it is still pending. It is not a valid objection to the order that the services were rendered before it was made." In Fullhart v. Fullhart, 109 Mo. App. 705, 83 S. W. 541, it is said: "We know of no principle of law by which a woman who has a meritorious cause of action for divorce, employs an attorney to institute and prosecute such an action, can, after it has been instituted and carried on for some time, deprive him of his right to compensation for the services so rendered in that action by a reconciliation with her husband, followed by a resumption of cohabitation. It would seem that upon the clearest principles of common honesty as well as law, an attorney in such a predicament ought to be compensated for the services rendered, and that the wife should be allowed suit money for that purpose."

[41]Lacey v. Lacey, 108 Cal. 45, 40 Pac. 1056; Keefer v. Keefer, 140 Ga. 18, 78 S. E. 462, 46 L. R. A. (N. S.) 527; Steger v. Steger, 67 Ill. App. 533. Jordan v. Westerman, 62 Mich. 170, 28 N. W. 826, 4 Am. St. 836, McCarthy v. McCarthy, 137 N. Y. 500, 33 N. E. 550; Naumer v. Gray, 41 App. Div. 361, 58 N. Y. S. 476; Yoder v. Yoder, 105 Wash. 491, 178 Pac. 474; Hillman v. Hillman, 42 Wash. 595, 85 Pac. 61, 114 Am. St. 135. In Reynolds v. Reynolds, 67 Cal. 176, 7 Pac. 480, the court said: "As long as the condition which the law implies—viz., subsequent kindness—continued, the plaintiff had no cause of action or occasion for the service of counsel in that regard. When the husband and wife forgave and were forgiven, and abandoned their criminations and recriminations, the attorneys had but to gather up their briefs and retire. The court should at once have dismissed the case, and made no further order in it." In McCullough v. Murphy, 45 Ill. 256, it was said: "If the controversy is settled by the parties by the voluntary return of the wife to the husband, and the abandonment of the suit, before counsel have procured such order, their right to it is gone. They should have procured the order while the suit was being prosecuted, and if they failed to do so, their application will be too late." In Anderson v. Steger, 173 Ill. 112,

ciliation, or after the wife dismisses her action.[42] They do not sanction the continuance of the wife's suit for the sole purpose of the allowance of counsel fees.[43]

As a general rule counsel fees already allowed can not be defeated by a reconciliation of the parties,[44] or the voluntary dismissal by the wife of her action for divorce.[45]

An order for counsel fees already earned may be entered after reconciliation while the cause is still pending,[46] and while the proceedings are yet within the control of the court it may set

50 N. E. 665, the parties had become reconciled and were living together, and a motion by the wife to dismiss was continued after her solicitor had moved for an allowance for past services, which being allowed by the trial court, was held error.

[42]Reynolds v. Reynolds, 67 Cal. 176, 7 Pac. 480; Anderson v. Steger, 173 Ill. 112, 50 N. E. 665; Newman v. Newman, 69 Ill. 167; Courtney v. Courtney, 4 Ind. App. 221, 30 N. E. 914; Chase v. Chase, 29 Hun (N. Y.) 527, 65 How. Pr. 306; Corder v. Speake, 37 Ore. 105, 51 Pac. 647; Carden v. Carden, (Tenn.), 37 S. W. 1032; Thompson v. Thompson, 3 Head (Tenn.) 527.

[43]Reynolds v. Reynolds, 67 Cal. 176, 7 Pac. 480; Stover v. Stover, 7 Idaho 185, 61 Pac. 462; Anderson v. Steger, 173 Ill. 112, 50 N. E. 665; McCulloch v. Murphy, 45 Ill. 256; Sims v. Davis, 48 Nebr. 720, 67 N. W. 765; Thompson v. Thompson, 3 Head. (Tenn.) 527; Hillman v. Hillman, 42 Wash. 595, 85 Pac. 61, 114 Am. St. 135; Szymanski v. Szymanski, 151 Wis. 145, 138 N. W. 53. But see contra Taylor v. Taylor, 33 Idaho 445, 196 Pac. 211. In the case of Yoder v. Yoder, 105 Wash. 491, 178 Pac. 474, 3 A. L. R. 1104, the court says: "We believe it to be the duty both of the trial courts and appellate courts to let nothing stand in the way of the reconciliation of estranged spouses at any stage of the proceedings. But we do not believe that by such voluntary act of the estranged parties to a divorce suit, they can so summarily and without consideration dispose of counsel who in good faith performed varied valuable services, and expended money in behalf of the wife, who is peculiarly protected in such cases by our law."

[44]Nunn v. Page, 134 Ky. 698, 121 S. W. 442, 135 Am. St. 429; Evans v. Steward, 18 Ky. L. 941, 38 S. W. 697; Yoder v. Yoder, 105 Wash. 491, 178 Pac. 474, 3 A. L. R. 1104.

[45]Traylor v. Richardson, 2 Ind. App. 452, 28 N. E. 205.

[46]Sprayberry v. Merk, 30 Ga. 81, 76 Am. Dec. 637; Davis v. Davis, 141 Ind. 367, 40 N. E. 803; Beaulieu v. Beaulieu, 114 Minn. 511, 131 N. W. 481; Fullhart v. Fullhart, 109 Mo. App. 705, 83 S. W. 541; Kiddle v. Kiddle, 90 Nebr. 248, 133 N. W. 181, 36 L. R. A. (N. S.) 1001, Ann. Cas. 1913A, 796; Sumner v. Sumner, 54 Wis. 642, 12 N. W. 21. In Courtney v. Courtney, 4 Ind. App. 221, 30 N. E. 914, where the parties had become reconciled and were living together, the wife notified her solicitors that their services were no longer required, and filed in vacation a written dismissal of the cause, whereupon the clerk entered an order to that effect: but inasmuch as it still required the order of the court to make such dismissal a final judgment,

aside a final decree and award counsel fees for past services.[47] The husband may not avoid the payment of counsel fees already earned by dismissing his suit pending an application for temporary alimony,[48] although the fact of dismissal may be considered.[49]

The law encourages the defense of all divorce actions.[50] The court may refuse to dismiss a cause where there is a collusive settlement for the purpose of defrauding an attorney of his fees.[51]

After a reconciliation of the parties to an action for separate maintenance, the attorney may sue for his fees.[52] After dismissal of the action by the court, order for counsel fees can no longer be entered.[53]

§ 728. **Counsel fees—Contingent fees.**—In divorce cases the law has provided that allowance may be made to carry on the suit which includes whatsoever reasonable sums the services of the solicitor may be worth, and also all other expenses as well as for her suit. Applications for such allowance as well as for alimony, peculiarly call for good faith and candor on the part of the applicant. It would be a fraud upon the court which makes these allowances based upon the facts before him of the husband's ability and the wife's necessity and also upon the husband who is called upon to pay, if the funds so decreed to the wife as her alimony should previously be bartered away to her solicitors under a private contract with her.[54]

upon an intervening motion of the wife's solicitors, payment for their services was ordered.

[47]Davis v. Davis, 141 Ind. 367, 40 N. E. 803.

[48]O'Neil v. O'Neil, 100 Iowa 743, 69 N. W. 523; Gossett v. Patten, 23 Kans. 340; Powell v. Lilly, 24 Ky. L. 193, 68 S. W. 123; Stevens v. Stevens, 1 Metc. (Mass.) 279; Hays v. Ledman, 28 Misc. 575, 59 N. Y. S. 687; Anonymous, 15 Abb. Pr. N. S. (N. Y.) 307; Freeman v. Freeman, 8 Abb. N. C. (N. Y.) 174; Germond v. Germond, 1 Paige (N. Y.) 83; Thorndike v. Thorndike, 1 Wash. Ter. 175.

[49]Waters v. Waters, 49 Mo. 385.

[50]Yoder v. Yoder, 105 Wash. 491, 178 Pac. 474, 3 A. L. R. 1104.

[51]Szymanski v. Szymanski, 151 Wis. 145, 138 N. W. 53; Clarke v. Burke, 65 Wis. 359, 27 N. W. 22, 56 Am. Rep. 631.

[52]Naumer v. Gray, 41 App. Div. 361, 58 N. Y. S. 476.

[53]Womacks v. Womacks, 125 Ill. App. 441.

[54]Newman v. Freitas, 129 Cal. 283, 61 Pac. 907, 50 L. R. A. 548; Jordan v. Westerman, 62 Mich. 170, 28 N. W. 826, 4 Am. St. 836; Lynde v. Lynde, 64 N. J. Eq. 736, 52 Atl. 694, 58 L. R. A. 471, 97 Am. St. 692; Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. 544. Agreements for contingent fees are objectionable in ordinary actions, but in actions for divorce this kind of agreement is particularly vicious.

Where such a contract has been made and the alimony allowed by the court has come into the hands of the solicitor who manifests an intention to retain his illegal portion thereof a suit may be begun to recover the same without having made a previous demand therefor.[55]

Moreover, such contracts are against public policy for another reason. Public policy is interested in maintaining the family relation. The interests of society require that these relations shall not be lightly severed; that families shall not be broken up for inadequate causes or other unworthy motives; and that where differences have arisen which threaten disruption, public welfare and the good of society demands a reconciliation if practicable or possible. Contracts of this kind tend directly to prevent such reconciliation, and, if legal and valid, tend directly to bring around alienation of husband and wife by offering a strong inducement, amounting to a premium, to induce and advise dissolution of the marriage ties as a method of obtaining relief from real or fancied grievances, which otherwise would pass unnoticed.[56] The number of counsel which may be employed by the wife, where she relies upon orders of court that her husband should pay their fees, depends upon the exigencies of the case and the husband's pecuniary ability.[57]

§ 729. **Counsel fees—Number of counsel.**—But it is usual to allow counsel fees for one solicitor only,[58] and no allowance will be made for more unless it is made to appear that they were necessary to protect the wife's interests.[59]

The wife's attorney becomes an interested party in the proceeding, and ceases to act as a legal adviser and an officer of the court. The courts discourage such agreements; and if in the progress of the trial, the court discovers an attorney is rendering his services upon a contingent fee, no allowance for attorney's fees will be made. Brindley v. Brindley, 121 Ala. 429, 25 So. 751; citing White v White, 86 Cal. 212, 24 Pac. 1030.

[55]Jordon v. Westerman, 62 Mich. 170, 28 N. W. 826, 4 Am. St. 836; Lynde v. Lynde, 64 N. J. Eq. 736, 52 Atl. 694, 58 L. R. A. 471, 97 Am. St. 692.

[56]Jordon v. Westerman, 62 Mich. 170, 28 N. W. 826, 4 Am. St. 836.

[57]Hecht v. Hecht, 28 Ark. 92; Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; Stillman v. Stillman, 99 Ill. 196, 39 Am. Rep. 21; Jenkins v. Jenkins, 91 Ill. 167; Blake v. Blake, 70 Ill. 618; Ricketts v. Ricketts, 4 Gill (Md.) 105; Black v. Black, 5 Mont. 15, 2 Pac. 317; State v. Sachs, 3 Wash. 371, 28 Pac. 540.

[58]Uhlman v. Uhlman, 51 N. Y. Super. Ct. 361.

[59]Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; Rogers v. Rogers, 103 Ga. 763, 30 S. E. 659; Dugan v. Dugan,

§ 730. **Counsel fees—Allowance on appeal.**—Counsel fees are allowed the wife on an appeal from a decree of divorce, without reference to which of the parties takes the appeal. If taken by the husband, it is granted as a matter of course, for the presumption is that he is in the wrong.[60] But on her appeal this presumption is shifted, and counsel fees are granted her not as a matter of course for here her good faith must appear,[61] and her appeal must not be without merit.[62]

Indeed it has been held that strong reasons should appear that she will be successful before counsel fees will be allowed.[63] However, where the trial court allows counsel fees and suit money to prosecute an appeal by the wife, a presumption is raised that the appeal is not without merit and that it is taken in good faith.[64] The good faith may be determined from an inspection of the record solely.[65]

A wife appealing from an order dismissing her cause for divorce, may be allowed counsel fees to properly present such appeal.[66] So, where in her action for separate maintenance, he

1 Duv. (Ky.) 289; Williams v. Williams, 29 Wis. 517.

[60]Larkin v. Larkin, 71 Cal. 330, 12 Pac. 227; Ex parte Winter, 70 Cal. 291, 11 Pac. 630; Jenkins v. Jenkins, 91 Ill. 167; Earle v. Earle, 75 Ill. App. 351; Simpson v. Simpson, 91 Iowa 235, 59 N. W. 22; Doolittle v. Doolittle, 78 Iowa 691, 43 N. W. 616, 6 L. R. A. 187; Blair v. Blair, 74 Iowa 311, 37 N. W. 385; Rohrback v. Rohrback, 75 Md. 317, 23 Atl. 610; Novotny v. Novotny, (Minn.), 189 N. W. 258 (allowed wife on husband's appeal from order as to custody of child); Schuster v. Schuster, 84 Minn. 403, 87 N. W. 1014; Lake v. Lake, 17 Nev. 230, 30 Pac. 878; McBride v. McBride, 119 N. Y. 519, 23 N. E. 1065; Haddock v. Haddock, 75 App. Div. 565, 78 N. Y. S. 304; Poillon v. Poillon, 75 App. Div. 536, 78 N. Y. S. 323; Cohen v. Cohen, 11 Misc. 704, 32 N. Y. S. 1082; Halsted v. Halsted, 11 Misc. 592, 32 N. Y. S. 1080; Shy v. Shy, 7 Heisk (Tenn.) 125; Engleman v. Engleman, 97 Va. 487, 34 S. E. 50; Sullivan v. Sullivan, 49 Wash. 508, 95 Pac. 1095; Holcomb v. Holcomb, 49 Wash. 498, 95 Pac. 1091; Wass v. Wass, 42 W. Va. 460, 26 S. E. 440.

[61]Gay v. Gay, 146 Cal. 237, 79 Pac. 885; Whitmore v. Whitmore, 49 Mich. 417, 13 N. W. 800; Holthoefer v. Holthoefer, 47 Mich. 260, 11 N. 150; Zeigenfuss v. Zeigenfuss, 41 Mich. 414; Disborough v. Disborough, 51 N. J. Eq. 306, 28 Atl. 3. A husband is estopped from urging that his wife's appeal is not prosecuted with due diligence when he has appealed from an order allowing her counsel fees and suit money therefor. Donaldson v. Donaldson, (Mo. App.), 215 S. W. 904.

[62]Krause v. Krause, 23 Wis. 354; Ottway v. Ottway, 13 Pro. Div. 141.

[63]Berger v. Berger, 141 App. Div. 455, 126 N. Y. S. 284.

[64]Donaldson v. Donaldson, (Mo. App.) 215 S. W. 904.

[65]Gay v. Gay, 146 Cal. 237, 79 Pac. 885.

[66]Chaffee v. Chaffee, 14 Mich. 463.

interposes a counterclaim for divorce in which he is successful, counsel fees may be allowed her to perfect an appeal.[67] Counsel fees may be allowed in the appellate court at any stage of the proceeding, and included in the order affirming the decree of the lower court;[68] but the application for them should be made in the court below whenever there is a reasonable opportunity to do so;[69] and the value of the legal services should be determined by such lower court.[70] Where the appeal is from the order allowing temporary alimony the merits of the main controversy can not be gone into for the purpose of determining the probability of success therein.[71]

An order for counsel fees in the Supreme Court may not be modified where it was not objected to when entered.[72] It is very clear that temporary alimony or counsel fees will not be allowed on appeal where the trial court has found that there was no legal marriage between the parties.[73]

A wife is not entitled to an allowance for counsel fees for services in prosecuting the appeal where pending such appeal the husband dies,[74] nor for the rendition of services other than those for the purpose of appeal.[75]

§ 731. **Counsel fees—Independent suit therefor.**—The order for counsel fees, like that for temporary alimony, is subject to modifications by the court entering it, and therefore is not subject to an independent suit by the attorney for the wife against the husband, but where the order is final, as upon the dismissal of the suit or in the final decree, and is made payable to the attorneys themselves, an action by them will lie thereon.[76]

[67]Gansz v. Gansz, 59 N. Y. S. 955.

[68]Willitts v. Willitts, 76 Nebr. 228, 107 N. W. 379, 5 L. R. A. (N. S.) 767, 14 Ann. Cas. 883.

[69]Mosher v. Mosher, 16 N. Dak. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820, 125 Am. St. 654.

[70]Mosher v. Mosher, 16 N. Dak. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820, 125 Am. St. 654.

[71]Donaldson v. Donaldson, (Mo. App.), 215 S. W. 904. See also Blake v. Blake, 80 Ill. 523.

[72]Everett v. Everett, 119 Miss. 627, 81 So. 417.

[73]Taylor v. Taylor, 7 Colo. App. 549, 44 Pac. 675. See also Coad v. Coad, 40 Wis. 392.

[74]Strickland v. Strickland, 80 Ark. 451, 97 S. W. 659.

[75]Poillon v. Poillon, 75 App. Div. 536, 78 N. Y. S. 323.

[76]Traylor v. Richardson, 2 Ind. App. 452, 28 N. E. 205; Matson v. Matson, 186 Iowa 607, 173 N. W. 127; Geisler v. Geisler, 30 Ky. L. 430, 98

It seems that a counsel may maintain an independent suit against the wife for the value of his services rendered in her suit for divorce above the amount which had been allowed by the court therefor, inasmuch as the counsel was not a party to the action and therefore not bound by the order of the court.[77]

§ 732. **Liability of husband and wife for legal services to wife in divorce suit.**—A married woman may make herself chargeable with the value of services rendered upon her employment of counsel to secure a divorce from her husband, although the suit is discontinued. Upon the question of the husband's liability for the costs and expenses of the wife in divorce proceedings, the courts can not be said to be unanimous. In some cases where he is held liable, his responsibility is placed upon the ground of an implied promise arising out of the wife's power to bind the husband as his agent, and upon the ground that such expenses are necessaries. The husband, however, has been relieved from liability in some states, and it will also be found that his liability has been denied where the proceedings have been instituted by the wife without lawful or reasonable cause, and also in cases where she has an ample estate.[78]

§ 733. **Costs.**—It is a general rule that all costs in a divorce proceeding are chargeable to the husband regardless of who brings suit and even if the wife fails in her complaint.[79]

S. W. 102; Kapp v. Seventh Dist. Ct., 32 Nev. 264, 107 Pac. 95, Ann. Cas. 1912D, 177; Van Horn v. Van Horn, 48 Wash. 388, 93 Pac. 670, 125 Am. St. 940.

[77]Anderson v. Stegen, 173 Ill. 112, 50 N. E. 665. Farrell v. Betts, 16 Ala. App. 668, 81 So. 188, in which it is said, "Counsel fees are allowed to the wife as alimony, and not to her for the benefit of her solicitors, so they may sue her for any difference between what they have earned and what was allowed as they are not parties to the suit in which they are allowed."

[78]Wolcott v. Patterson, 100 Mich. 227, 58 N. W. 1006, 24 L. R. A. 629, 43 Am. St. 456. That the husband is not liable: Kincheloe v. Merriman, 54 Ark. 557, 16 S. W. 578, 26 Am. St. 60; Johnson v. Williams, 3 G. Greene (Iowa) 97, 54 Am. Dec. 491; Coffin v. Dunham, 8 Cush. (Mass.) 404, 54 Am. Dec. 769; Ray v. Adden, 50 N. H. 82, 9 Am. Rep. 175; Wing v. Hurlburt, 15 Vt. 607, 40 Am. Dec. 695; Clarke v. Burke, 65 Wis. 359, 27 N. W. 22, 56 Am. Rep. 631. Counsel fees in divorce cases are not "necessaries" for which the husband is liable. Grimstad v. Johnson, 61 Mont. 18, 201 Pac. 314. That he is: Sprayberry v. Merk, 30 Ga. 81, 76 Am. Dec. 637.

[79]Richardson v. Richardson, 4 Port. (Ala.) 467, 30 Am. Dec. 538; Prine v. Prine, 36 Fla. 676, 18 So.

A wife may be awarded costs although alimony, suit money, and counsel fees have been denied her on account of her failure to prove her necessities and ability of her husband to make provision for her.[80]

781, 34 L. R. A. 87; Finley v. Finley, 9 Dana (Ky.) 52, 33 Am. Dec. 528; Lockridge v. Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52.

[80]Prine v. Prine, 36 Fla. 676, 18 So. 781, 34 L. R. A. 87.

CHAPTER 45

PERMANENT ALIMONY

Section

740. Permanent alimony in general.
741. Allowance of gross sum.
742. Dependent on valid marriage.
743. Husband's resources.
744. Conduct of parties.
745. Both parties at fault.
746. Wife at fault.
747. Separation by mutual agreement.
748. Husband living in adultery.
749. Abandonment of wife.
750. Impotency.
751. Cruelty to wife.
752. Condition of family.
753. Previous provision for wife's support—Agreements between parties.
754. Wife's property or income.
755. Source of property.
756. Requiring husband to disclose on oath.
757. Necessity of divorce.
758. Reference to master.
759. Reference to arbitrator.

§ 740. **Permanent alimony in general.**—Permanent alimony is purely a matter of statutory creation and is awarded by the court upon considerations of equity and public policy, founded upon the obligation growing out of the marriage relation that the husband must support his wife, and which continues after her legal separation without her fault.[1]

[1]Parker v. Parker, 211 Mass. 139, 97 N. E. 988; Haskell v. Haskell, 119 Minn. 484, 138 N. W. 787; Lape v. Lape, 99 Ohio St. 143, 124 N. E. 51, 6 A. L. R. 187. See also West v. West, 126 W. Va. 696, 101 S. E. 876; Norman v. Norman, 88 W. Va. 640, 107 S. E. 407. Like the alimentum of the civil law from which the word "alimony" was evidently derived it

It is allowed after the trial, and is measured according to the husband's ability,[2] the financial condition of the parties,[3] the earning capacity of the husband,[4] the social standing of the parties, and the needs of the wife and children, though other matters may be taken into consideration, such as the wife's separate income or estate.[5]

respects a provision for food, clothing and habitation, or the necessary support of the wife after the marriage bond has been severed. Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. 544.

[2]Gibson v. Gibson, 203 Ala. 466, 83 So. 478, 7 A. L. R. 1658; Van Natta v. Van Natta, 188 Ind. 75, 121 N. E. 825; Raspberry v. Raspberry, 189 Ky. 502, 225 S. W. 148; Burton v. Burton, 184 Ky. 268, 211 S. W. 869; Kiplinger v. Kiplinger, 172 Mich. 552, 138 N. W. 230; Kinney v. Kinney (Mo. App.), 231 S. W. 267; Lauderdale v. Lauderdale (Mo. App.), 224 S. W. 126 ($3,500 not excessive for wife and two children; husband worth $10,000); Betz v. Betz, 70 Pa. Super. Ct. 396; Lovegrove v. Lovegrove, 128 Va. 449, 104 S. E. 804.

[3]Van Natta v. Van Natta, 188 Ind. 75, 121 N. E. 825; Brett v. Brett, 191 Iowa 262, 182 N. W. 241. ($100,000 not excessive where husband worth $400,000); Mitvalsky v. Mitvalsky, 191 Iowa 8, 179 N. W. 520; Meyer v. Meyer, 187 Iowa 617, 174 N. W. 356 ($7,500 reasonable where husband worth $27,000); Walter v. Walter, 190 Ky. 49, 226 S. W. 374; Bocage v. Lombard, 144 La. 1005, 81 So. 604; Thompson v. Thompson, 205 Mich. 124, 171 N. W. 347, 3 A. L. R. 990; Fisher v. Fisher (Mo. App.), 207 S. W. 261; Cummins v. Cummins, 59 Mont. 225, 195 Pac. 1031; James v. James, 103 Nebr. 278, 171 N. W. 904 ($7,500 not excessive—husband worth $47,500); Silva v. Silva, 81 Okla. 159, 197 Pac. 165; Twohy v. Twohy, 130 Va. 557, 107 S. E. 642 ($3,600 a year not excessive where husband worth $300,000).

[4]Ex parte Spencer, 83 Cal. 460, 23 Pac. 395, 17 Am. St. 266; Eidenmuller v. Eidenmuller, 37 Cal. 364; Stampfli v. Stampfli, 53 Cal. App. 126, 199 Pac. 829; Farrar v. Farrar, 41 Cal. App. 452, 182 Pac. 989; Rang v. Rang, 211 Ill. App. 385; Francis v. Francis, 108 Kans. 220, 194 Pac. 641; McKee v. McKee, 191 Ky. 669, 231 S. W. 213; Bailey v. Bailey, 189 Ky. 449, 225 S. W. 30; McKinney v. McKinney, 185 Ky. 315, 215 S. W. 34; Larson v. Larson, 147 Minn. 457, 179 N. W. 723; Lape v. Lape, 99 Ohio St. 143, 124 N. E. 51, 6 A. L. R. 187; Taylor v. Taylor, 144 Tenn. 311, 232 S. W. 445. The court may compel payment out of future earnings. Ramsay v. Ramsay, 125 Miss. 185, 87 So. 491, 14 A. L. R. 712.

[5]Ortman v. Ortman, 203 Ala. 167, 82 So. 417; Bowman v. Worthington, 24 Ark. 522; Mitchell v. Mitchell, 193 Iowa 153, 185 N. W. 62; Moore v. Moore, 192 Iowa 394, 184 N. W. 732; Carson v. Carson (Iowa), 171 N. W. 584; Francis v. Francis, 108 Kans. 220, 194 Pac. 641; Blair v. Blair, 106 Kans. 151, 186 Pac. 746; Kelly v. Kelly, 183 Ky. 576, 209 S. W. 335; Wygodsky v. Wygodsky, 134 Md. 344, 106 Atl. 698; Sparhawk v. Sparhawk, 120 Mass. 390; Burrows v. Purple, 107 Mass. 428; Sheafe v. Sheafe, 24 N. H. 564; Silva v. Silva, 81 Okla. 159, 197 Pac. 165; Karmany v. Karmany,

The husband's obligation of maintenance of the children continues only during their minority and of the wife only while she remains single or until he dies.[6] The amount of the allowance rests very largely in the discretion of the court.[7] The wife has the burden of showing the facts to justify the award.[8]

§ 741. **Allowance of gross sum.**—In most states, the courts may allow a fixed sum[9] of money in a single payment, or a part of the husband's real estate in full settlement of alimony.[10] Other states sanction a continuing allowance,[11] or a fixed amount payable in installments where the statute does not require personal judgment for a sum in gross.[12]

§ 742. **Dependent on valid marriage.**—Permanent alimony is a right growing out of a valid marriage and hence cannot be awarded where the marriage is void,[13] but the mere fact that there was some fraud in the marriage contract is no defense.[14]

§ 743. **Husband's resources.**—If the husband is without property, but is in good health,[15] strong and able to work, he will have to support his wife.[16] However, a woman who is used

71 Pa. Super. Ct. 308; Betz v. Betz, 70 Pa. Super. Ct. 396; Norman v. Norman, 88 W. Va. 640, 107 S. E. 407.

[6]Tremper v. Tremper, 39 Cal. App. 62, 177 Pac. 868.

[7]Gibson v. Gibson, 203 Ala. 466, 83 So. 478; Webster v. Webster, 43 Cal. App. 772, 185 Pac. 863; Farrar v. Farrar, 41 Cal. App. 452, 182 Pac. 989; Van Natta v. Van Natta, 188 Ind. 75, 121 N. E. 825; Mitvalsky v. Mitvalsky, 191 Iowa 8, 179 N. W. 520; Blair v. Blair, 106 Kans. 151, 186 Pac. 746; Kelly v. Kelly, 183 Ky. 576, 209 S. W. 335; Lovegrove v. Lovegrove, 128 Va. 449, 104 S. E. 804.

[8]Moore v. Moore, 192 Iowa 394, 184 N. W. 732; Miller v. Miller, 194 App. Div. 183, 185 N. Y. S. 313.

[9]Stepp v. Stepp, 178 Ky. 337, 198 S. W. 935.

[10]Robinson v. Robinson, 79 Cal. 511, 21 Pac. 1095; Bobowski v. Bobowski, 242 Ill. 524, 90 N. E. 361; Winemiller v. Winemiller, 114 Ind. 540, 17 N. E. 123; Inskeep v. Inskeep, 5 Iowa 204; Burrows v. Purple, 107 Mass. 428; Crews v. Mooney, 74 Mo. 26; Calame v. Calame, 25 N. J. Eq. 548; Piatt v. Piatt, 9 Ohio 37; Hengen v. Hengen, 85 Ore. 155, 166 Pac. 525; Williams v. Williams, 6 S. Dak. 284, 61 N. W. 38.

[11]Walker v. Walker, 147 Ark. 376, 227 S. W. 762.

[12]Goldberg v. Goldberg, 72 Ind. App. 477, 126 N. E. 36; Runyan v. Runyan, 72 Ind. App. 469, 126 N. E. 35; Lauderdale v. Lauderdale (Mo App.), 224 S. W. 126; Lape v. Lape, 99 Ohio St. 143, 124 N. E. 51, 6 A. L. R. 187.

[13]Aldridge v. Aldridge, 116 Miss. 385, 77 So. 150; Robinson v. Robinson, 112 Miss. 224, 72 So. 923.

[14]Peckerman v. Peckerman, 91 Misc. 114, 154 N. Y. S. 297.

[15]Keenan v. Keenan, 219 Mass. 107, 106 N. E. 568.

[16]Fitzpatrick v. Fitzpatrick, 127

to work cannot compel her husband to maintain her in idleness unless he is abundantly able to do so.[17]

A man is in duty bound to support his wife to the best of his ability, but if he is insolvent, sick, or unable to earn money, he cannot be compelled to pay alimony.[18]

§ 744. **Conduct of parties.**—In awarding alimony, the conduct of the parties is taken into consideration, and an innocent wife who has been greatly wronged will ordinarily be granted a larger allowance than she otherwise would have been granted, if her conduct had influenced her husband's wrongful act.[19] Accordingly, in decreeing alimony the court will take into consideration the conduct of the wife, and, if she contributed to the cause of divorce, she will be allowed less alimony than she would otherwise have been allowed.[20]

In the discretion of the court, alimony may be ordered to be paid to a guilty wife after divorce given to her husband for the offense.[21] And this is sometimes done in cases of separate support, and in divorces from bed and board, where it is shown to the satisfaction of the court that both parties have been guilty of adultery, and the husband has property and the wife none.[22]

§ 745. **Both parties at fault.**—Alimony may be granted when both parties are at fault,[23] or where the fault of the husband is greater than the fault of the wife.[24]

§ 746. **Wife at fault.**—Very generally the right of the wife to alimony depends on her freedom from fault.[25] Accordingly

Minn. 96, 148 N. W. 1074; Muse v. Muse, 84 N. Car. 35; Bailey v. Bailey, 21 Gratt. (Va.) 43; Herrett v. Herrett, 80 Wash. 474, 141 Pac. 1158; Campbell v. Campbell, 37 Wis. 206.

[17]Ressor v. Ressor, 82 Ill. 442.

[18]Eidenmuller v. Eidenmuller, 37 Cal. 364; Bankston v. Bankston, 27 Miss. 692; Germond v. Germond, 4 Paige (N. Y.) 643; Campbell v. Campbell, 37 Wis. 206. As to what is reasonable, see Derritt v. Derritt, 66 Okla. 124, 168 Pac. 455; Andreas v. Andreas, 88 N. J. Eq. 130, 102 Atl. 259, (about one-third of husband's income).

[19]Becker v. Becker, 79 Ill. 532; Stewartson v. Stewartson, 15 Ill. 145; Helden v. Helden, 7 Wis. 296.

[20]Tumbleson v. Tumbleson, 79 Ind. 558; Peckford v. Peckford, 1 Paige (N. Y.) 274.

[21]Graves v. Graves, 108 Mass. 314, and cases cited.

[22]Graves v. Graves, 108 Mass. 314.

[23]Nichols v. Nichols, 189 Ky. 500, 225 S. W. 147; Bascom v. Bascom, Wright (Ohio) 632.

[24]Hoffman v. Hoffman, 190 Ky. 13, 226 S. W. 119; Burton v. Burton, 184 Ky. 268, 211 S. W. 869; Kelly v. Kelly, 183 Ky. 576, 209 S. W. 335.

[25]Phinney v. Phinney, 77 Fla. 850,

where a wife, through her own fault, causes her husband to desert her, she will ordinarily not be allowed alimony.[26] However, where there is a joint accumulation of property, or where the husband's property has been contributed to by her efforts or from her personal wealth she is entitled to such alimony as the circumstances warrant.[27] So, alimony will not be denied in those cases where the fault of the wife has been condoned.[28] The court may also take into consideration the fact that the wife entered into the marriage relation for mercenary motives.[29]

§ 747. **Separation by mutual agreement.**—Alimony may be allowed where the husband and wife have agreed to live apart.[30]

§ 748. **Husband living in adultery.**—Alimony may be allowed the wife if the husband has deserted her and is living in adultery.[31]

§ 749. **Abandonment of wife.**—If a husband abandons his wife without justifiable cause, he is liable for alimony.[32]

§ 750. **Impotency.**—Impotency of the husband is not an offense for which the wife should be granted alimony.[33]

§ 751. **Cruelty to wife.**—If the husband maltreats his wife and she is forced to leave him, she is entitled to alimony.[34] The

82 So. 357; Rybakowicz v. Rybakowicz, 290 Ill. 550, 125 N. E. 370; Crumbley v. Crumbley, 94 Ore. 617, 186 Pac. 423. But see Mitchell v. Mitchell, 193 Iowa 153, 185 N. W. 62.

[26]Angelo v. Angelo, 81 Ill. 251; Ahrns v. Ahrns, 160 Ky. 342, 169 S. W. 720; Griffin v. Griffin, 8 B. Mon. (Ky.) 120. A wife guilty of marital misconduct is not generally entitled to temporary alimony. Garsed v. Garsed, 170 N. Car. 672, 87 S. E. 45; Page v. Page, 161 N. Car. 170, 76 S. E. 619; Keller v. Keller, 58 W. Va. 325, 52 S. E. 318.

[27]Vigil v. Vigil, 49 Colo. 156, 111 Pac. 833, 31 L. R. A. (N. S.) 578; Carlton v. Carlton, 78 Fla. 252, 83 So. 87; Davis v. Davis, 134 Ga. 804, 68 S. E. 594, 30 L. R. A. (N. S.) 73, 20 Ann. Cas. 20; Ecker v. Ecker, 22 Okla. 873, 98 Pac. 918, 20 L. R. A. (N. S.) 421.

[28]West v. West, 126 Va. 696, 101 S. E. 876.

[29]Glass v. Glass, 116 Wash. 638, 200 Pac. 88.

[30]Hawes v. Hawes, 66 Ga. 142; Gray v. Gray, 65 Ga. 193.

[31]Thompson v. Thompson, 10 Rich. Eq. (S. Car.) 416.

[32]Glover v. Glover, 16 Ala. 440; McMullen v. McMullen, 10 Iowa 412; Johnson v. Johnson, 183 Ky. 421, 209 S. W. 385; Steele v. Steele, 96 Ky. 382, 29 S. W. 17; Jamison v. Jamison, 4 Md. Ch. 289; Simpson v. Simpson, 31 Mo. 24.

[33]G..... v. G....., 67 N. J. Eq. 30, 56 Atl. 736.

[34]Kinsey v. Kinsey, 37 Ala. 393; Galland v. Galland, 38 Cal. 265;

award of alimony in such a case may be in a fixed sum and made a lien on the estate of the husband.[35]

§ 752. **Condition of family.**—In decreeing alimony the court will take into consideration the number of children, the expense of maintaining the family, and the condition of the wife's health.[36]

§ 753. **Previous provision for wife's support—Agreements between parties.**—If the husband has already made suitable provision for his wife's support, she will be denied alimony.[37] Very generally stipulations and agreements between parties to a divorce suit—for settlement of their property rights and the amount of the alimony will, if proper and just, be carried out by the decree awarding alimony.[38] The agreements should receive the approval of the court.[39]

§ 754. **Wife's property or income.**—In decreeing alimony the court will take into consideration the capability of the wife. If the wife has independent means, or if she can maintain herself by her own earnings in the social position she has been accustomed to, she is not entitled to alimony.[40]

§ 755. **Source of property.**—The length of time of the marriage is a proper consideration in determining the amount of

Chandler v. Chandler, 146 Ga. 32, 88 S. E. 561; Finn v. Finn, 62 Iowa 482, 17 N. W. 739; Graves v. Graves, 50 Ohio St. 196, 33 N. E. 720; Devall v. Devall, 4 Desaus. (S. Car.) 79; Almond v. Almond, 4 Rand. (Va.) 663, 15 Am. Dec. 781.

[35]Tiffin v. Tiffin, 209 Mich. 232, 176 N. W. 435.

[36]Bursler v. Bursler, 22 Mass. 427.

[37]Stevens v. Stevens, 49 Mich. 504, 13 N. W. 835; Cain v. Cain, 188 App. Div. 780, 177 N. Y. S. 178; McDonough v. McDonough, 26 How. Pr. (N. Y.) 193.

[38]Chambers v. Porter (Iowa) 183 N. W. 431; Carr v. Carr, 185 Iowa 1205, 171 N. W. 785; Crenshaw v. Crenshaw, 276 Mo. 471, 208 S. W. 249; Van Horn v. Van Horn, 196 App. Div. 472, 188 N. Y. S. 98; Goldfish v. Goldfish, 193 App. Div. 686, 184 N. Y. S. 512; Horn v. Horn, 80 Okla. 60, 194 Pac. 102. But see Kerr v. Kerr, 236 Mass. 353, 128 N. E. 409.

[39]Bergevin v. Bergevin, 168 Wis. 466, 170 N. W. 820.

[40]Hawes v. Hawes, 66 Ga. 142; Logan v. Logan, 2 B. Mon. (Ky.) 142; Coles v. Coles, 2 Md. Ch. 341; Brown v. Brown, 22 Mich. 242; Porter v. Porter, 41 Miss. 116; McCarthy v. McCarthy, 137 N. Y. 500, 33 N. E. 550; Beadleston v. Beadleston, 103 N. Y. 402, 8 N. E. 735; Maxwell v. Maxwell, 28 Hun (N. Y.) 566; Wright v. Wright, 6 Tex. 29; Kiser v. Kiser, 108 Va. 730, 62 S. E. 937; Nicholls v. Nicholls, 30 L. J. P. D. & Adm. 163.

property contributed by the wife. Where she has contributed little she is entitled to less alimony.[41]

§ 756. **Requiring husband to disclose on oath.**—When the court deems it proper to award the wife personal estate, or money in lieu thereof, it may require the husband to disclose on oath what personal estate has come to him by reason of the marriage, how it has been disposed of, and what portion thereof remains in his hands.[42]

§ 757. **Necessity of divorce.**—Unless alimony is allowed in connection with the divorce decree it can not usually be allowed.[43] But where the wife was not served with notice she is not barred from claiming alimony, even though the husband secured final decree for divorce.[44]

§ 758. **Reference to master.**—If the petition for alimony does not state what property the husband has, the matter may be referred to a master or referee, and the report of such master or referee should state the husband's ability to pay.[45]

§ 759. **Reference to arbitrator.**—The question of alimony may be referred to an arbitrator by agreement of the parties.[46]

[41]Walston v. Walston (Iowa), 126 N. W. 145; Thompson v. Thompson, 205 Mich. 124, 171 N. W. 347, 3 A. L. R. 990; Spratler v. Spratler, 203 Mich. 498, 169 N. W. 956; Allen v. Allen, 188 Mich. 532, 155 N. W. 488; Hanrahan v. Hanrahan, 170 Mich. 79, 135 N. W. 899; Lofvander v. Lofvander, 146 Mich. 370, 109 N. W. 662, 13 D. L. N. 793; De Vry v. De Vry, 46 Okla. 254, 148 Pac. 840; Gust v. Gust, 78 Wash. 414, 139 Pac. 228; Uecker v. Thiedt, 133 Wis. 148, 113 N. W. 447.

[42]Umlauf v. Umlauf, 22 Ill. App. 580.

[43]Hall v. Hall, 141 Ga. 361, 80 S. E. 992; Hazard v. Hazard, 197 Ill. App. 612; Spain v. Spain, 177 Iowa 249, 158 N. W. 529, L. R. A. 1917D, 319, Ann. Cas. 1918E, 1225.

[44]Barberton Savings Bank Co. v. Belford, 32 Ohio Cir. Ct. 574.

[45]Meeker v. Meeker, 74 Fla. 442, 76 So. 197; Story v. Story, Walk. (Mich.) 421, 8 Am. St. 417; Brotherton v. Brotherton, 12 Nebr. 75, 10 N. W. 544; Worden v. Worden, 3 Edw. Ch. (N. Y.) 387.

[46]Carter v. Carter, 109 Mass. 306.

CHAPTER 46

MODIFICATION, SUSPENSION AND TERMINATION OF ALIMONY

Section

765. Modification of decree for alimony.
766. Alimony based on agreement.
767. Changed conditions.
768. Effect of wife's subsequent adultery upon alimony.
769. Termination of alimony.
770. Reconciliation.
771. Effect of imprisonment of wife to suspend alimony.
772. Remarriage.

§ 765. **Modification of decree for alimony.**—After a decree for alimony or other allowance for the wife or children, or after a decree for the appointment of trustees to receive and hold property in trust for the use of the wife or children, the court may, from time to time, on the petition of either party, revise and alter such decree, and may make any decree which it might have made in the original suit.[1] But it can not make an entirely different order[2] or one which it could not have made in the first instance,[3] and the order should not be made after the term of court has expired.[4]

[1]Kurtz v. Kurtz, 38 Ark. 119; Robbins v. Robbins, 101 Ill. 416; Stillman v. Stillman, 99 Ill. 196, 39 Am. Rep. 21; Thomas v. Thomas, 44 Ill. App. 604; Alderson v. Alderson, 84 Iowa 198, 50 N. W. 671; Fisher v. Fisher, 32 Iowa 20; Sparhawk v. Sparhawk, 120 Mass. 390; Graves v. Graves, 108 Mass. 314; Bursler v. Bursler, 22 Mass. 427; Waters v. Waters, 49 Mo. 385; State v. Second Judicial Dist. Ct., 14 Mont. 398, 36 Pac. 757; Atkins v. Atkins, 13 Nebr. 271, 11 N. W. 285; Le Beau v. Le Beau (N. H.), 114 Atl. 28; Holmes v. Holmes, 4 Barb. (N. Y.) 295; Rindlaub v. Rindlaub, 28 N. Dak. 168, 147 N. W. 725; Greenleaf v. Greenleaf, 6 S. Dak. 348, 61 N. W. 42; Moe v. Moe, 30 Wis. 308.

[2]Phillippi v. Phillippi, 113 Mo. App. 55, 87 S. W. 529.

[3]Wallace v. Wallace, 75 N. H. 217, 72 Atl. 1033, 13 Ann. Cas. 293.

[4]Towns v. Towns, 171 Wis. 32, 176 N. W. 216; Zentzis v. Zentzis, 163 Wis. 342, 158 N. W. 284. See White v. McDowell, 74 Wash. 44, 132 Pac. 734; and Ruge v. Ruge, 97 Wash. 51, 165 Pac. 1063, L. R. A. 1917F, 721. In this last case the court di-

After term the court can not alter a permanent decree of alimony except it has reserved the authority so to do, where there are children, or the statute gives express authority.[5] Notice of the application to modify must be given to the adverse party.[6]

Past due instalments of permanent alimony may not be annulled or modified.[7]

§ 766. **Alimony based on agreement.**[8]—Where alimony is based on consent of all parties, or on a contract, the court has no

vides the cases under this head into six classes: 1. Where the decree in the main action is one granting a divorce a mensa et thoro or for separate maintenance. 2. Where the alimony awarded is temporary or pendente lite, as distinguished from permanent. 3. Where there are minor children. 4. Where the court by express provision in its decree reserves to itself either all or a portion of its power to provide alimony for the wife or maintenance for the children. 5. Where statutes confer power to revise and alter decree. 6. All other cases, viz. cases where the divorce is absolute, the alimony awarded is permanent, there are no minor children, there is no express reservation in the decree, and there is no statute in the particular jurisdiction expressly or by necessary implication conferring upon the court the authority to modify or alter its decrees in respect to alimony for the support of the wife. This case belonged to the last class and the court would not modify the order. See case, citing numerous authorities and also the dissenting opinion of Chadwick, J.

[5]Gilbert v. Gilbert, 151 Ga. 520, 107 S. E. 490; Dills v. Dills (Iowa), 181 N. W. 388; Mayer v. Mayer, 154 Mich. 386, 117 N. W. 890, 19 L. R. A. (N. S.) 245, 129 Am. St. 477; Sweeney v. Sweeney, 42 Nev. 431, 179 Pac. 638; Anderson v. Anderson, 110 Misc. 123, 179 N. Y. S. 865; Clough v. Long, 8 Ohio App. 420; Sampson v. Sampson, 16 R. I. 456, 16 Atl. 711, 3 L. R. A. 349; Taylor v. Taylor, 144 Tenn. 311, 232 S. W. 445; Going v. Going, 144 Tenn. 303, 232 S. W. 443; Ruge v. Ruge, 97 Wash. 51, 165 Pac. 1063, L. R. A. 1917F, 721; Kuether v. Kuether (Wis.), 183 N. W. 695. The Supreme Court is without authority to allow an increase of alimony. Gray v. Gray, 44 N. Dak. 89, 176 N. W. 7. The court which decrees a divorce cannot by any form of judgment then rendered in reference to alimony, deprive itself of the authority given it by the statute to revise such judgment. Campbell v. Campbell, 37 Wis. 206. See notes, 16 Am. Dec. 668; 88 Am. Dec. 658.

[6]Benjamin v. Benjamin, 78 Fla. 14, 82 So. 597; Parker v. Parker, 189 App. Div. 603, 179 N. Y. S. 51; Gewirtz v. Gewirtz, 189 App. Div. 483, 178 N. Y. S. 738.

[7]Tehsman v. Tehsman (N. J. Ch.), 114 Atl. 320.

[8]Pryor v. Pryor, 88 Ark. 302, 114 S. W. 700, 129 Am. St. 102; Van Sickle v. Harmeyer, 172 Ill. App. 218; Julier v. Julier, 62 Ohio St. 90, 56 N. E. 661, 78 Am. St. 697; Henderson v. Henderson, 37 Ore. 141, 60 Pac. 597, 61 Pac. 136, 48 L. R. A. 766, 82 Am. St. 741; Buckminster v. Buckminster, 38 Vt. 248, 88 Am. Dec. 652. See note, 13 Ann. Cas. 296

power to modify the terms agreed upon for alimony.[9]

A wife may lose her right to question the validity of an order discontinuing payment of alimony where she consents in writing to the order.[10]

§ 767. **Changed conditions.**—To authorize any change or modification of the award there must be evidence of a change in the circumstances of one or both of the parties;[11] changing need of the children,[12] helpless condition of wife,[13] or decreased earning power of the husband may warrant modification of award.[14]

[9]Pryor v. Pryor, 88 Ark. 302, 114 S. W. 700, 129 Am. St. 102; Mathews v. Mathews, 49 Cal. App. 497, 193 Pac. 586; Carr v. Carr, 185 Iowa 1205, 171 N. W. 785 (unless agreement based on mistake); Hatfield v. Hatfield, 59 Okla. 132, 158 Pac. 942. But see Le Beau v. Le Beau (N. H.), 114 Atl. 28. Contra: Emerson v. Emerson, 120 Md. 584, 87 Atl. 1033 (as validity depends on the decree and not on the contract); Wallace v. Wallace, 74 N. H. 256, 67 Atl. 580, 13 Ann. Cas. 293.

[10]Durrell v. Durrell, 211 Ill. App. 281.

[11]Simms v. Simms, 175 U. S. 162, 20 Sup. Ct. 58, 44 L. ed. 115. Ortman v. Ortman, 203 Ala. 167, 82 So. 417; Bauman v. Bauman, 18 Ark. 320, 68 Am. Dec. 171; Jewell v. Jewell, 71 Colo. 470, 207 Pac. 991; Cole v. Cole, 142 Ill. 19, 31 N. E. 109, 34 Am. St. 56, 19 L. R. A. 811; Plaster v. Plaster, 47 Ill. 290; Karr v. Rust, 217 Ill. App. 555; Tobin v. Tobin, 29 Ind. App. 382, 64 N. E. 624; Barish v. Barish, 190 Iowa 493, 180 N. W. 724; Fisher v. Fisher, 32 Iowa 20; Brown v. Brown, 172 Ky. 754, 189 S. W. 921; Staton v. Staton, 164 Ky. 688, 176 S. W. 21, L. R. A. 1915F, 820; Graves v. Graves, 108 Mass. 314; Hall v. Hall, 172 Mich. 210, 137 N. W. 536 (changed condition of wife but not of husband may be considered); Bowlby v. Bowlby, 91 Minn. 193, 97 N. W. 669 (where plaintiff enforces antenuptial contract for her support); Kinney v. Kinney (Mo. App.), 231 S. W. 267; Ahrenfeldt v. Ahrenfeldt, 4 Sandf. Ch. (N. Y.) 493; Forrest v. Forrest, 16 N. Y. Super. Ct. (3 Bosw.) 661; Cox v. Cox, 20 Ohio St. 439; Holt v. Holt, 23 Okla. 639, 102 Pac. 187 (where wife induced to obtain divorce by fraud of the husband); Toncray v. Toncray, 123 Tenn. 476, 131 S. W. 977, 34 L. R. A. (N. S.) 1106, Ann. Cas. 1912C, 284; Holter v. Holter, 108 Wash. 519, 185 Pac. 598; Kempster v. Evans, 81 Wis. 247, 51 N. W. 327, 15 L. R. A. 391; Campbell v. Campbell, 37 Wis. 206. See also Foote v. Foote, 22 Ill. 425; Allen v. Allen, 100 Mass. 373; Forrest v. Forrest, 25 N. Y. 501; Cox v. Cox, 19 Ohio St. 502; McKarracher v. McKarracher, 3 Yeates (Pa.) 56; Barber v. Barber, 2 Pinney (Wis.) 297. See note, 88 Am. Dec. 657.

[12]Hood v. Venable, 140 Ga. 363, 78 S. E. 1078; Gehlbach v. Gehlbach, 219 Ill. App. 503 (medical expenses); Foote v. Foote (N. J. Ch.), 68 Atl. 467.

[13]Case v. Case, 205 Ill. App. 507; Hillman v. Gallant, 148 La. 82, 86 So. 661.

[14]Parsons v. Parsons, 26 Ky. L. 256, 80 S. W. 1187 (where husband disabled); Barbaras v. Barbaras, 88

The facts relied upon to secure a modification of an order must be clearly set forth in the motion or application.[15]

The judgment until modified, for changed conditions is a final judgment.[16]

§ 768. **Effect of wife's subsequent adultery upon alimony.**—Cases may arise where it may be highly unjust and inequitable that the husband should be compelled to continue to support his divorced wife. When the husband is required by his daily labor to support his wife, if she should lead a life of idleness and prostitution, reasons of justice would seem to justify the court, in the exercise of its general chancery powers, to modify or revoke the former order for alimony.[17]

On the other hand it has been held that in cases of divorce the courts look at the standing of the parties, the conduct of each, and the origin of the estate, and, having due regard to the manner of living of each, make such allowance to the wife as is reasonable and just. When the allowance has been thus made neither has the right to complain of the subsequent conduct of the other, and the failure of the wife to lead a chaste life will afford no ground for depriving her of her alimony as previously fixed, nor will the failure of the husband to conduct himself properly afford ground for increasing her allowance.[18] After the divorce the wife owes no duty to the husband, the non-performance of which will forfeit her right to the alimony awarded her. In any event a petition by a husband to be relieved from the further payment of alimony awarded to his wife on decree of divorce for his misconduct, on the ground that she is living a life of prostitution, is clearly insufficient, if it fails to show that the husband derived no estate or property from his wife, or that his estate and property are not the result of their joint earnings and savings.

Minn. 105, 92 N. W. 522; Matzke v. Matzke, 173 N. Y. S. 245; Davis v. Davis, 78 App. Div. 500, 79 N. Y. S. 621; Karmany v. Karmany, 71 Pa. Super. Ct. 308.

[15]Milekovich v. Quinn, 40 Cal. App. 537, 181 Pac. 256; Rang v. Rang, 211 Ill. App. 385; Boger v. Boger, 86 W. Va. 590, 104 S. E. 49.

[16]Matson v. Matson, 186 Iowa 607, 173 N. W. 127. See also Bradley v. Bradley, 40 Cal. App. 638, 181 Pac. 237. But see Kupfer v. Kupfer, 215 Ill. App. 170.

[17]Cole v. Cole, 142 Ill. 19, 31 N. E. 109, 19 L. R. A. 811, 34 Am. St. 56; Durrell v. Durrell, 211 Ill. App. 281; Cogswell v. Tibbetts, 3 N. H. 41.

[18]Cole v. Cole, 142 Ill. 19, 31 N. E. 109, 19 L. R. A. 811, 34 Am. St. 56; Sloan v. Cox, 4 Hayw. (Tenn.) 75. See note, 60 Am. Dec. 672.

The petition should also show whether the wife has other means of support; that he has paid the alimony due her up to the time of the filing of his petition; and that his fault or misconduct did not cause the wrongful acts of his wife. While in default himself, by neglecting or refusing to comply with the requirements of the decree, he can not be heard to ask that it shall be vacated.[19]

§ 769. **Termination of alimony.**—Alimony ceases upon the death of either party, but the wife may collect arrears out of the husband's estate.[20] If, however, the husband died after a court of competent jurisdiction had ascertained and fixed the alimony at a gross sum, it was in legal effect a judgment. It was a money claim, a debt collectible by execution, and operated *per se* as a lien upon all the real estate of the defendant in the county.[21]

§ 770. **Reconciliation.**—If the parties become reconciled, and the wife returns to her husband, she can not claim further alimony.[22] But an allowance for attorneys' fees, already fixed by the court, is presumed to have been earned, and is not affected by the reconciliation.[23]

§ 771. **Effect of imprisonment of wife to suspend alimony.**—It seems, however, the right to alimony may be suspended when a wife has been sentenced to a term of imprisonment.[24] But in a

[19]Cole v. Cole, 142 Ill. 19, 31 N. E. 109, 19 L. R. A. 811, 34 Am. St. 56; Cariens v. Cariens, 50 W. Va. 113, 40 S. E. 335, 55 L. R. A. 930. See also Rang v. Rang, 211 Ill. App. 385.

[20]Parsons v. Parsons' Estate, 70 Colo. 333, 201 Pac. 559, 18 A. L. R. 1038; Hood v. Hood, 138 Md. 355, 113 Atl. 895, 15 A. L. R. 774; Stone v. Duffy, 219 Mass. 178, 106 N. E. 595; Knapp v. Knapp, 134 Mass. 353; Wagner v. Wagner, 132 Mich. 343, 93 N. W. 889; Holmberg v. Holmberg, 106 Nebr. 717, 184 N. W. 134; Wilson v. Hinman, 182 N. Y. 408, 75 N. E. 236, 2 L. R. A. (N. S.) 232, 108 Am. St. 820; Rogers v. Vines, 28 N. Car. 293; Yates v. Yates, 165 Wis. 250, 161 N. W. 743. See note in 18 Harv. Law Rev. 541.

[21]Coffman v. Finney, 65 Ohio St. 61, 61 N. E. 155, 55 L. R. A. 794; Conrad v. Everich, 50 Ohio St. 476, 35 N. E. 58; Moore v. Rittenhouse, 15 Ohio St. 310.

[22]Lockridge v. Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52; Holbrook v. Holbrook, 18 La. Ann. 643; Tiffin v. Tiffin, 2 Binn. (Pa.) 202; Henrie v. Henrie, 71 W. Va. 131, 76 S. E. 837.

[23]McMakin v. Wickliffe, 16 Ky. L. 240; Yoder v. Yoder, 105 Wash. 491, 178 Pac. 474, 3 A. L. R. 1104.

[24]In Leslie v. Leslie (1908) Probate Div. 99, 13 Ann. Cas. 750; the court remarked: "It is said that this woman is entitled to have an expensive inquiry as against her husband and at his expense, with a view of

suit for divorce instituted by the husband against her, where she was without means of support, she was held entitled to alimony pendente lite, although placed in jail upon his complaint.[25]

§ 772. **Remarriage.**—Generally the remarriage of a divorced wife terminates the alimony,[26] or so much of it as does not go to the support of minor children,[27] and this though the decree for alimony is entered by consent of the parties.[28]

Remarriage of the husband does not affect the award, since he must be his own judge as to how much obligation he can carry.[29]

the allotment of permanent alimony for her, although she is imprisoned and under a sentence which will continue for more than three years at least. Anything may happen in those three years; she may die; the husband may die; or things may have altered in a way which will make his income absolutely different from what it is today. She has no opportunity of spending money on amusements; and the state is providing her with support and no alimony ought to be paid by the husband for her support or maintenance, her clothing, or the education of the children if there were any, but there are no children here, etc."

[25]Harmon v. Harmon, 5 Penn. (Del.) 152, 58 Atl. 1042.

[26]Brown v. Brown, 38 Ark. 324; Casteel v. Casteel, 38 Ark. 477; Cohen v. Cohen, 150 Cal. 99, 88 Pac. 267, 11 Ann. Cas. 520; Tremper v. Tremper, 39 Cal. App. 62, 177 Pac. 868; Morgan v. Lowman, 80 Ill. App. 557; Emerson v. Emerson, 120 Md. 584, 87 Atl. 1033; Hartigan v. Hartigan, 145 Minn. 27, 176 N. W. 180. See notes, 62 L. R. A. 975; 11 Ann. Cas. 523.

[27]Thompson v. Mentzer, 216 Ill. App. 470; Southworth v. Southworth, 168 Mass. 511, 47 N. E. 93; Krauss v. Krauss, 127 App. Div. 740, 111 N. Y. S. 788. But see Hartigan v. Hartigan, 142 Minn. 274, 171 N. W. 925; Warren v. Warren, 92 N. J. Eq. 334, 112 Atl. 729.

[28]Thompson v. Mentzer, 216 Ill. App. 470.

[29]Kelly v. Kelly, 194 Mich. 94, 160 N. W. 397; Levy v. Levy, 149 App. Div. 561, 133 N. Y. S. 1084; State v. Brown, 31 Wash. 397, 72 Pac. 86, 62 L. R. A. 974. In the following cases, however, the court has apparently considered the remarriage as some reason for changing the allowance: Aldrich v. Aldrich, 166 Mich 248, 131 N. W. 542; Warren v. Warren, 114 Minn. 389, 131 N. W. 370; Newton v. Newton, 145 Wis. 261, 130 N. W. 105.

CHAPTER 47

FOREIGN DECREES FOR ALIMONY

Section

775. Power of courts to render decrees affecting other states.
776. Sister state may enforce payment.
777. Foreign decrees as to property generally.
778. Effect on land without the jurisdiction.

§ 775. **Power of courts to render decrees affecting other states.**—Where one state has jurisdiction of the subject-matter and the parties, a decree for alimony is final and, under the constitutional full faith and credit clause, such decree can not be attacked by another state.[1]

So where there has been a final decree awarding the wife a lump sum as alimony, she can not bring alimony proceedings in another state to have land situated in that state made the basis of a separate alimony allowance.[2] Thus, where the domicil of the

[1]Thompson v. Thompson, 226 U. S. 551, 57 L. ed. 347, 33 Sup. Ct. 129; White v. Warren, 214 Mass. 204, 100 N. E. 1103; Lynde v. Lynde, 162 N. Y. S. 405, 56 N. E. 979, 48 L. R. A. 679, 76 Am. St. 332, affd. 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. 555; Arrington v. Arrington, 127 N. Car. 190, 37 S. E. 212, 52 L. R. A. 201, 80 Am. St. 791. A proceeding for divorce partakes of "the nature of proceedings in rem rather than of proceedings in personam; the res being the status. * * * At the same time, these causes cannot be said to be altogether proceedings in rem. There is a personal element that enters into them, not found in suits instituted merely to subject or affect property. * * * It results therefore that these causes constitute in some measure a dividing line between proceedings strictly in rem and proceedings strictly in personam, partaking in part of the nature of each; the former, however, predominating. Hence they are very often very properly denominated proceedings quasi in rem." Joyner v. Joyner, 131 Ga. 217, 62 S. E. 182, 18 L. R. A. (N. S.) 647, 127 Am. St. 220; citing Minor on Conflict of Laws, 191; Cheever v. Wilson, 9 Wall. (U. S.) 108, 19 L. ed. 604. A decree of divorce granted by a court of another state, showing upon its face that neither of the parties to the action therefor, were citizens or residents of that state, is invalid in Indiana; such divorce to non-residents, so decreed, is not rendered valid by a statute of such state authorizing divorce to be decreed on behalf of a party desiring to become a resident thereof. Hood v. State, 56 Ind. 263, 26 Am. Rep. 21.

[2]Bates v. Bodie, 245 U. S. 520, 62 L. ed. 444, 38 Sup. Ct. 182, L. R. A. 1918C, 355, revg. 95 Nebr. 757, 146 S. W. 1002, L. R. A. 1915E, 421.

husband and the matrimonial domicil are identical the courts of such domiciliary state have jurisdiction to render a divorce on the petition of the husband, and may disregard an unjustifiable absence therefrom by the wife, and may render judgment dissolving the marriage, which will be binding upon both parties, and will be entitled to recognition in all other states by virtue of the full faith and credit clause of the Constitution of the United States.[3]

However, where there was no personal service on the defendant no decree for alimony can be made affecting property not within the jurisdiction, and hence proceedings may be brought in the state where such property is found.[4] Where there has been no personal service there is no constitutional requirement compelling full faith and credit by another state, and it follows that a wife still living in the state of matrimonial domicil may bring suit after a decree of divorce granted to a husband in another state, and have his property in the state of matrimonial domicil subjected to alimony decree.[5]

§ 776. **Sister state may enforce payment.**—A sister state may enforce a final decree for alimony, but it can not enforce a decree for future payments which have not become fixed in amount beyond power of the local court to change, for such a decree is subject to modification by the court which passed it.[6]

[3]Atherton v. Atherton, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. 544. Where the domicil of matrimony was in a particular state and the husband abandons his wife and goes into another state in order to avoid his marital obligations, such other state to which the husband has wrongfully fled does not become a new domicil of matrimony, and is not to be treated as actual or constructive domicil of the wife. Her domicil remains as it was. Barber v. Barber, 21 How. (U. S.) 582, 16 L. ed. 226.

[4]Darnell v. Darnell (Ill. App.), 67 Wash. L. Rep. 23.

[5]Haddock v. Haddock, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. 525, 5 Ann. Cas. 1. People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274. (The defendant in this case on the trial of an indictment for bigamy had pleaded a divorce obtained by the former wife in Ohio). Toncray v. Toncray, 123 Tenn. 476, 131 S. W. 977, 34 L. R. A. (N. S.) 1106, Ann. Cas. 1912C, 284. A judgment of divorce in another state to a husband from a wife residing elsewhere without personal service, or appearance, or her knowledge of the proceeding, is no bar to an action by her for a divorce in the state of her own domicil. Cook v. Cook, 56 Wis. 195, 14 N. W. 33, 43 Am. Rep. 706; Barber v. Barber, 89 Misc. 519, 151 N. Y. S. 1064.

[6]Lynde v. Lynde, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. 555; Page v. Page, 189 Mass. 85, 75 N. E. 92;

A decree for alimony entered by a foreign court is a judgment of that court and may be sued on in an action at law in other states, like other judgments.[7] But there is no ground in equity

Lynde v. Lynde, 55 N. J. Eq. 591, 39 Atl. 1114; Lynde v. Lynde, 54 N. J. Eq. 473, 35 Atl. 641; Lynde v. Lynde, 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679, 76 Am. St. 332; Gilbert v. Gilbert, 83 Ohio St. 265, 94 N. E. 421, 35 L. R. A. (N. S.) 521; Collard v. Collard, 7 Ohio App. 53. In some cases, however, the particular decree although providing for such further payment was in such form as to be regarded as not subject to further revision by the court which passed it. See Brisbane v. Dobson, 50 Mo. App. 170. See also Harrison v. Harrison, 20 Ala. 629, 50 Am. Dec. 227; Arrington v. Arrington, 127 N. Car. 190, 37 S. E. 212, 52 L. R. A. 201, 80 Am. St. 791. In a note in 9 L. R. A. (N. S.) 1168, 1169 it is pointed out that cases like this are practically overruled so far as they are based on the "full faith and credit" provision of the federal Constitution. And see Arrington v. Arrington, 131 N. Car. 143, 42 S. E. 554, 92 Am. St. 769, upholding former decision, but only under the peculiar circumstances of this case. See concurring opinions of Douglas, Clark and Cook, J. J. See also 33 Harv. Law Rev. 423; 17 Mich. Law Rev. 527. Where a foreign alimony decree was not alleged to be final in a petition to enforce it, the court held it was not a decree enforceable in Massachusetts, within the Const. U. S., art. 4, § 1, requiring that full faith and credit shall be given in each state to the judicial proceedings of every other state. Page v. Page, 189 Mass. 85, 75 N. E. 92.

[7]Sistare v. Sistare, 218 U. S. 1, 54 L. ed. 905, 30 Sup. Ct. 682, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061; Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. 735; Lynde v. Lynde, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. 555; Barber v. Barber, 21 How. (U. S.) 582, 16 L. ed. 226; Britton v. Chamberlain, 234 Ill. 246, 84 N. E. 895; Schuler v. Schuler, 209 Ill. 522, 71 N. E. 16; Dow v. Blake, 148 Ill. 76, 35 N. E. 761, 39 Am. St. 156; Wells v. Wells, 209 Mass. 282, 95 N. E. 845, 35 L. R. A. (N. S.) 561; Page v. Page, 189 Mass. 85, 75 N. E. 92, 4 Ann. Cas. 296; McCullough v. McCullough, 203 Mich. 288, 168 N. W. 929; Searles v. Searles, 140 Minn. 385, 168 N. W. 133; Brisbane v. Dobson, 50 Mo. App. 170; Arrington v. Arrington, 127 N. Car. 190, 37 S. E. 212, 52 L. R. A. 201, 80 Am. St. 791; Henry v. Henry, 74 W. Va. 563, 82 S. E. 522, L. R. A. 1916B, 1024. Where a decree rendered in one state is embraced by the full faith and credit clause, constitutional provision commands that the other states shall give to the decree the force and effect to which it was entitled in the state where rendered. Harding v. Harding, 198 U. S. 317, 49 L. ed. 1066, 25 Sup. Ct. 679. A decree for alimony is said by the Supreme Court of the United States to become a "judicial debt of record against the husband," and that a suit may be brought in another jurisdiction to "carry the decree into a judgment there, with the same effect that it had in the state in which the decree was given." Accordingly a bill in equity was maintained in the circuit court for the district of Wisconsin to enforce a decree for alimony made in New York upon a divorce from bed and board. Barber v. Barber, 21 How. (U. S.) 582, 16 L. ed. 226.

for specific performance, or any direct method of enforcing the decrees of a foreign court.[8]

§ 777. **Foreign decrees as to property generally.**—As a rule, it is considered that no decree of a foreign court can so operate or be enforced in the state, wherein the domicil of the other party is situated, as to make any change of property rights, such as dower or distribution.[9]

§ 778. **Effect on land without the jurisdiction.**—A court having proper jurisdiction can compel an accounting of land owned by the defendant in another state, and fix the property rights thereto,[10] but it can not compel a division of property contrary to the laws of the state where the property is situated.[11]

[8]Bullock v. Bullock, 51 N. J. Eq. 444, 27 Atl. 435; Wood v. Wood, 7 Misc. 579, 28 N. Y. S. 154, 31 Abb. N. C. 235, 58 N. Y. St. 395. On equity jurisdiction to enforce a foreign decree for alimony, see note to Israel v. Israel, 148 Fed. 576, 9 L. R. A. (N. S.) 1168. In the case of Sistare v. Sistare, 218 U. S. 1, 54 L. ed. 905, 30 Sup. Ct. 682, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061, it is held that a judgment enforceable in the state where rendered must be given effect in another state, although the methods of procedure to enforce its collection may not be the same in both states.

[9]Bates v. Bodie, 245 U. S. 520, 62 L. ed. 444, 38 Sup. Ct. 182, L. R. A. 1918C, 355; Fall v. Eastin, 215 U. S. 1, 54 L. ed. 65, 30 Sup. Ct. 3, 23 L. R. A. (N. S.) 924, 17 Ann. Cas. 853; Proctor v. Proctor, 215 Ill. 275, 74 N. E. 145, 69 L. R. A. 673, 106 Am. St. 168, 2 Ann. Cas. 819; Dunham v. Dunham, 57 Ill. App. 478; Hilbish v. Hattle, 145 Ind. 59, 44 N. E. 20, 33 L. R. A. 783; Sharp v. Sharp, 65 Okla. 76, 166 Pac. 175, L. R. A. 1917F, 562; Williams v. Williams, 83 Ore. 59, 162 Pac. 834; Hicks v. Hicks, 69 Wash. 627, 125 Pac. 945.

[10]Fall v. Fall, 75 Nebr. 104, 106 N. W. 412, 113 N. W. 175, 121 Am. St. 767; Tiedemann v. Tiedemann, 92 Misc. 417, 156 N. Y. S. 111, judg. mod. 158 N. Y. S. 851.

[11]Pinkley v. Pinkley, 155 Ky. 203, 159 S. W. 795; Sharp v. Sharp, 65 Okla. 76, 166 Pac. 175, L. R. A. 1917F, 562; Williams v. Williams, 83 Ore. 59, 162 Pac. 834; Zentzis v. Zentzis, 163 Wis. 342, 158 N. W. 284 (court may order real estate in another state transferred).

CHAPTER 48

ENFORCEMENT OF ALIMONY

Section

785. Jurisdiction of courts to enforce.
786. Requirement of security for payment of alimony.
787. Lis pendens to preserve status quo.
788. Appointment of receiver to preserve status quo.
789. Injunction to maintain status quo.
790. Issuance of writ of ne exeat.
791. Setting aside fraudulent conveyances.
792. Enforcement of temporary alimony by striking out pleadings and evidence and denial of privileges to defendant.
793. Contempt proceedings to compel payment of alimony in general.
794. Contempt proceedings—Procedure.
795. Defenses to contempt proceedings.
796. Issuance of execution.
797. Attachment of husband's property.
798. Decree of alimony as lien.
799. Husband out of jurisdiction—Extradition.
800. Oath for poor debtors.
801. Wife as creditor after decree for alimony.
802. Appointment of trustee of wife's property.

§ 785. **Jurisdiction of courts to enforce.**—Only the court having jurisdiction of the cause, may enforce an order for temporary alimony.[1] The power to punish the violation of such order through proceedings for contempt, is inherent in such court,[2] and the court to which an appeal is taken.[3]

The enforcement of alimony allowed against a ward, may be had only in the court having jurisdiction of his estate, and not

[1]Karr v. Rust, 217 Ill. App. 555; Kelly v. Kelly, 105 Kans. 72, 181 Pac. 561; Vine v. Vine, 21 R. I. 190, 42 Atl. 871.

[2]Van Dyke v. Van Dyke, 125 Ga. 491, 54 S. E. 537; O'Callaghan v. O'Callaghan, 69 Ill. 552; State v. District Court, 31 Mont. 511, 79 Pac. 13; In re Cave, 26 Wash. 213, 66 Pac. 425, 90 Am. St. 736.

[3]Talman v. Leonard, 6 App. D. C. 224.

against his general guardian personally.[4] An infant husband who has no property under his control may not be imprisoned for failure to pay alimony, as marriage does not emancipate him.[5]

§ 786. **Requirement of security for payment of alimony.**—When alimony or other allowance is decreed to the wife or children, the court may require sufficient surety to be given for its payment according to the terms of the decree,[6] and a refusal to give security is contempt.[7]

§ 787. **Lis pendens to preserve status quo.**—As a general rule, bills filed for alimony and maintenance, merely, do not constitute lis pendens, because such a suit is in personam, and does not apply to any specific part of the personal or real estate of the husband.[8]

Where a bill of divorce and alimony is filed by the wife against the husband, and there is no special allegation in it pointing out any particular property which is sought to be charged with the payment of the alimony, there will be no lis pendens, as to the real or personal property of the defendant. If, however, the bill should point out particular real or personal property, and within the limits of the manifest jurisdiction and powers of the court to grant relief, and should seek to have alimony assigned out of such specific property, there would be constructive notice of the lis pendens.[9] The averments of the bill must be so definite that anyone on reading it may learn what property has been made the subject of litigation.[10]

The mere filing of a notice of lis pendens without the order of court charging alimony as a lien on property will not ordinarily affect a subsequent bona fide mortgage.[11]

Furthermore, the prayer for relief must be certain and specific

[4]Sturgis v. Sturgis, 51 Ore. 10, 93 Pac. 696, 15 L. R. A. (N. S.) 1034, 131 Am. St. 724.

[5]Austin v. Austin, 167 Mich. 164, 132 N. W. 495, Ann. Cas. 1913A, 545.

[6]Laufer v. Laufer, 61 Ind. App. 508, 112 N. E. 106; Rhinehart v. Rhinehart, 126 Miss. 488, 89 So. 152; Holmes v. Holmes, 29 N. J. Eq. 9.

[7]Andrews v. Andrews, 69 Ill. 609.

[8]Feigley v. Feigley, 7 Md. 537, 61 Am. Dec. 375; Gilmore v. Gilmore, 5 Jones Eq. (N. Car.) 284; Baird v. Baird, Phil. Eq. (N. Car.) 317; Brightman v. Brightman, 1 R. I. 112; Almond v. Almond, 4 Rand. (Va.) 662, 15 Am. Dec. 781.

[9]Powell v. Campbell, 20 Nev. 232, 20 Pac. 156, 2 L. R. A. 615, 19 Am. St. 350.

[10]2 Pom. Eq. Jur. 76

[11]Sun Insurance Co. v. White, 123 Cal. 196, 55 Pac. 902.

as to the property to be sought to be charged for the payment or security of the alimony to be awarded.[12] So where there is only a general prayer for alimony and no specific property is pointed out the doctrine of lis pendens will not ordinarily apply.[13]

§ 788. **Appointment of receiver to preserve status quo.**—A receiver may be appointed at the beginning of an action for alimony, or for a divorce and alimony, upon a proper showing, and he will be authorized to take possession of the property of the husband, and preserve it, pending the litigation,[14] and collect rents and profits.[15]

And this procedure will be proper where there is danger of the property within the state being lost, destroyed, removed, or depreciated, so as to impair the chances of collecting the award, and the husband is indefinitely absent from the state,[16] but neither the property nor its proceeds may be applied to the payment of such alimony until a lawful judgment therefor has been obtained.[17] The appointment of a receiver will be denied, however, where the wife is protected by a money judgment made a lien on his property,[18] or where, under a statute, the court may

[12]Sun Insurance Co. v. White, 123 Cal. 196, 55 Pac. 902. In this case the wife filed a cross bill praying that such portion of the common property as should be proper be assigned to her, and it was held a subsequent bona fide mortgage by the husband of his separate property was superior to her decree for alimony although she had described the mortgaged property in her bill. Garver v. Graham, 6 Kans. App. 344, 51 Pac. 812.

[13]Wilkinson v. Elliott, 43 Kans. 590, 23 Pac. 614, 19 Am. St. 158: Tolerton v. Williard, 30 Ore. 579.

[14]Lisenbee v. Lisenbee, 42 Cal. App. 567, 183 Pac. 862; Anderson v. Anderson, 124 Cal. 48, 56 Pac. 630, 57 Pac. 81, 71 Am. St. 17; Murray v. Murray, 115 Cal. 266, 47 Pac. 37, 37 L. R. A. 626, 56 Am. St. 97; Bergen v. Bergen, 22 Ill. 187; Braecklein v. Braecklein, 139 Md. 341, 115 Atl. 118; De Lukacsevics v. Nagle, 89 N. J. Eq. 106, 103 Atl. 375; Holmes v. Holmes, 29 N. J. Eq. 9; Carey v. Carey, 2 Daly (N. Y.) 424; Warren v. Warren, 36 R. I. 167, 89 Atl. 651; Stillman v. Stillman, 7 Baxt. (Tenn.) 169. See notes, 64 Am. Dec. 495; 72 Am. St. 67.

[15]Vincent v. Parker, 7 Paige (N. Y.) 65.

[16]Murray v. Murray, 115 Cal. 266, 47 Pac. 37, 37 L. R. A. 626, 56 Am. St. 97; Stallings v. Stallings, 127 Ga. 464, 56 S. E. 469, 9 L. R. A. (N. S.) 593; Kirby v. Kirby, 1 Paige (N. Y.) 261; Carey v. Carey, 2 Daly (N. Y.) 424; Questal v. Questal, Wright (Ohio) 492; Barker v. Dayton, 28 Wis. 367.

[17]Stallings v. Stallings, 127 Ga. 464, 56 S. E. 469, 9 L. R. A. (N. S.) 593, citing Price v. Price, 90 Ga. 244, 15 S. E. 774.

[18]Gust v. Gust, 78 Wash. 414, 139 Pac. 228.

make the wife's alimony a lien upon the husband's estate,[19] or where the husband has been enjoined from disposing of the property.[20] The appointment of a receiver rests largely within the discretion of the trial court,[21] and terminates with the entry of the final judgment where he has not taken possession of any property,[22] But, of course, the receiver takes the property in any case, subject to all prior liens and incumbrances.[23]

§ 789. **Injunction to maintain status quo.**—The court may issue an injunction to prevent the husband from disposing of his property to avoid the payment of alimony.[24] The injunction must be prayed for, and the petition must state sufficient facts to justify the grant of the order.[25] An irregular verification of the petition may be amended.[26]

An injunction issued under an order indorsed according to the statute prohibiting disposition of property, the day before divorce petition was filed, is effectual for that purpose.[27] The defendant may be enjoined from releasing a cause of slander commenced by the wife before the marriage.[28]

§ 790. **Issuance of writ of ne exeat.**—Where the complainant has a reasonable apprehension that the defendant is about to leave the state to avoid paying alimony, the court may issue the writ of ne exeat, or it may be issued before the suit has been heard on its merits.[29]

[19]Huellmantel v. Huellmantel, 124 Cal. 583, 57 Pac. 582.

[20]Goff v. Goff, 54 W. Va. 364, 46 S. E. 177.

[21]Reum v. Reum (Tex. Civ. App.), 209 S. W. 760.

[22]White v. White, 130 Cal. 597, 62 Pac. 1062, 80 Am. St. 150.

[23]Petaluma Savings Bank v. Superior Court, 111 Cal. 488, 44 Pac. 177; Bradley v. Ramsey (Tex. Civ. App.), 65 S. W. 1112.

[24]Norris v. Norris, 27 Ala. 519; Raines v. Raines, 138 Ga. 790, 76 S. E. 51; Draper v. Draper, 68 Ill. 17; Gechter v. Gechter, 51 Md. 187; Ricketts v. Ricketts, 4 Gill (Md.) 105; Carney v. Carney, 138 Tenn. 647, 200 S. W. 517; Turner v. Turner, 47 Tex. Civ. App. 391, 105 S. W. 237; Moir v. Moir, 182 Iowa 370, 165 N. W. 1001 (injunction not granted husband to restrain her from hindering him).

[25]Norris v. Norris, 27 Ala. 519; Uhl v. Irwin, 3 Okla. 388, 41 Pac. 376.

[26]Ex parte Gregory, 85 Tex. Cr. 115, 210 S. W. 204.

[27]Ex parte Gregory, 85 Tex. Cr. 115, 210 S. W. 204.

[28]Gibson v. Gibson, 46 Wis. 449, 1 N. W. 147.

[29]Lamar v. Lamar, 123 Ga. 827, 51 S. E. 763, 107 Am. St. 169, 3 Ann. Cas. 294; Jones v. Kennicott, 83 Ill. 434; Penny v. Penny, 88 N. J. Eq. 160, 102 Atl. 257; Bylandt v. Bylandt, 6 N. J. Eq. 28; Anonymous, 2 N. Car. 347; Holcomb v. Holcomb, 49 Wash. 498, 95 Pac. 1091.

The purpose of the writ is to hold the custody of the defendant's body until he shall give bail to abide the decree of the court.[30]

This writ was originally a high prerogative writ issued for state and political purposes to forbid a subject to depart from the realm, but the crown use of it was abolished by Magna Charta; after which it became an instrument of the chancery courts to enforce decrees based on equitable demands.[31] Later on it was employed by them where the facts warranted it, to enforce the decrees already made for alimony by the ecclesiastical courts, which had no power in that respect.[32] In such case it issues on the ground that the plaintiff's claim is an equitable demand.[33] The courts of the United States have extended the English rule, and the writ is now issued as a matter of necessity to prevent the failure of justice, in cases where the husband threatens to leave the state before the decree.[34] It may now issue at the commencement of the suit, or during any stage of the proceedings as well as after the decree according to the English practice.[35]

[30]Gresham v. Peterson, 25 Ark. 377; McGee v. McGee, 8 Ga. 295, 52 Am. Dec. 407; Cable v. Alvord, 27 Ohio St. 654.

[31]Bronk v. State, 43 Fla. 461, 31 So. 248, 99 Am. St. 119; Lamar v. Lamar, 123 Ga. 827, 51 S. E. 763, 107 Am. St. 169, 3 Ann. Cas. 294; McGee v. McGee, 8 Ga. 295, 52 Am. Dec. 407.

[32]Read v. Read, 1 Ch. Cas. 115, 2 Ch. Rep. 19; Ex parte Whitmore, Dick. 143; Smithson's Case, 2 Vent. 345; Head v. Head, 3 Atk. 295; Pearne v. Lisle, Ambl. 76; Anonymous, 2 Atk. 211; Vandergucht v. DeBlaquiere, 8 Sim. 315, 2 Jur. 738.

[33]Mitchell v. Bunch, 2 Paige (N. Y.) 606, 22 Am. Dec. 669; Bonesteel v. Bonesteel, 28 Wis. 245.

[34]Gresham v. Peterson, 25 Ark. 377; Marselis v. People, 18 Colo. App. 258, 71 Pac. 429; Bronk v. State, 43 Fla. 461, 31 So. 248, 99 Am. St. 119; Lamar v. Lamar, 123 Ga. 827, 51 S. E. 763, 107 Am. St. 169, 3 Ann. Cas. 294; Bleyer v. Blum, 70 Ga. 558; McGee v. McGee, 8 Ga. 295, 52 Am. Dec. 407; Bayly v. Bayly, 2 Md. Ch. 326; Yule v. Yule, 10 N. J. Eq. 138; Bylandt v. Bylandt, 6 N. J. Eq. 28; Bushnell v. Bushnell, 15 Barb. (N. Y.) 399; Forrest v. Forrest, 2 Edm. Sel. Cas. (N. Y.) 171; Boucicault v. Boucicault, 21 Hun (N. Y.) 431, 59 How. Pr. 131; Denton v. Denton, 1 Johns. Ch. (N. Y.) 364; Mitchell v. Bunch, 2 Paige (N. Y.) 606, 22 Am. Dec. 669; Robinson v. Robinson, 21 R. I. 81, 41 Atl. 1009. See also Bailey v. Cadwell, 51 Mich. 217, 16 N. W. 381. A statute authorizing the court to do the acts and things necessary and proper to carry its orders into execution, authorizes the granting of the writ, to prevent its judgment for alimony, when rendered, being ineffective. Ex parte Grbic, 170 Wis. 201, 174 N. W. 546, 8 A. L. R. 325

[35]Lyon v. Lyon, 21 Conn. 185; Dunham v. Jackson, 1 Paige (N. Y.)

In Michigan, the English rule is followed, and the writ will not issue except for arrears of alimony actually due, and for costs.[36]

The writ is a writ of right[37] but should not be issued in a doubtful case.[38] The writ will generally be denied where the affidavit for it is filed before the petition for divorce.[39]

The proper course is to file the bill or petition for divorce, and after that to file petition for the ne exeat, supported by the necessary affidavit, sworn to subsequently to the filing of the bill.[40] The affidavit of the wife alone is sufficient to support the order for the writ, but it must be positive as to the intention of the defendant to go abroad, or as to his threats or declarations to that effect.[41] In some jurisdictions it will be sufficient if the intention of the defendant to go abroad is sworn to on information and belief.[42] It should appear also from the affidavit that the departure of the defendant will defeat the wife's right to alimony.[43]

The writ will be denied if the defendant makes it appear that he does not intend to leave the jurisdiction.[44]

In some jurisdictions it is held that it should appear from the bill or affidavit not only that the defendant is about to depart, but that he has disposed of, or is about to remove his property.[45] The affidavit may be amended if found defective.[46]

629; Ex parte Grbic, 170 Wis. 201, 174 N. W. 546, 8 A. L. R. 325.

[36]Bailey v. Cadwell, 51 Mich. 217, 16 N. W. 381.

[37]DeCarriere v. DeColonien, 4 Vesey Jr. 577.

[38]Yule v. Yule, 10 N. J. Eq. 138; Seymour v. Hazard, 1 Johns. Ch. (N. Y.) 1.

[39]Bylandt v. Bylandt, 6 N. J. Eq. 28; Yule v. Yule, 10 N. J. Eq. 138.

[40]Bylandt v. Bylandt, 6 N. J. Eq. 28.

[41]McGee v. McGee, 8 Ga. 295, 52 Am. Dec. 407; Yule v. Yule, 10 N. J. Eq. 138.

[42]Yule v. Yule, 10 N. J. Eq. 138; Collinson v. Collinson, 18 Ves. 354.

[43]Yule v. Yule, 10 N. J. Eq. 138.

[44]Bayly v. Bayly, 2 Md. Ch. 326; Forrest v. Forrest, 2 Edm. Sel. Cas. (N. Y.) 171; Forrest v. Forrest, 10 Barb. (N. Y.) 46, 5 How. Pr. (N. Y.) 125, 3 Code Rep. 141; Vandergucht v. DeBlaquiere, 8 Sim. 315, 2 Jur. 738. Where the husband abandons the wife, as well as the household goods, and refuses to contribute to the support of her and the children, and threatens to depart from the state, the writ of ne exeat may issue. Crapps v. Crapps, 148 Ga. 510, 97 S. E. 680.

[45]Fitzgerald v. Gray, 59 Ind. 254; Dean v. Smith, 23 Wis. 483, 99 Am. Dec. 198.

[46]Louderback v. Rosengrant, 4 Ind. 563.

The bill or petition must contain a specific prayer for the writ.[47]

Where the writ has been obtained by supporting affidavits as to the defendant's intention to leave the state, it will not be discharged upon a counter-affidavit by himself.[48] The defendant may, however, show that the writ ought not to have been issued,[49] and in such case his remedy is by a motion to set it aside,[50] which should be made at the earliest opportunity.[51]

Where it afterward appears that the court has no jurisdiction over the subject matter of the suit in which the claim for alimony is made, the writ will be discharged.[52] This may occur where neither of the parties were residents of the state when the bill was filed, and the matrimonial domicil was not in that state at the time the cause of action arose.[53]

The defendant may not be discharged by habeas corpus proceedings where there has been a mere irregularity in issuing the writ. In such case the remedy is by appeal.[54] On discharge of writ, the court may, nevertheless, require security to abide the decree.[55] The court, in determining the amount of bond to be required, should have due regard to the rank of the parties, and the property of the husband, so as to prevent oppression or extortion.[56] The bond may be subsequently amended or a new undertaking may be filed.[57] The bail as first fixed may, upon evidence showing it to be excessive, be reduced.[58] There is a breach of the bond where, without procuring a discharge of the

[47]Edmonds v. Her Husband, 4 La. 489; Feigley v. Feigley, 7 Md. 537, 61 Am. Dec. 375; Bayly v. Bayly, 2 Md. Ch. 326; Wilson v. Wilson, Wright (Ohio) 128; Handlan v. Handlan, 37 W. Va. 486, 16 S. E. 597; Gibson v. Gibson, 46 Wis. 449, 1 N. W. 147.

[48]Houseworth's Admr. v. Hendrickson, 27 N. J. Eq. 60.

[49]McGee v. McGee, 8 Ga. 295, 52 Am. Dec. 407.

[50]Harris v. Hardy, 3 Hill (N. Y.) 393.

[51]Dithmar v. Dithmar, 68 N. J. Eq. 533, 59 Atl. 644.

[52]Miller v. Miller, 1 N. J. Eq. 386; Elmendorf v. Elmendorf, 58 N. J. Eq. 113, 44 Atl. 164; Anshutz v. Anshutz, 16 N. J. Eq. 162; Kirrigan v. Kirrigan, 15 N. J. Eq. 146; Yule v. Yule, 10 N. J. Eq. 138.

[53]Dithmar v. Dithmar, 68 N. J. Eq. 533, 59 Atl. 644.

[54]Bronk v. State, 43 Fla. 461, 31 So. 248, 99 Am. St. 119.

[55]McGee v. McGee, 8 Ga. 295, 52 Am. Dec. 407; McDonough v. Gaynor, 18 N. J. Eq. 249; Mitchell v. Bunch, 2 Paige (N. Y.) 606, 22 Am. Dec. 669.

[56]Lamar v. Lamar, 123 Ga. 827, 51 S. E. 763, 107 Am. St. 169, 3 Ann. Cas. 294.

[57]Fitzgerald v. Gray, 59 Ind. 254.

[58]Kirby v. Kirby, 1 Paige (N. Y.) 261.

writ or leave of the court, the defendant departs from the state either before or after the decree.[59]

In some of the states, the writ of ne exeat is now abolished by statute or constitutional provisions.[60]

§ 791. **Setting aside fraudulent conveyances.**—Conveyances made in anticipation of liability under divorce proceeding and for the purpose of ending the husband's obligations to his wife are in bad faith and fraudulent. Where such conveyances are not made to innocent purchasers they may be set aside.[61] There is such a case where the husband leaves the state and conveys his property for an insignificant sum to one with knowledge of the divorce.[62]

§ 792. **Enforcement of temporary alimony by striking out pleadings and evidence and denial of privileges to defendant.**—An order to pay temporary alimony where it has been entered in a wife's action for divorce or separation, may not be enforced—or stating it more accurately—its enforcement may not be attempted by striking from the files of the cause, defensive pleadings[63] on

[59]Marselis v. People, 18 Colo. App. 258, 71 Pac. 429.

[60]New York, Code Civ. Pro. § 548; Collins v. Collins, 80 N. Y. 24; Arkansas: East v. East, 148 Ark. 143, 22 S. W. 5; California: Ex parte Harker, 49 Cal. 465; Ohio: Cable v. Alvord, 27 Ohio St. 654. See also constitutions and statutes of Kentucky, Louisiana, Mississippi, Pennsylvania, Vermont.

[61]Smith v. New York Life Ins. Co., 57 Fed. 133; Weyer v. Weyer, 40 Cal. App. 765, 182 Pac. 776; Moss v. Moss., 147 Ga. 311, 93 S. E. 875; Davidson v. Dingeldine, 295 Ill. 367, 129 N. E. 79; Deke v. Huenkemeier, 289 Ill. 148, 124 N. E. 381; De Ruiter v. De Ruiter, 28 Ind. App. 9, 62 N. E. 100, 91 Am. St. 107; Picket v. Garrison, 76 Iowa 347, 41 N. W. 38, 14 Am. St. 220; Campbell v. Trosper, 108 Ky. 602, 57 S. W. 245, 22 Ky. L. 277; Nolan v. Nolan, 214 Mich. 49, 181 N. W. 971; Buffalo v. Letson, 33 Okla. 261, 124 Pac. 968; Nix v. Nix. 57 Tenn. (10 Heisk.) 546 (though wife consented in ignorance); Crowder v. Crowder, 125 Va. 80, 99 S. E. 746; Hall v. Hall, 117 Wash. 615, 201 Pac. 912; Goulette v. Goulette, 114 Wash. 689, 195 Pac. 1045. But see Keohane v. Keohane, 38 Cal. App. 405, 176 Pac. 386.

[62]Matson v. Matson, 186 Iowa 607, 173 N. W. 127; see also Davis v. Davis, 187 Iowa 407, 173 N. W. 7.

[63]Hovey v. Elliott, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. 841; Ex parte Eubank, 206 Ala. 8, 89 So. 656; Foley v. Foley, 120 Cal. 33, 52 Pac. 122, 65 Am. St. 147; Johnson v. Superior Ct., 63 Cal. 578; Cason v. Cason, 15 Ga. 405; Gordon v. Gordon, 141 Ill. 160, 30 N. E. 446, 21 L. R. A. 387, 33 Am. St. 294; Eastes v. Eastes, 79 Ind. 363; Allen v. Allen, 72 Iowa 502, 34 N. W. 303; Bailey v. Bailey, 69 Iowa 77, 28 N. W. 443; Dwelly v. Dwelly, 46 Maine 377; McMakin v. McMakin, 68 Mo. App. 57; MacNamara v. MacNamara, 86 Nebr. 631, 126 N. W. 94, 27 L. R. A.

the part of the defendant and proceeding therewith as in case of default, but the contrary has been held in extreme cases.[64] As, for instance, if the defendant absents himself from the state so that no other method is left to enforce the order, his answer may be stricken out, as it may be inferred he has no desire in good faith to defend the action.[65]

The answer is sometimes stricken out for disobedience of the order to pay alimony,[66] but this practice is objectionable in that it prevents full investigation regarding the merits of the controversy which is necessary to protect the interests of the state.[67] His depositions may not be stricken out,[68] nor can his evidence in defense be excluded even if it be also in support of his cross-complaint.[69]

The proceedings in a husband's action for divorce may be stayed until his financial condition enables him to comply with an order for temporary alimony or suit money,[70] or until such order

(N. S.) 1062, 21 Ann. Cas. 451; Naveja v. Naveja, 110 Misc. 279, 179 N. Y. S. 881; Farnham v. Farnham, 9 How. Pr. (N. Y.) 231; Larson v. Larson, 9 S. Dak. 1, 67 N. W. 842; Ward v. Ward, 70 Vt. 430, 41 Atl. 435; Bachelor v. Bachelor, 30 Wash. 639, 71 Pac. 193; State v. Kittle, 86 W. Va. 587, 104 S. E. 44; Trough v. Trough, 59 W. Va. 464, 53 S. E. 630, 4 L. R. A. (N. S.) 1185, 115 Am. St. 940, 8 Ann. Cas. 837.

[64]Casteel v. Casteel, 38 Ark. 477; Peel v. Peel, 50 Iowa 221; McClung v. McClung, 40 Mich. 493; Walker v. Walker, 82 N. Y. 260, 8 Abb. N. C. 436, 59 How. Pr. 476; Knott v. Knott, 6 App. Div. 589, 39 N. Y. S. 804; Brisbane v. Brisbane, 67 How. Pr. 184, 5 Civ. Proc. R. (N. Y.) 352; Quigley v. Quigley, 45 Hun 23, 9 N. Y. St. 486.

[65]Zimmerman v. Zimmerman, 7 Mont. 114, 14 Pac. 665; Bates v. Bates, 145 N. Y. S. 411; Bennett v. Bennett, 15 Okla. 286, 81 Pac. 632, 70 L. R. A. 864.

[66]Cason v. Cason, 15 Ga. 405; Zimmerman v. Zimmerman, 7 Mont. 114, 14 Pac. 665; Walker v. Walker, 82 N. Y. 260, 8 Abb. N. C. 436, 59 How. Pr. 476; Brisbane v. Brisbane, 67 How. Pr. 184, 5 Civ. Proc. R. (N. Y.) 352; McCrea v. McCrea, 58 How. Pr. (N. Y.) 220; Farnham v. Farnham, 9 How. Pr. (N. Y.) 231; Quigley v. Quigley, 45 Hun 23, 9 N. Y. St. 486; Gant v. Gant, 10 Humphrey (Tenn.) 464, 53 Am. Dec. 736; Clark v. Clark, 13 Daly (N. Y.) 497; Bird v. Bird, 1 Lee 572.

[67]Gordon v. Gordon, 141 Ill. 160, 30 N. E. 446, 21 L. R. A. 387, 33 Am. St. 294; Allan v. Allan, 72 Iowa 502, 34 N. W. 303; Baily v. Baily, 69 Iowa 77, 28 N. W. 443; Peel v. Peel, 50 Iowa 521.

[68]Trough v. Trough, 59 W. Va. 464, 53 S. E. 630, 4 L. R. A. (N. S.) 1185, 115 Am. St. 940, 8 Ann. Cas. 837.

[69]Frey v. Frey, 61 Colo. 581, 158 Pac. 714. But to the contra see, McClung v. McClung, 40 Mich. 493.

[70]Winter v. Superior Ct., 70 Cal. 295, 11 Pac. 633; Frey v. Frey, 61 Colo. 581, 158 Pac. 714; Cairnes v. Cairnes, 29 Colo. 260, 68 Pac. 233, 93 Am. St. 55; Waters v. Waters, 49 Mo. 285; Reed v. Reed, 70 Nebr. 779,

is reversed on appeal.[71] And so with his action to annul a marriage, when he fails to pay suit money.[72] The payment of temporary alimony may be made a condition of the further prosecution of his suit,[73] or the entry of a decree in his favor may be postponed.[74]

A decree in the husband's favor on his cross-bill, may be set aside for his failure to pay temporary alimony,[75] or his cause may be dismissed for failure to obey the order,[76] notwithstanding his failure to obey it is due to his poverty.[77]

So his own action for divorce may be dismissed for his disobedience of the order, while the wife's cross-complaint may be prosecuted to a final decree.[78] But a husband in contempt in his wife's action for separate maintenance for non-payment of temporary alimony, may nevertheless pursue his own action against her for divorce.[79] His appeal from an order for permanent alimony will not be dismissed for his failure to pay temporary alimony ordered by the trial court, but such decree will not be modified or reversed until he does make such payment.[80] The ordinary privileges of the court may be denied him as a method of enforcement,[81] but whatever is a matter of right, such as a

98 N. W. 73; Wright v. Wright, 6 Tex. 29.

[71]Winter v. Superior Ct., 70 Cal. 295, 11 Pac. 633.

[72]Allen v. Superior Ct., 133 Cal. 504, 65 Pac. 977.

[73]Winter v. Superior Court, 70 Cal. 295, 11 Pac. 633; Johnson v. Superior Court, 63 Cal. 578; Waters v. Waters, 49 Mo. 385; Keane v. Keane, 42 L. J., Mat. 12, 3 P. & M. 52, 27 L. T. 768.

[74]State v. Rombauer, 99 Mo. 216, 12 S. W. 661; Latham v. Latham, 2 Sw. & Tr. 299.

[75]Bates v. Bates, 145 N. Y. S. 411.

[76]Casteel v. Casteel, 38 Ark. 477; Peel v. Peel, 50 Iowa 521.

[77]Purcell v. Purcell, 3 Edw. Ch. (N. Y.) 194; Deemer v. Deemer, 7 Pa. Co. Ct. 544. But see Newhouse v. Newhouse, 14 Ore. 290, 12 Pac. 422.

[78]Casteel v. Casteel, 38 Ark. 477.

[79]Tafel v. Tafel, 169 App. Div. 417, 155 N. Y. S. 164.

[80]Williams v. Williams, 6 S. Dak. 284, 61 N. W. 38.

[81]Cason v. Cason, 15 Ga. 405; Allen v. Allen, 72 Iowa 502, 34 N. W. 303; Peel v. Peel, 50 Iowa 521; McClung v. McClung, 40 Mich. 493; Zimmerman v. Zimmerman, 7 Mont. 114, 14 Pac. 665; Walker v. Walker, 82 N. Y. 260, 8 Abb. N. C. 436, 59 How. Pr. 476; Walker v. Walker, 20 Hun (N. Y.) 400; McCrea v. McCrea, 58 How. Pr. (N. Y.) 220; Farnham v. Farnham, 9 How. Pr. (N. Y.) 231; Bird v. Bird, 1 Lee 572, 5 Eng. Ec. 455; Latham v. Latham, 2 Sw. & Tr. 299. Also Krieger v. Krieger, 221 Ill. 479, 77 N. E. 909, where under the conditions stated in the text, the husband was denied the privileges of the court and was ordered by the trial court to appear in person at the bar of the court.

change of venue must be granted.[82] He may not, for example, be denied the privilege of the court to appear by attorney.[83] But favors such as the court may in its discretion exercise, such as opening a default and permitting an answer to be filed, may be denied him, until he has complied with the order for temporary alimony.[84] So the court may refuse to extend the time of the husband,[85] but this power does not extend to the right to deny a transcript preparatory to an appeal.[86] It seems to be the rule where the privileges of the court or its favors are denied a delinquent husband, there need be no previous order adjudging him guilty of contempt.[87]

§ 793. **Contempt proceedings to compel payment of alimony in general.**—Alimony may be enforced by process for contempt,[88] and the contumacious husband imprisoned for his wilful refusal to pay after being ordered by the court to do so.[89] This impris-

and relieve himself of the contempt, but not otherwise than in person, the Supreme Court held such order erroneous, for the order of the court could have been complied with either with or without his personal appearance.

[82]Hennessy v. Nicol, 105 Cal. 138, 38 Pac. 649.

[83]Krieger v. Krieger, 221 Ill. 479, 77 N. E. 909.

[84]Bennett v. Bennett, 208 U. S. 505, 52 L. ed. 590, 28 Sup. Ct. 356; Weidner v. Weidner, 85 Hun 432, 32 N. Y. S. 894, 66 N. Y. St. 211.

[85]McClung v. McClung, 40 Mich. 493.

[86]Martin v. Martin, 6 Blackf. (Ind.) 321.

[87]McClung v. McClung, 40 Mich. 493.

[88]Murray v. Murray, 84 Ala. 363, 4 So. 239; Ex parte Perkins, 18 Cal. 60; Van Dyke v. Van Dyke, 125 Ga. 491, 54 S. E. 537; Goss v. Goss, 29 Ga. 109; Blake v. People, 80 Ill. 11; Buck v. Buck, 60 Ill. 105; Crook v. People, 16 Ill. 534; Dwelly v. Dwelly, 46 Maine 377; Stuart v. Stuart, 123 Mass. 370; Slade v. Slade, 106 Mass. 499; Haines v. Haines, 35 Mich. 138; Ramsey v. Ramsey, 125 Miss. 185, 87 So. 491, 14 A. L. R. 712; State v. Second Judicial District Court, 31 Mont. 511, 79 Pac. 13; Pain v. Pain, 80 N. Car. 322; Waldron v. Waldron, 55 Pa. 231; In re Cave, 26 Wash. 213, 66 Pac. 425, 90 Am. St. 736.

[89]Murray v. Murray, 84 Ala. 363, 4 So. 239; Ex parte Perkins, 18 Cal. 60; Lyon v. Lyon, 21 Conn. 185; Roe v. Watson, 151 Ga. 365, 106 S. E. 907; Woodall v. Woodall, 147 Ga. 676, 95 S. E. 233; Carlton v. Carlton, 44 Ga. 216; Blake v. Blake, 80 Ill. 523; State v. Dent, 29 Kans. 416; Russell v. Russell, 69 Maine 326; Slade v. Slade, 106 Mass. 499; Steller v. Steller, 25 Mich. 159; Ex parte Phillips, 43 Nev. 368, 187 Pac. 311; Canavan v. Canavan, 18 New Mex. 640, 139 Pac. 154, 51 L. R. A. (N. S.) 972, Ann. Cas. 1915D, 1007; Strobridge v. Strobridge, 21 Hun (N. Y.) 288; Isaacs v. Isaacs, 61 How. Pr. (N. Y.) 369; Pain v. Pain, 80 N. Car. 322; Hand v. Hand, 11 Ohio Dec. 202, 25 Wkly. L. B. 214; West v. West, 126 Va. 696, 101 S. E. 876; Wright v. Wright, 74 Wis. 439, 43

onment will not amount to imprisonment for debt within the meaning of constitutional provisions prohibiting such imprisonment;[90] since alimony in the view of many of the courts is not a debt founded upon contract, but is more in the nature of a penalty, imposed upon the husband for his wrongful acts and noncompliance with the order of court.[91]

Such imprisonment may be ordered to continue until payment of the alimony is made,[92] although the term of the imprisonment and the number of times he may be imprisoned is often governed by statute.[93] Contempt proceedings will also lie to compel payment of installments of alimony ordered to be paid in the future by a final judgment of divorce, where an execution can not be issued, since there is no provision of law for collecting such judgment. Inability to pay installments of alimony, brought about by the party himself with the intention of avoiding payment, will not prevent his refusal to pay from being contumacious and punishable as a contempt of court.[94]

A mere contract to pay alimony can not be enforced by contempt proceedings.[95]

N. W. 145. Mowry v. Bliss, 28 R. I. 114, 65 Atl. 616 (no discharge from imprisonment by taking poor debtors' oath); Ex parte Morey, 28 R. I. 242, 66 Atl. 575, (habeas corpus will not discharge him).

[90]Murray v. Murray, 84 Ala. 363, 4 So. 239; In re Popejoy, 26 Colo. 32, 55 Pac. 1083, 77 Am. St. 222; Bronk v. State, 43 Fla. 461, 31 So. 248, 99 Am. St. 119; Lewis v. Lewis, 80 Ga. 706, 6 S. E. 918, 12 Am. St. 281; Carlton v. Carlton, 44 Ga. 216; Barclay v. Barclay, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351; Wightman v. Wightman, 45 Ill. 167; Ex parte Grace, 12 Iowa 208, 79 Am. Dec. 529; State v. King, 49 La. Ann. 1503, 22 So. 887; Steller v. Steller, 25 Mich. 159; Pain v. Pain, 80 N. C. 322; In re Cave, 26 Wash. 213, 66 Pac. 425, 90 Am. St. 736.

[91]Ex parte Perkins, 18 Cal. 60; Carlton v. Carlton, 44 Ga. 216; Anderson v. Anderson, 65 Ind. 196; Daniels v. Lindley, 44 Iowa 567; Allen v. Allen, 100 Mass. 373; Weber v. Weber, 93 App. Div. 149, 87 N. Y. S. 51; Pain v. Pain, 80 N. Car. 322.

[92]Ex parte Joutson, 154 Cal. 540, 98 Pac. 391; Beavers v. Beavers, 148 Ga. 506, 97 S. E. 65; Gray v. Gray, 127 Ga. 345, 56 S. E. 438; Smith v. Smith, 81 W. Va. 761, 95 S. E. 199, 8 A. L. R. 1149.

[93]Oxford v. Berry, 204 Mich. 197, 170 N. W. 83; Millis v. State, 106 Miss. 131, 63 So. 344; Richards v. Richards, 71 Misc. 532, 130 N. Y. S. 799; Maran v. Maran, 137 App. Div. 348, 122 N. Y. S. 9; People v. Walsh, 132 App. Div. 462, 116 N. Y. S. 839.

[94]Letts v. Letts, 85 N. J. Eq. 407, 96 Atl. 887; Staples v. Staples, 87 Wis. 592, 58 N. W. 1036, 24 L. R. A. 433.

[95]Clark v. Clark, 130 App. Div. 610, 115 N. Y. S. 500; Glynn v. Glynn, 8 N. Dak. 233, 77 N. W. 594.

§ 794. **Contempt proceedings—Procedure.**—The husband may be attached as for contempt under an order to show cause why he should not be punished therefor. This is the usual procedure,[96] where the contempt is not committed in the presence of the court.[97]

Before entering an order of commitment the court must find that the husband has the ability to comply with the order,[98] and this should be recited in the judgment or the order of commitment,[99] but its omission will not, ordinarily vitiate the order.[1]

The order should show fully what constitutes the contempt and if committed in the presence of the court should show that the defendant was in court when the order was entered.[2] Another prerequisite to commitment is a service upon the husband

[96]Ex parte Todd, 119 Cal. 57, 50 Pac. 1071; Spencer v. Lawler, 79 Cal. 215, 21 Pac. 742; Anderson v. Anderson, 205 Ill. App. 595; Schuele v. Schuele, 57 Ill. App. 189; Bowman v. Webster, 214 Mich. 518, 183 N. W. 232; Oxford v. Berry, 204 Mich. 197, 170 N. W. 83; Holcomb v. Holcomb, 53 Wash. 611, 102 Pac. 653. In Ormsby v. Ormsby, 1 Phila. (Pa.) 378, it is said that an attachment for contempt is not to punish for being unable to perform it but is designed to enforce the compliance with the order. The object of the attachment is merely to bring the appellant before the court to show cause why he should not be adjudged guilty and punished for contempt for refusing to obey its order. O'Callaghan v. O'Callaghan, 69 Ill. 552; Ex parte Petrie, 38 Ill. 498. Bench warrant may be issued for arrest of contumacious husband. Oxford v. Berry, 204 Mich. 197, 170 N. W. 83.

[97]Taliaferro v. Taliaferro, 171 N. Y. S. 25.

[98]In re McCarty, 154 Cal. 534, 98 Pac. 540; In re Cowden, 139 Cal. 244, 73 Pac. 156; Ex parte Silvia, 123 Cal. 293, 55 Pac. 988, 69 Am. St. 58; Shore v. People, 26 Colo. 516, 59 Pac. 49; Rawson v. Rawson, 35 Ill. App. 505; Ex parte Wright, 65 Ind. 504; Ogden v. State, 3 Nebr. 886, 93 N. W. 203; Lutz v. District Court, 29 Nev. 152, 86 Pac. 445; In re Odum, 133 N. Car. 250, 45 S. E. 569; Hoffman v. Hoffman, 26 S. Dak. 34, 127 N. W. 478, 30 L. R. A. (N. S.) 564, Ann. Cas. 1913A, 956; State v. Galloway, 5 Cold. (Tenn.) 326, 98 Am. Dec. 404.

[99]Ex parte Henshaw, 73 Cal. 486, 15 Pac. 110; Crites v. State, 74 Nebr. 687, 105 N. W. 469; Bergin v. Deering, 70 Hun 381, 24 N. Y. S. 35; Ex parte Robertson, 27 Tex. App. 628, 11 S. W. 669, 11 Am. St. 207.

[1]Ex parte Chastain, 94 Ark. 558, 127 S. W. 973; Ex parte Davis, 73 Ark. 358, 84 S. W. 633; Ex parte Summers, 27 N. Car. 149; Coleman v. State, 121 Tenn. 1, 113 S. W. 1045; Ex parte Beavers, 80 W. Va. 34, 91 S. E. 1076.

[2]Rossen v. Rossen, 35 Ill. App. 505; Matzke v. Matzke, 185 App. Div. 533, 173 N. Y. S. 244. See also Fischer v. Hayes, 6 Fed. 63, 19 Blatchf. (U. S.) 13; Clay v. Waters, 178 Fed. 385; Easton v. State, 39 Ala. 551, 87 Am. Dec. 49; Ex parte Chastain, 94 Ark. 558, 127 S. W. 973; Ex parte Summers, 27 N. Car. 146; Ex parte Smith, 40 Tex. Cr. 179, 49 S. W. 396.

of the copy of the order for the payment of alimony,[3] unless he is present in court at the time the order is entered.[4] Service outside the state will be ineffectual,[5] but if he absents himself from the state so that such service may not be made on him therein, it may be made upon his attorneys of record.[6] Notice must be given him also of the application to punish him.[7]

The refusal of the husband to give a bond when surety for the payment of the alimony is required by the decree is punishable in the same manner as any other contempt.[8]

Another essential prerequisite to an order of commitment for contempt for the non-payment of alimony, is an order for such payment.[9] And he must have had notice of the application for such order.[10] A demand must be made upon him for payment,[11] by one having authority to make such demand,[12] unless he was present in court when the order was made,[13] or the decree was originally entered by his consent,[14] or he has made such a demand unnecessary by notifying the wife of his intention not to pay.[15] It has been held that the order to show cause is equivalent to demand.[16]

[3]Johnson v. Superior Court, 63 Cal. 578; O'Callaghan v. O'Callaghan, 69 Ill. 552; Petrie v. People, 40 Ill. 334; Sandford v. Sandford, 40 Hun (N. Y.) 540.

[4]Ex parte Cottrell, 59 Cal. 417. This will be presumed once he has entered his appearance in the cause. Petrie v. People, 40 Ill. 334.

[5]Russell v. Russell, 15 Phila. (Pa.) 168; Johnson v. Superior Court, 63 Cal. 378.

[6]Fairchild v. Fairchild (N. J.), 13 Atl. 599.

[7]Sanchez v. Sanchez, 21 Fla. 346; Isaacs v. Isaacs, 61 How. Pr. (N. Y.) 369; Andrew v. Andrew, 62 Vt. 495, 20 Atl. 817.

[8]Wright v. Wright, 74 Wis. 439, 43 N. W. 145.

[9]Gerard v. Gerard, 2 Barb. Ch. (N. Y.) 73.

[10]Sanchez v. Sanchez, 21 Fla. 346.

[11]Barclay v. Barclay, 184 Ill. 471, 56 N. E. 821; Otillio v. Otillio, 119 La. 965, 44 So. 799; Ervay v. Ervay, 120 Mich. 525, 79 N. W. 802; Edison v. Edison, 56 Mich. 185, 22 N. W. 264; Brown v. Brown, 22 Mich. 299; Park v. Park, 80 N. Y. 156; Matzke v. Matzke, 185 App. Div. 533, 173 N. Y. S. 244; Compton v. Compton, 125 App. Div. 859, 110 N. Y. S. 775; Woolworth v. Woolworth, 115 App. Div. 405, 100 N. Y. S. 865; Sandford v. Sandford, 40 Hun (N. Y.) 540; Noland v. Noland, 29 Hun (N. Y.) 630; Larson v. Larson, 9 S. Dak. 1, 67 N. W. 842; Luther v. Luther, 25 Pa. Co. Ct. 16.

[12]Conklin v. Conklin, 113 App. Div. 743, 99 N. Y. S. 310; Kalmanowitz v. Kalmanowitz, 108 App. Div. 296, 95 N. Y. S. 627.

[13]Ex parte Cottrell, 59 Cal. 417.

[14]Shaffner v. Shaffner, 212 Ill. 492, 72 N. E. 447.

[15]Potts v. Potts, 68 Mich. 492, 36 N. W. 240.

[16]Shaffner v. Shaffner, 212 Ill. 492, 72 N. E. 447.

A complete case of contempt is not made unless there has been a refusal to pay the alimony,[17] and it must appear that such refusal amounted to contemptuous disobedience.[18] There must be a willful contempt of the authority of the court.[19] Questioning the legal effect of an order to pay alimony is held a willful disobedience of the order.[20]

§ 795. **Defenses to contempt proceedings.**—Defenses which might have been set up in divorce proceedings can not be set up in contempt, they being regarded as waived.[21] The fact that a motion to set aside is pending is no defense,[22] and neither is the fact that money due him was attached in the divorce proceeding.[23] Total inability to pay is a good defense,[24] even where his inability results from his refusal to work.[25]

A court can not compel a man to seek employment in order

[17]In re McCarty, 154 Cal. 534, 98 Pac. 540.

[18]Slade v. Slade, 106 Mass. 499.

[19]Blake v. People, 80 Ill. 11; Steller v. Steller, 25 Mich. 159.

[20]Longhi v. Longhi, 202 Ill. App. 8.

[21]Wilkins v. Wilkins, 146 Ga. 382, 91 S. E. 415; Lake v. Houghton Circuit Judge, 172 Mich. 660, 138 N. W. 249.

[22]Knauer v. Knauer, 121 App. Div. 748, 106 N. Y. S. 491.

[23]Wright v. Wright, 93 Conn. 296, 105 Atl. 684.

[24]Lane v. Lane, 27 App. D. C. 171; East v. East, 148 Ark. 143, 229 S. W. 5; In re Cowden, 139 Cal. 244, 73 Pac. 156; Davis v. Davis, 138 Ga. 8, 74 S. E. 830; VanDyke v. VanDyke, 125 Ga. 491, 54 S. E. 537; Wester v. Martin, 115 Ga. 776, 42 S. E. 81; Kadlowsky v. Kadlowsky, 63 Ill. App. 292; Schuele v. Schuele, 57 Ill. App. 189; McSherry v. McSherry, 49 Ill. App. 90; Kahlbon v. People, 101 Ill. App. 567; Perry v. Pernet, 165 Ind. 67, 74 N. E. 609, 6 Ann. Cas. 533; Lockridge v. Lockridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52; Kemp v. Kemp, 146 La. 361, 83 So. 652; Pettibone v. Pettibone, 141 App. Div. 861, 126 N. Y. S. 676, (where plaintiff compelled defendant to sacrifice his property); Pain v. Pain, 80 N. Car. 322; Pancost v. State, 15 Ohio Cir. Ct. 246, 8 Ohio Cir. Dec. 546; Snook v. Snook, 110 Wash. 310, 188 Pac. 502, 9 A. L. R. 262; Ormsby v. Ormsby, 1 Phila. (Pa.) 578; Crombie v. Crombie, 88 Wash. 520, 153 Pac. 306; Holcomb v. Holcomb, 53 Wash. 611, 102 Pac. 653. Inability is not a defense where the husband deliberately put it out of his power to pay by mortgaging his property. State v. District Court, 58 Mont. 355, 192 Pac. 829. Where the defendant has no property but makes no honest effort to earn money this is no defense to an award of alimony. Fowler v. Fowler, 61 Okla. 280, 161 Pac. 227, L. R. A. 1917C, 89. See notes, 24 L. R. A. 436; 30 L. R. A. (N. S.) 1002.

[25]Webb v. Webb, 140 Ala. 262, 37 So. 96, 103 Am. St. 30; Ex parte Todd, 119 Cal. 57, 50 Pac. 1071 (court can not compel man to work to pay alimony).

to pay alimony.[26] Some courts, however, hold that the husband may be punished for contempt where he makes no honest effort, considering his physical and mental capabilities, to work and earn money to pay the alimony.[27] The burden is upon him to show his inability to pay,[28] and he must be allowed an opportunity to make such showing.[29]

It has been held that the husband can not set up his inability to pay unless he further shows he has made application to modify the order or decree for alimony,[30] and has diligently followed up this application.[31] It is not a defense that the wife is able to support herself,[32] or has been guilty of adultery since the final decree and alimony,[33] or having the ability to pay at the time of the order he has since become bankrupt,[34] or he has become unable to comply with the order because of his re-marriage.[35]

The invalidity of the order for alimony is a good defense.[36]

[26]Ex parte Todd, 119 Cal. 57, 50 Pac. 1071; Lester v. Lester, 63 Ga. 356; Lansing v. Lansing, 41 How. Pr. (N. Y.) 248; Messervy v. Messervy, 85 S. Car. 189, 67 S. E. 130, 30 L. R. A. (N. S.) 1001, 137 Am. St. 873.

[27]Deen v. Bloomer, 191 Ill. 416, 61 N. E. 131; Barclay v. Barclay, 184 Ill. 471, 56 N. E. 821; Lansing v. Lansing, 41 How. Pr. (N. Y.) 248; Hoffman v. Hoffman, 28 Ohio Cir. Ct. 658; Fowler v. Fowler, 61 Okla. 280, 161 Pac. 227, Ann. Cas. 1917C, 89.

[28]Shaffner v. Shaffner, 212 Ill. 492, 72 N. E. 447; Deen v. Bloomer, 191 Ill. 416, 61 N. E. 131; O'Callaghan v. O'Callaghan, 69 Ill. 552; Zippe v. Zippe, 143 Ill. App. 638; Lockbridge v. Lockbridge, 3 Dana (Ky.) 28, 28 Am. Dec. 52; Hurd v. Hurd, 63 Minn. 443, 65 N. W. 728; Ex parte Canavan, 17 N. Mex. 100, 130 Pac. 248; Holtham v. Holtham, 6 Misc. 266, 26 N. Y. S. 762; State v. Cook, 66 Ohio St. 566, 64 N. E. 567, 58 L. R. A. 625; Ormsby v. Ormsby, 1 Phila. (Pa.) 578; State v. Smith, 17 Wash. 430, 50 Pac. 52.

[29]Ex parte Gerzeback (Cal. App.), 208 Pac. 318; Steller v. Steller, 25 Mich. 159; Tinker v. Crooks, 22 Hun (N. Y.) 579; Andrew v. Andrew, 62 Vt. 495, 20 Atl. 817.

[30]Nixon v. Nixon, 15 Mont. 6, 37 Pac. 839; State v. Second District Judicial Court (Mont.), 40 Pac. 66; Chazin v. Chazin, 112 N. Y. S. 525; Compton v. Compton, 125 App. Div. 859, 110 N. Y. S. 775; Young v. Young, 35 Misc. 335, 71 N. Y. S. 944; Delanay v. Delanay, 19 App. Div. 295, 46 N. Y. S. 106; Mowry v. Bliss, 28 R. I. 114, 65 Atl. 616.

[31]O'Callaghan v. O'Callaghan, 69 Ill. 552.

[32]Nipper v. Nipper, 133 Ga. 216, 65 S. E. 405.

[33]Wilkins v. Wilkins, 146 Ga. 382, 91 S. E. 415.

[34]Ex parte Wilson, 73 Cal. 97, 14 Pac. 393.

[35]Ryer v. Ryer, 67 How. Pr. (N. Y.) 369.

[36]Holter v. Holter, 108 Wash. 519, 185 Pac. 598. It is not a defense that the order is not supported by sufficient evidence. State v. District Court, 58 Mont. 355, 192 Pac. 829.

Contempt is not purged by the act of the husband by attaching the alimony in his hands in his action against the divorced wife.[37]

Ignorance of the facts may be a good defense when there is no bad faith,[38] but ignorance of law is no defense.[39]

A dismissal of the divorce suit supersedes arrears on alimony pendente lite.[40]

§ 796. **Issuance of execution.**—The order or decree for the payment of alimony may provide for its enforcement by execution,[41] when authorized by statute,[42] and where the decree so provides there may be no proceedings as for contempt.[43] Where, however, the decree improperly authorizes an execution the right to proceed by way of contempt for non-compliance with the order still exists.[44]

The execution is proper where the alimony decree is held to be a judgment for a debt.[45] Successive executions may issue to

[37]Wright v. Wright, 93 Conn. 296, 105 Atl. 684.

[38]Ex parte Hall, 125 Ark. 309, 188 S. W. 827 (where defendant in good faith believed he had overpaid); Dixon v. Dixon, 76 N. J. Eq. 364, 74 Atl. 995 (invalid order of foreign court).

[39]Adams v. Adams, 179 App. Div. 152, 166 N. Y. S. 167.

[40]Lubow v. Lubow, 195 N. Y. S. 31; Fauls v. Fauls, 153 App. Div. 367, 138 N. Y. S. 459; Dietz v. Dietz, 136 N. Y. S. 341; Hayes v. Hayes, 74 Misc. 533, 134 N. Y. S. 482, 150 App. Div. 842, 135 N. Y. S. 225.

[41]Homestead not exempt: Ford v. Ford, 201 Ala. 519, 78 So. 873; Marsh v. Marsh, 162 Ind. 210, 70 N. E. 154; Menzie v. Anderson, 65 Ind. 239; Wetmore v. Wetmore, 149 N. Y. 520, 44 N. E. 169, 33 L. R. A. 708, 52 Am. St. 752; Wood v. Wood, 61 N. Car. 538; Peeke v. Fitzpatrick, 74 Ohio St. 396, 78 N. E. 519, 6 Ann. Cas. 824. Homestead exempt: Nunn v. Page, 134 Ky. 698, 121 S. W. 442, 135 Am. St. 429; Ex parte Silvia, 123 Cal. 293, 55 Pac. 988, 69 Am. St. 58. See notes, 55 Am. St. 89; 102 Am. St. 704, 707.

[42]Casteel v. Casteel, 38 Ark. 477; VanCleave v. Bucher, 79 Cal. 600, 21 Pac. 954; Nunn v. Page, 134 Ky. 698, 121 S. W. 442, 135 Am. St. 429; Evans v. Stewart, 18 Ky. L. 941, 38 S. W. 697; McCurley v. McCurley, 60 Md. 185, 45 Am. Rep. 717; Graly v. Graly, 31 How. Pr. 475. State v. Rombauer, 99 Mo. 216, 12 S. W. 661; Waters v. Waters, 49 Mo. 385; Kapp v. Seventh Judicial District, 32 Nev. 264, 107 Pac. 95, Ann. Cas. 1912D, 177; Halsted v. Halsted, 21 App. Div. 466, 47 N. Y. S. 649; Ostrom v. Ostrom, 38 Misc. 232, 77 N. Y. S. 594; Wood v. Wood, 61 N. Car. 538; Groves' Appeal, 68 Pa. 143.

[43]Haines v. Haines, 35 Mich. 138; Miller v. Miller, 7 Hun (N. Y.) 208; Gane v. Gane, 45 N. Y. Super. Ct. 355.

[44]Mercer v. Mercer, 73 Hun 192, 25 N. Y. S. 867, 56 N. Y. St. 117.

[45]Ex parte Eubank, 206 Ala. 8, 89 So. 656; Bassett v. Waters, 103 Kans. 853, 176 Pac. 663; Remmers v. Wolf's Estate, 206 Mo. App. 159, 226 S. W. 290; Levine v. Levine, 95

secure alimony until the property attached is exhausted, and the attachment will hold good until that time. The levy of execution for alimony will confer a valid title against the grantee of the husband after attachment.[46]

§ 797. **Attachment of husband's property.**—Upon a libel by a wife for a divorce for a cause accruing after the marriage, an attachment to secure a suitable support and maintenance to her, and to such children as may be committed to her care and custody, may be made upon the husband's real and personal estate by the officer serving the libel.[47]

When the libel is filed in vacation in the office of the clerk of the court, such attachment may be made upon the summons issued thereon, in the same manner as attachments are made upon writs in actions at common law. When the libel is in the first instance presented to the court, the attachment may be made in like manner upon the order of notice issued thereon. The amount for which the attachment is to be made should be expressed in the summons or order of notice. The attachment may be made by trustee process, in which case there should be inserted in the summons or order of notice a direction to attach the goods, effects, and credits of the libellee in the hands of the alleged trustee, and service should be made upon the trustee by copy. The court may in such cases make all necessary orders to secure to the trustee his costs.[48]

The attachment of the husband's property, extends to all, whether alimony or other allowance, which the wife may recover, pending the suit, or upon final decree;[49] but it has been held that a decree for alimony can not be dated back so as to take effect from the date of an attachment to the exclusion of intervening creditors.[50]

§ 798. **Decree of alimony as lien.**—In the absence of statute, a decree of alimony does not create a lien upon the husband's

Ore. 94, 187 Pac. 609. But see Averett v. Averett, 112 Misc. 487, 183 N. Y. S. 48. Alimony is not a debt enforcible by execution. Beeler v. Beeler (Tex. Civ. App.), 218 S. W. 553.

[46]Place v. Washburn, 163 Mass. 530, 40 N. E. 853; Downs v. Flanders, 150 Mass. 92, 22 N. E. 585.

[47]Goss v. Goss, 29 Ga. 109; Burrows v. Purple, 107 Mass. 428; Groves' Appeal, 68 Pa. 143.

[48]See Form, § 1022, p. 818.

[49]Burrows v. Purple, 107 Mass. 428.

[50]Daniels v. Lindley, 44 Iowa 567.

real estate, unless the decree is fastened upon a certain piece of property.[51] It is a personal charge on the defendant and not on his estate.[52] But the court may declare the decree to be a lien upon certain real or personal estate of the defendant,[53] and where this is done an attachment for contempt may not be made for failure to pay counsel fees.[54]

As a general rule temporary alimony should not be declared a lien on the husband's land as it embarrasses alienation.[55]

§ 799. **Husband out of jurisdiction—Extradition.**—Where a husband is out of the jurisdiction of the court contempt can not lie,[56] and neither is he extraditable if he left the jurisdiction before the award became due.[57]

§ 800. **Oath for poor debtors.**—A husband may be lawfully arrested on an execution issued upon a decree for alimony; and, upon his application to take the oath for the relief of poor debtors, charges of fraud may be filed against him by his wife.[58]

§ 801. **Wife as creditor after decree for alimony.**—A wife who has had alimony decreed to her becomes a creditor of the hus-

[51]Warren v. Warren, 92 N. J. Eq. 334, 112 Atl. 729; Gust v. Gust, 78 Wash. 414, 139 Pac. 228. A decree for alimony creates a lien by statute in Pennsylvania. Lynn v. Lynn, 76 Pa. Super. Ct. 444. But it is not a lien under Utah statutes unless recorded. Lindquist v. Clayton, 54 Utah 79, 179 Pac. 655.

[52]Casteel v. Casteel, 38 Ark. 477; Olin v. Hungerford, 10 Ohio 268; Fisher v. Fisher, 19 R. I. 53, 31 Atl. 579; In re Lawton, 12 R. I. 210; Campbell v. Campbell, 37 Wis. 206.

[53]Coffey v. Cross, 185 Ala. 86, 64 So. 95; Austin v. Austin, 143 Ark. 222, 220 S. W. 46; Bobowski v. Bobowski, 242 Ill. 524, 90 N. E. 361; Gridley v. Wood, 215 Ill. App. 473; Thomas v. Thomas, 44 Ill. App. 604; Blankenship v. Blankenship, 19 Kans. 159; Stratton v. Stratton, 77 Maine 373, 52 Am. Rep. 779; Mahoney v. Mahoney, 59 Minn. 347, 61 N. W. 334; Stoy v. Stoy, 41 N. J. Eq. 370, 2 Atl. 638, 7 Atl. 625; Galusha v. Galusha, 108 N. Y. 114, 15 N. E. 63; Tolerton v. Williard, 30 Ohio St. 579; Gardenhire v. Gardenhire, 2 Okla. 484, 37 Pac. 813; Moore v. Moore, 42 Utah 140, 129 Pac. 344; Smith v. Smith, 81 W. Va. 761, 95 S. E. 199, 8 A. L. R. 1149. See also Meyer v. Meyer, 184 Cal. 687, 195 Pac. 387. And see notes, 9 Ann. Cas. 90; 18 Ann. Cas. 565; 102 Am. St. 703, 708; 9 Ann. Cas. 91.

[54]Andrews v. Andrews, 69 Ill. 609. But see O'Callaghan v. O'Callaghan, 69 Ill. 552.

[55]Casteel v. Casteel, 38 Ark. 477; Houston v. Timmerman, 17 Ore. 499, 21 Pac. 1037, 4 L. R. A. 716, 11 Am. St. 848. See also Whitmore v. Brown, 147 Ark. 147, 227 S. W. 34.

[56]Wulff v. Wulff, 151 App. Div. 22, 135 N. Y. S. 289, affirming order 74 Misc. 213, 133 N. Y. S. 807.

[57]Ex parte Kuhns, 36 Nev. 487, 137 Pac. 83, 50 L. R. A. (N. S.) 507.

[58]Foster v. Foster, 130 Mass. 189.

band. The decree for alimony creates a debt of record in her favor.[59] And a discharge in bankruptcy or insolvency does not discharge the husband from the obligation, as alimony is not a debt founded on a contract within the meaning of the bankruptcy or insolvency statutes.[60]

§ 802. **Appointment of trustee of wife's property.**—When personal estate, or money in lieu thereof, is awarded to the wife, the court may, in its discretion, order such estate or money to be delivered or paid to a trustee appointed by the court, upon trust to invest the same and apply the income thereof, in such manner as the court may direct, to the support and maintenance of the wife and of the minor children of the marriage or any of them, and also to pay over the principal sum to the wife and children in such proportions and at such times as may be ordered by the final decree of the court. The trustee should give such bond for the faithful performance of his trust as the court may require.[61]

[59]Chase v. Chase, 105 Mass. 385; Allen v. Allen, 100 Mass. 373; Morrison v. Morrison, 49 N. H. 60.

[60]Noyes v. Hubbard, 64 Vt. 302, 23 Atl. 727, 15 L. R. A. 394, 33 Am. St. 928.

[61]Slowikowski v. Slowikowski, 172 Wis. 460, 179 N. W. 510. Burrows v. Purple, 107 Mass. 428 (husband restrained from disposing of proceeds of community property). Van Ness v. Van Ness (Tex.), 218 S. W. 1076.

CHAPTER 49

SYNOPSIS OF THE MARRIAGE STATUTES OF THE STATES AND TERRITORIES

Section
805. Alabama.
806. Alaska.
807. Arizona.
808. Arkansas.
809. California.
810. Colorado.
811. Connecticut.
812. Delaware.
813. District of Columbia.
814. Florida.
815. Georgia.
816. Hawaii.
817. Idaho.
818. Illinois.
819. Indian Territory.
820. Indiana.
821. Iowa.
822. Kansas.
823. Kentucky.
824. Louisiana.
825. Maine.
826. Maryland.
827. Massachusetts.
828. Michigan.
829. Minnesota.
830. Mississippi.
831. Missouri.
832. Montana.
833. Nebraska.
834. Nevada.
835. New Hampshire.
836. New Jersey.
837. New Mexico.

Section

838. New York.
839. North Carolina.
840. North Dakota.
841. Ohio.
842. Oklahoma.
843. Oregon.
844. Panama.
845. Pennsylvania.
846. Philippine Islands.
847. Porto Rico.
848. Rhode Island.
849. South Carolina.
850. South Dakota.
851. Tennessee.
852. Texas.
853. Utah.
854. Vermont.
855. Virginia.
856. Washington.
857. West Virginia.
858. Wisconsin.
859. Wyoming.

§ 805. Alabama.

Common-law marriages.

Common-law marriages are recognized.[1]

Marriages prohibited.

The son must not marry his mother or stepmother, or the sister of his father or mother, or the widow of his uncle. The brother must not marry his sister or half-sister, or the daughter of his brother or half-brother, or of his sister or half-sister. The father must not marry his daughter or grand-daughter, or the widow of his son. No man shall marry the daughter of his wife or the daughter of the son or daughter of his wife; and all such marriages are incestuous.[2]

These provisions apply to illegitimate as well as to legitimate children and other relations.[3]

[1]Tartt v. Negus, 127 Ala. 301, 28 So. 713; Williams v. State, 54 Ala. 131, 25 Am. Rep. 665.

[2]Civil Code 1907, § 4877.

[3]Civil Code 1907, § 4878.

Voidable marriages.

Incestuous marriages are voidable.[4] Divorce is provided for by statute in case of physical incapacity and pregnancy before marriage.[5]

Criminal marriages.

Marriage of a female compelled by menace, fraud, or duress,[6] bigamous marriages,[7] incestuous marriages,[8] and marriages between negroes to third degree and whites are criminal.[9]

The male must submit to an antenuptial examination, and obtain a physician's certificate of freedom from disease.[10]

Marriage age limit.

The marriage age limit for males, is seventeen years and for females fourteen years.[11]

§ 806. **Alaska.**

Common-law marriages.

Common-law marriages are recognized.[12]

Marriages prohibited.

These marriages are prohibited: When either party has husband or wife living at time of marriage; and where the parties are related to each other within and not including the fourth degree of consanguinity, whether of the whole or half blood, computed according to the rules of the civil law.[13]

Voidable marriages.

Want of legal age or sufficient understanding, or where consent of either party is obtained by force or fraud.[14]

Marriage age limit.

The marriage age limit for males is twenty-one years and for females eighteen years.[15]

[4]Ante, and Crim. Code 1907, §§ 7127, 7128.

[5]Civil Code 1907, §§ 3793, 3794.

[6]Crim. Code 1907, §§ 6210, 6211.

[7]Crim. Code 1907, § 6389.

[8]Crim. Code 1907, §§ 7128, 7129.

[9]Crim. Code 1907, § 7421.

[10]Acts 1919, p. 169, No. 178.

[11]Civil Code 1907, § 4879. Such marriages are voidable only. Biggs v. State, 55 Ala. 108.

[12]McDaniels v. McDaniels, 5 Alaska 107.

[13]Compiled Laws 1913, § 432.

[14]Compiled Laws 1913, § 433; Sturgis v. Sturgis, 51 Ore. 10, 93 Pac. 696, 15 L. R. A. (N. S.) 1034, 131 Am. St. 724.

[15]Compiled Laws 1913, § 431.

§ 807. **Arizona.**

Common-law marriages.

Common-law marriages are not recognized. Marriage without license and solemnization is invalid.[16]

Marriages prohibited.

Marriages between lineal ascendants and descendants, brothers and sisters, of the half as well as of the whole blood, uncles and nieces, aunts and nephews, first cousins,[17] and marriages between whites and negroes, Indians, or Mongolians are prohibited.[18]

Void marriages.

Those marriages which are prohibited are void.[19]

Voidable marriages.

Divorces are granted for physical incapacity at time of marriage.[20]

Criminal marriages.

Bigamous marriages,[21] marriages within prohibited degrees,[22] and marriage of female entered into by false personation are criminal.[23]

Marriage age limit.

The marriage age limit for males is eighteen years and for females sixteen years.[24] Parental consent required in writing for males under twenty-one and females under eighteen.[25]

§ 808. **Arkansas.**

Common-law marriages.

Such marriages have been declared invalid by the courts,[26] but if such marriage is entered into in a state which recognizes its validity, it will be recognized as valid in Arkansas.[27]

[16]Rev. Stat. 1913, Civil Code, § 3844.

[17]Rev. Stat. 1913, Civil Code, § 3838.

[18]Rev. Stat. 1913, Civil Code, § 3837.

[19]Rev. Stat. 1913, Civil Code, §§ 3837, 3838.

[20]Rev. Stat. 1913, Civil Code, § 3859.

[21]Penal Code 1913, §§ 275, 277, 278.

[22]Penal Code 1913, § 279. See Am. Bar Assn. Proceedings, 1919, vol. 44, p. 301.

[23]Penal Code 1913, § 520.

[24]Rev. Stat. 1913, Civil Code, § 3832, as amended by Act. 1919, Sess. Laws 1919, ch. 18.

[25]Rev. Stat. 1913, Civil Code, § 3835.

[26]Furth v. Furth, 97 Ark. 272, 133 S. W. 1037, Ann. Cas. 1912D, 505.

[27]Evatt v. Miller, 114 Ark. 84, 169 S. W. 817; Estes v. Merrill, 121 Ark. 361, 181 S. W. 136.

Marriages prohibited.

Marriages between lineal ascendants and descendants, brothers and sisters, of the half as well as the whole blood, uncles and nieces, aunts and nephews, first cousins (these provisions extending to illegitimate relations),[28] and whites and negroes or mulattoes are prohibited.[29]

Void marriages.

Marriages under the age of consent,[30] incestuous marriages,[31] marriages of whites with negroes or mulattoes are void.[32]

Voidable marriages.

Where a marriage was obtained by fraud or force, and where either party was under the age of consent, physical incapacity or insanity before marriage, such marriage is voidable.[33]

Criminal marriages.

Bigamous marriages,[34] and incestuous marriages are criminal.[35]

Marriage age limit.

The marriage age limit for males is seventeen years and for females fourteen years,[36] and marriages below such ages are void.[37]

Parental consent is required for males under twenty-one and females under eighteen.[38]

§ 809. California.

Common-law marriages.

Common-law marriages are not recognized.[39]

Marriages prohibited.

Marriages between whites and negroes, Mongolians or mulattoes, parents and children, ancestors and descendants of every degree, brothers and sisters of the half as well as of the whole blood, uncles and aunts with nieces and nephews, whether legitimate or not are prohibited.[40]

[28]Craw. & Moses Dig. 1921, § 7038.

[29]Craw. & Moses Dig. 1921, §§ 7039, 7040.

[30]Craw. & Moses Dig. 1921, § 7041.

[31]Craw. & Moses Dig. 1921, § 7038. Misdemeanor to solemnize an incestuous marriage. Craw. & Moses Dig. 1921, § 7045.

[32]Craw. & Moses Dig. 1921, § 7039.

[33]Craw. & Moses Dig. 1921, § 7041.

[34]Craw. & Moses Dig. 1921, §§ 2606-9.

[35]Craw. & Moses Dig. 1921, § 7045.

[36]Craw. & Moses Dig. 1921, § 7037.

[37]Craw. & Moses Dig. 1921, § 7037.

[38]Craw. & Moses Dig. 1921, § 7062.

[39]Deering's Civil Code, 1915, § 55.

[40]Deering's Civil Code, 1915, § 60

Void Marriages.

Marriages of white persons with negroes, Mongolians or mulattoes,[41] and incestuous marriages are void.[42]

Voidable marriages.

Where marriage was obtained by fraud or force, where either party was under the age of consent, physical incapacity or insanity before marriage, it is voidable, as also are bigamous marriages.[43]

Criminal marriages.

Bigamous marriages,[44] incestuous marriages,[45] and marriages under false impersonation are criminal.[46]

Marriage age limit.

The marriage age limit for males is twenty-one years and for females eighteen years.[47] But a marriage may be contracted between a male eighteen years of age and a female sixteen years of age upon written consent of parent or guardian.[48]

§ 810. Colorado.

Common-law marriages.

Common-law marriages are recognized.[49]

Marriages prohibited.

All marriages between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as of the whole blood, uncles and aunts with nieces and nephews, and between first cousins, whether legitimate or not; between whites and negroes or mulattoes;[50] and marriages within one year after divorce are prohibited.[51]

Void marriages.

Incestuous marriages and marriages of white persons with negroes or mulattoes are void.[52]

Voidable marriages.

Where either party was insane at time of marriage such marriage is voidable.[53]

[41]Deering's Civil Code, 1915, §§ 60, 69.

[42]Deering's Civil Code, 1915, § 59.

[43]Deering's Civil Code, 1915, § 82.

[44]Deering's Penal Code, 1915, §§ 281, 283.

[45]Deering's Penal Code, 1915, § 285.

[46]Deering's Penal Code, 1915, § 528.

[47]Deering's Civil Code, 1915, § 56, as amended by Laws 1921, Ch. 233.

[48]Laws 1921, Ch. 233.

[49]Israel v. Arthur, 18 Colo. 158, 32 Pac. 68.

[50]Courtwright's Stat. 1914, § 4163.

[51]Courtwright's Stat. 1914, § 2122.

[52]Courtwright's Stat. 1914, § 4163.

[53]Courtwright's Stat. 1914, § 4126.

Where either party is under physical incapacity, and in case of bigamous marriages divorces are granted.[54]

Criminal marriages.

Bigamous marriages,[55] and incestuous marriages are criminal.[56]

Marriage age limit.

The marriage age limit for males is twenty-one years and for females eighteen years. The solemnization of a marriage of a person under these ages is criminal, unless with the consent of parents, if they are in the state.[57]

§ 811. Connecticut.

Common-law marriages.

Common-law marriages are apparently not recognized, but there is no decision directly in point.[58]

Marriages prohibited.

No man shall marry his mother, grandmother, daughter, granddaughter, sister, aunt, niece, stepmother, or stepdaughter; no woman shall marry her father, grandfather, son, grandson, brother, uncle, nephew, stepfather, or stepson.[59]

Void marriages.

Incestuous marriages,[60] and marriages performed by unauthorized persons are void.[61]

Voidable marriages.

Where the marriage is a fraudulent "contract" it is voidable.[62]

Criminal marriages.

Marriages of epileptics and imbeciles when woman is under forty-five,[63] prohibited marriages,[64] and bigamous marriages are criminal.[65]

Marriage age limit.

The marriage age limit for males is twenty-one years and for females twenty-one years. No license shall be issued if either

[54]Courtwright's Stat. 1914, § 2112.

[55]Courtwright's Stat. 1914, § 1766.

[56]Courtwright's Stat. 1914, § 4163.

[57]Courtwright's Stat. 1914, § 4172.

[58]See Gen. Stat. 1918, § 5263, and amendment to this section by Public Acts 1921, ch. 259; Hall & Brooke, American Marriage Laws (1919), p. 59.

[59]Gen Stat. 1918, § 5262. See also Stapleberg v. Stapleberg, 77 Conn. 31, 58 Atl. 233 (construing New York law).

[60]Gen. Stat. 1918, § 5262.

[61]Gen. Stat. 1918, § 5267.

[62]Gen. Stat. 1918, § 5280 and note.

[63]Gen. Stat. 1918, § § 6428-9. See Benton v. Benton, 1 Day 111.

[64]Gen. Stat. 1918, § § 5262, 6381.

[65]Gen. Stat. 1918, § 6377.

party is a "minor" until a parent or person in control has assented.[66] There is no statutory provision establishing an absolute minimum age, but if either party applying for license is under sixteen it is necessary to have the consent of a selectman of the town endorsed upon the license.[67]

§ 812. Delaware.

Common-law marriages.

Common-law marriages are valid.[68]

Marriages prohibited.

Marriages between ascendants and descendants, their wives or husbands, step ascendants and descendants, brothers and sisters, uncles and nieces, aunts and nephews,[69] whites with negroes or mulattoes,[70] or between paupers[71] are prohibited. Marriages of epileptics, of persons of unsound mind, or persons suffering with a venereal or other communicable disease, or marriage by a drunkard or a narcotic drug addict,[72] or marriage of divorced persons unless certain requirements are met are prohibited.[73]

Void marriages.

Incestuous marriages,[74] marriages between a white and a negro or mulatto,[75] and marriages solemnized by an unauthorized person unless consummated with full belief by either of the parties in its validity are void.[76]

Voidable marriages.

Marriage of a person of unsound mind or of an epileptic or of one afflicted with a venereal or other communicable disease, or of a drunkard or narcotic drug addict is voidable at the instance of the innocent party.[77]

Bigamous and incestuous marriages, marriages compelled through force, fraud, or coercion, or marriages where impotency exists are voidable by decree of court.[78]

Criminal marriages.

Bigamous marriages[79] and incestuous marriages[80] are criminal.

[66]Gen. Stat. 1918, § 5263.

[67]Gen. Stat. 1918, § 5263 and amendment by Public Acts 1921, Ch. 259.

[68]Laws 1921, Ch. 182, § 3000.

[69]Laws 1921, Ch. 182, § 2992.

[70]Laws 1921, Ch. 182, § 2992.

[71]Laws 1921, Ch. 182, § 2992.

[72]Laws 1921, Ch. 182, § 2992.

[73]Laws 1921, Ch. 182, § 2992.

[74]Laws 1921, Ch. 182, § 2992.

[75]Laws 1921, Ch. 182, § 2992.

[76]Laws 1921, Ch. 182, § 2993.

[77]Laws 1921, Ch. 182, § 2992.

[78]Rev. Code 1915, § 3004.

[79]Rev. Code 1915, § 4785.

[80]Rev. Code 1915, § 4788.

Marriage age limit.

The marriage age limit for males is eighteen years and for females sixteen years, unless with consent of parent or guardian,[81] or marriage is confirmed after reaching that age.[82]

§ 813. District of Columbia.

Common-law marriages.

Common-law marriages are probably valid. They have not been declared invalid by statute.[83]

Marriages prohibited.

Marriages between ascendants and descendants by consanguinity and affinity, brothers and sisters, step-parents and step-children, and bigamous marriages are prohibited.[84]

Void marriages.

Incestuous and bigamous marriages are void.[85]

Voidable marriages.

Marriages where consent has been obtained by force or fraud, where a party is physically incapable, marriage of an idiot or lunatic,[86] and marriages under age of consent[87] are voidable.

Criminal marriages.

Bigamous marriages,[88] and incestuous marriages[89] are criminal.

Marriage age limit.

The marriage age limit for males is twenty-one years and for females eighteen years.[90] Under these ages licenses to marry are not to be issued without the consent of a parent or guardian.[91] Marriageable age for males is sixteen and for females fourteen. Marriages below these ages are void from the time their nullity is declared by court.[92]

§ 814. Florida.

Common-law marriages.

Common-law marriages are recognized.[93]

[81]Parental consent is required for males under twenty-one and females under eighteen. The consent must be certified under seal, in the presence of two reputable witnesses. Laws 1921, Ch. 182, § 2998.

[82]Laws 1921, Ch. 182, § 2998.

[83]Travers v. Reinhardt, 25 App. D. C. 567; Meister v. Moore, 96 U. S. 76, 24 L. ed. 826.

[84]Code 1919, § 1283.

[85]Code 1919, § 1283.

[86]Code 1919, § 1285.

[87]Code 1919, § 1285.

[88]Code 1919, § 870.

[89]Code 1919, § 875.

[90]Code 1919, § 1285. These are the ages for parental consent.

[91]Code 1919, § 1292.

[92]Code 1919, § 1285.

[93]Caras v. Hendrix, 62 Fla. 446, 57 So. 345.

Marriages prohibited.

Marriages between ascendants and descendants, brothers and sisters, uncles and neices, aunts and nephews are prohibited.[94]

Void marriages.

Marriages of whites with negroes,[95] or marriages while former spouse is living[96] are void.

Voidable marriages.

Divorces are granted in cases of marriages within the prohibited degrees, in cases of impotency and of permanent insanity.[97]

Criminal marriages.

Bigamous marriages,[98] incestuous marriages,[99] and marriages between whites and a person of one-eighth or more negro blood[1] are criminal.

Marriage age limit.

The marriage age limit for males is twenty-one years and for females twenty-one years. These are the ages below which the consent of the parent or person in control is required.[2] Otherwise common-law ages control, fourteen for males and twelve for females.[3]

§ 815. **Georgia.**

Common-law marriages.

Common-law marriages are recognized.[4]

Marriages prohibited.

The statute provides against certain marriages.[5] The marriage of a man with his stepmother, mother-in-law, daughter-in-law, stepdaughter, or granddaughter of his wife, and of a woman with her corresponding relatives;[6] marriages between whites and blacks[7] are prohibited.

[94]Rev. Gen. Stat. 1920, § 5415.
[95]Rev. Gen. Stat. 1920, § 3938.
[96]Rev. Gen. Stat. 1920, § 5416.
[97]Rev. Gen. Stat. 1920, § 3191.
[98]Rev. Gen. Stat. 1920, § 5416.
[99]Rev. Gen. Stat. 1920, § 5414.
[1]Rev. Gen. Stat. 1920, § § 3938, 5419.
[2]Rev. Gen. Stat. 1920, § 3934.
[3]Green v. Green, 77 Fla. 101, 80 So. 739.
[4]Drawdy v. Hesters, 130 Ga. 168, 60 S. E. 451; Smith v. Smith, 84 Ga. 440, 11 S. E. 496, 8 L. R. A. 362; Clark v. Cassidy, 64 Ga. 662.
[5]Park's Civil Code 1914, § 2932.
[6]Park's Civil Code 1914, § 2932.
[7]Park's Civil Code 1914, § 2941.

Void marriages.

Bigamous marriages,[8] incestuous marriages,[9] and marriages of whites with blacks[10] are void.

Voidable marriages.

Fraudulent marriages, marriages under age limit, and with physical or mental disability at time of marriage[11] are voidable.

Criminal marriages.

Bigamous marriages, except where other spouse has been absent five years,[12] and incestuous marriages[13] are criminal.

Marriage age limit.

The marriage age limit for males is seventeen years[14] and for females fourteen years.[15] Parental consent is required for marriage of females under eighteen.[16]

§ 816. Hawaii.

Marriages prohibited.

Marriages within the fourth degree of consanguinity[17] are prohibited.

Voidable marriages.

Prohibited marriages, marriages at time of which there is a physical or mental disability, and marriages under age of consent and bigamous marriages are voidable.[18]

Criminal marriages.

Marriages involving bigamy,[19] incest,[20] or abduction[21] are criminal.

Marriage age limit.

The marriage age limit for males is seventeen years and for females fourteen years.[22]

§ 817. Idaho.

Common-law marriages.

Common-law marriages are recognized.[23]

[8]Park's Civil Code, 1914, § 2931.
[9]Park's Civil Code, 1914, § 2931.
[10]Park's Civil Code, 1914, § 2941.
[11]Park's Civil Code, 1914, § 2931. See Park v. Barron, 20 Ga. 702, 65 Am. Dec. 641.
[12]Park's Penal Code 1914, § § 367, 368, 369.
[13]Park's Penal Code 1914, § 371.
[14]Park's Civil Code 1914, § 2931. Morgan v. Morgan, 148 Ga. 625, 97 S. E. 675, 4 A. L. R. 925.
[15]Park's Civil Code 1914, § 2931.
[16]Park's Civil Code 1914, § 2938.
[17]Rev. Laws 1915, § 2905.
[18]Rev. Laws 1915, § 2905.
[19]Rev. Laws 1915, § 4152.
[20]Rev. Laws 1915, § 4153.
[21]Rev. Laws 1915, § 3900.
[22]Rev. Laws 1915, § 2905.
[23]Comp. Stat. 1919, § 4591.

Marriages prohibited.

Marriages between ascendants and descendants, brothers and sisters of the half as well as the whole blood, uncles and nieces, aunts and nephews,[24] and first cousins are prohibited.

Void marriages.

Bigamous marriages,[25] incestuous marriages,[26] and marriages of whites with negroes, mulattoes, or Mongolians[27] are void.

Voidable marriages.

Marriages procured by fraud or force, marriages where either party was under the age limit, or under a physical disability or insanity at time of marriage, or where there had already been a former marriage which was still in force[28] are voidable.

Criminal marriages.

Marriages entered into by falsely impersonating another,[29] prohibited marriages,[30] and bigamous marriages[31] are criminal.

Marriage age limit.

The marriage age limit for males is eighteen years and for females eighteen years.[32] Marriages under eighteen without parental consent may be annulled at the suit of the parent at any time before such minor has reached the prescribed age or at the suit of the minor within four years after arriving at such age, unless the marriage has been recognized since.[33]

§ 818. Illinois.

Common-law marriages.

Common-law marriages are not recognized.[34]

Marriages prohibited.

Marriage between lineal ascendants and descendants, brothers and sisters of the half as well as the whole blood, uncles and nieces, aunts and nephews, and first cousins is prohibited. This section applies to illegitimate as well as legitimate relations.[35]

[24]Comp. Stat. 1919, § 4595, as amended by Laws 1921, ch. 115.

[25]Comp. Stat. 1919, § 4597.

[26]Comp. Stat. 1919, § 4595

[27]Comp. Stat. 1919, § 4596, as amended by Laws 1921, ch. 115.

[28]Comp. Stat. 1919, § 4620.

[29]Comp. Stat. 1919, § 8469.

[30]Comp. Stat. 1919, § 8286.

[31]Comp. Stat. 1919, § 8285.

[32]Comp. Stat. 1919, § 4592.

[33]Comp. Stat. 1919, §§ 4620-21.

[34]Hurd's Rev. Stat. 1921, ch. 89, § 4

[35]Hurd's Rev. Stat. 1921, ch. 89, § 1. See Arado v. Arado, 281 Ill. 123, 117 N. E. 816, 4 A. L. R. 28.

Void marriages.

Incestuous marriages[36] are void.

Voidable marriages.

Insanity or idiocy at time of marriage renders the marriage voidable.[37]

Criminal marriages.

Bigamous marriages,[38] and incestuous marriages[39] are criminal.

Marriage age limit.

The marriage age limit for males is eighteen years and for females sixteen years.[40] Parental consent is required for the marriage of males under twenty-one and females under eighteen.[41]

§ 819. **Indian Territory.**[42]

Prohibited marriages.

Marriage between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as the whole blood, between uncles and nieces, aunts and nephews, and first cousins are prohibited. The prohibition extends to illegitimate children and relations,[43] and to marriages where either party has former spouse living.[44]

Void marriages.

Incestuous marriages,[45] marriage between whites and negroes or mulattoes,[46] and marriages under the age of consent[47] are void.

Voidable marriages.

Where either party is under the age of consent, mentally or physically incapable or has consented on account of force or fraud the marriage is voidable.[48]

Criminal marriages.

Bigamous marriages, except when former spouse has been

[36]Hurd's Rev. Stat. 1921, ch. 89, § 1. See Williams v. McKeene, 193 Ill. App. 615.

[37]Hurd's Rev. Stat. 1921, ch. 89, § 2.

[38]Hurd's Rev. Stat. 1921, ch. 38, § 28.

[39]Hurd's Rev. Stat. 1921, ch. 38, §§ 156, 157.

[40]Hurd's Rev. Stat. 1921, ch. 89, § 3. See Matthes v. Matthes, 198 Ill. App. 515.

[41]Hurd's Rev. Stat. 1921, ch. 89, § 3.

[42]In 1907 Indian Territory and Oklahoma were admitted to the Union as the State of Oklahoma. 13th U. S. Census (1910), vol. 3, p. 434.

[43]Statutes 1899, § 2992.

[44]Statutes 1899, § 2995.

[45]Statutes 1899, § 2992.

[46]Statutes 1899, § 2993.

[47]Statutes 1899, § 2991.

[48]Statutes 1899, § 2994.

absent five years and is not known to be living[49] and incestuous marriages[50] are criminal.

Marriage age limit.

The marriage age limit for males is seventeen years and for females fourteen years.[51]

§ 820. **Indiana.**

Common-law marriages.

Common-law marriages are recognized.[52]

Marriages prohibited.

Marriage between those nearer of kin than second cousins,[53] and marriages between whites and persons of one-eighth negro blood[54] are prohibited.

Void marriages.

Incestuous marriages,[55] marriages out of state to evade provisions of statute,[56] marriages while former husband or wife living, between whites and blacks of one-eighth negro blood, marriages where one party is insane or idiotic[57] are void.

Voidable marriages.

Mental disability of either party at time of marriage, or either party below age limit renders marriage voidable.[58]

Criminal marriages.

Bigamous[59] and incestuous marriages[60] are criminal.

Marriage age limit.

The marriage age limit for males is eighteen years and for females sixteen years.[61]

§ 821. **Iowa.**

Common-law marriages.

Common-law marriages are recognized.[62]

Marriages prohibited.

Marriages between lineal ascendants and descendants, broth-

[49]Statutes 1899, §§ 923, 924.
[50]Statutes 1899, §§ 921, 922.
[51]Statutes 1899, § 2991.
[52]Teter v. Teter, 101 Ind. 129, 51 Am. Rep. 742; Franklin v. Lee, 30 Ind. App. 31, 62 N. E. 78.
[53]Burns' Ann. Stat. 1914, § 8357
[54]Burns' Ann. Stat. 1914, § 8360.
[55]Burns' Ann. Stat. 1914, § 2352.
[56]Burns' Ann. Stat. 1914, § 8377.
[57]Burns' Ann. Stat. 1914, § 8359-60.
[58]Burns' Ann. Stat. 1914, § 8360.
[59]Burns' Ann. Stat. 1914, § 2350.
[60]Burns' Ann. Stat. 1914, § 2352.
[61]Burns' Ann. Stat. 1914, § 8357. See Henneger v. Lomas, 145 Ind. 287, 44 N. E. 462, 32 L. R. A. 848.
[62]Love v. Love, 185 Iowa 930, 171 N. W. 257; Blanchard v. Lambert, 43 Iowa 228, 22 Am. Rep. 245; McFarland v. McFarland, 51 Iowa 565, 2 N. W. 269.

ers and sisters, uncles and nieces, aunts and nephews, step-parents and stepchildren, parents-in-law and children-in-law and cousins[63] are prohibited.

Void marriages.

Prohibited marriages and bigamous marriages[64] are void.

Voidable marriages.

Bigamous marriages, incestuous marriages, and marriages at the time of which there was physical or mental incapacity of either party[65] are voidable.

Criminal marriages.

Bigamous marriages[66] and those which are prohibited[67] are criminal.

Marriage age limit.

The marriage age limit for males is sixteen years and for females fourteen years.[68] This statute does not repeal the common-law rule fixing the age of marriage consent at fourteen for males and twelve for females. The statute is merely cumulative.[69]

§ 822. **Kansas.**

Common-law marriages.

Common-law marriages are recognized, but those contracting them are subject to a fine or imprisonment.[70]

Marriages prohibited.

Marriages between lineal ascendants and descendants, brothers and sisters of the half as well as the whole blood, uncles and nieces, aunts and nephews, and first cousins, all these relatives illegitimate as well as legitimate[71] and marriages of epileptics, imbeciles, feeble-minded or insane persons except the woman be over forty-five[72] are prohibited.

Void marriages.

Incestuous marriages and those marriages which are prohibited[73] are void.

[63]Code 1897, § 4936, and Supp. 1913, § 4936. See Wittick v. Wittick, 164 Iowa 485, 145 N. W. 913.

[64]Code 1897, § 3151.

[65]Code 1897, § 3182.

[66]Code 1897, § 4933.

[67]Code 1897, § 4936.

[68]Code 1897, § 3140. See also Wilcox's Supplement of 1913. Parental consent is required for males under twenty-one and females under eighteen. Code 1897, § § 3143, 3188.

[69]Goodwin v. Thompson, 2 G. Greene 329.

[70]State v. Walker, 36 Kans. 297, 13 Pac. 279, 59 Am. Rep. 556; Gen. Stat. 1915, § 6134.

[71]Gen. Stat. 1915, § 6135.

[72]Gen. Stat. 1915, § 6155, as amended by Laws 1919, Ch. 230, § 1.

[73]Gen. Stat. 1915, § 6135.

Voidable marriages.

Divorce is provided in case of physical disability at time of marriage, in case of marriages entered into fraudulently, and where pre-nuptial pregnancy existed without husband's knowledge.[74]

Marriages are to be declared void when either of the parties was incapable from want of age or understanding.[75]

Criminal marriages.

Marriage of a female compelled by force,[76] and prohibited marriages[77] are criminal.

Marriage age limit.

The marriage age limit for males is fifteen years and for females twelve years.[78]

§ 823. Kentucky.

Common-law marriages.

Common-law marriages are not recognized.[79]

Marriages prohibited.

Marriages between ascendants and descendants, their wives or husbands, step ascendants and descendants, brothers and sisters, uncles and nieces or grand nieces, aunts and nephews or grand nephews;[80] marriages of whites with negroes or mulattoes, marriage of an idiot, insane person, or person under age; and bigamous marriages,[81] and marriages by an unauthorized person[82] are prohibited.

Void marriage.

Prohibited marriages[83] are void, except in the case of a marriage by an unauthorized person where one party believed it valid.[84]

Voidable marriages.

Marriages under the age of consent if not ratified after that age, and marriages contracted by force or fraud[85] are voidable.

[74]Gen. Stat. 1915, § 7571.
[75]Gen. Stat. 1915, § 7585.
[76]Gen. Stat. 1915, § 3394.
[77]Gen. Stat. 1915, §§ 3613, 6135.
[78]Gen. Stat. 1915, § 3609.
[79]Carroll's Stat. 1922, § 2097.
[80]Carroll's Stat. 1922, § 2096.
[81]Carroll's Stat. 1922, § 2097.
[82]Carroll's Stat. 1922, § 2097.
[83]Carroll's Stat. 1922, §§ 2096, 2097.
[84]Carroll's Stat. 1922, §§ 2097, 2102.
[85]Carroll's Stat. 1922, § 2100.

Criminal marriages.

Marriages between whites and negroes or mulattoes, incestuous marriages[86] and bigamous marriages[87] are criminal.

Marriage age limit.

The marriage age limit for males is fourteen years and for females twelve years.[88]

§ 824. **Louisiana.**

Common-law marriages.

Common-law marriages are not recognized.[89]

Marriages prohibited.

Marriages between ascendants and descendants, brothers and sisters of the half as well as the whole blood, uncles and nieces, aunts and nephews, all this applying to illegitimate as well as to legitimate relatives; and marriages between white persons and persons of color[90] are prohibited.

Void marriages.

Marriages between ascendants and descendants and marriages between white persons and persons of color are void.[91]

Voidable marriages.

Marriages below age limit, marriages by fraud or force, and want of free consent, and bigamous and incestuous marriages are voidable.[92]

Criminal marriages.

Bigamous and incestuous marriages[93] are criminal.

Marriage age limit.

The marriage age limit for males is fourteen years and for females twelve years.[94]

§ 825. **Maine.**

Common-law marriages.

Common-law marriages are probably not recognized, but there is no clear decision in point.[95]

[86]Carroll's Stat. 1922, §§ 1219, 2114.

[87]Carroll's Stat. 1922, § 1216.

[88]Carroll's Stat. 1922, § 2097.

[89]See Johnson v. Raphael, 117 La. 967, 42 So. 470; Landry v. Ballanger, 120 La. 962, 45 So. 956, 15 L. R. A. (N. S.) 463, 14 Ann. Cas. 952.

[90]Marr's Rev. Stat. 1915, § 4439.

[91]See Marr's Rev. Stat. 1915, § 4461; State v. Carriere, 141 La. 136, 74 So. 792.

[92]Marr's Rev. Stat. 1915, §§ 4439, 4470.

[93]Marr's Rev. Stat. 1915, §§ 1653, 1654. The marriage of first cousins is not incest. State v. Convillon, 117 La. 935.

[94]Rev. Civil Code 1912, art. 92.

[95]See State v. Hodgkins, 19 Maine

Marriages prohibited.

Marriages between ascendants and descendants, their wives or husbands, step ascendants and descendants, brothers and sisters, uncles and nieces, aunts and nephews, with ascendants and descendants of spouse[96] are prohibited. Licenses are forbidden to be issued to a town pauper.[97]

Void marriages.

Incestuous marriages, marriage of an insane person or idiot, and bigamous marriages are void.[98]

Voidable marriages.

Incestuous marriages, bigamous marriages, marriages below age limit, and marriages at time of which one party was an idiot or an insane person are voidable.[99]

Criminal marriages.

Incestuous and bigamous marriages[1] are criminal.

Marriage age limit.

The marriage age limit for males is twenty-one years and for females eighteen years. Under these ages certificates are forbidden to be issued without the consent of parent or guardian.[2]

§ 826. Maryland.

Common-law marriages.

Common-law marriages are technically not recognized, but practically they are.[3]

Marriages prohibited.

Marriages between ascendants and descendants, and with ascendants or descendants by affinity, between brothers and sisters, uncles and nieces,[4] aunts and nephews,[5] and marriages between whites and blacks[6] are prohibited.

155, 36 Am. Dec. 742; Ligonia v. Buxton, 2 Greenl. (Maine) 102, 11 Am. Dec. 46; Hiram v. Pierce, 45 Maine 367, 71 Am. Dec. 555.

[96]Rev. Stat. 1916, ch. 64, § 1.

[97]Rev. Stat. 1916, ch. 64, § 5.

[98]Rev. Stat. 1916, Ch. 65, §§ 1, 2, 3. No insane, feeble minded person, or idiot is capable of contracting marriage. Laws 1917, p. 33.

[99]Rev. Stat. 1916, ch. 64, §§ 1-3; ch. 65, § 1.

[1]Rev. Stat. 1916, ch. 126, §§ 2, 4.

[2]Rev. Stat. 1916, ch. 64, § 5.

[3]See Matthes v. Matthes, 80 Md. 89.

[4]Ann. Code 1912, art. 62, §§ 1, 2; Fensterwald v. Burk, 129 Md. 131, 98 Atl. 358, 3 A. L. R. 1562, (see Rhode Island statutes, post); Harrison v. State, 22 Md. 468, 85 Am. Dec. 658.

[5]Ann. Code 1912, art. 62, §§ 1, 2.

[6]Ann. Code 1912, art. 27, § 330.

Void marriages.

Incestuous marriages,[7] and marriages between whites and blacks[8] are void.

Voidable marriages.

Marriages within the prohibited degrees, bigamous marriages, and marriages when there is an impotence of either party are void.[9]

Criminal marriages.

Bigamous marriages[10] and prohibited marriages[11] are criminal.

Marriage age limit.

The marriage age limit for males is twenty-one years and for females eighteen years. Under these ages certificate can not issue without consent of parent or guardian.[12]

§ 827. **Massachusetts.**

Common-law marriages.

Common-law marriages are not recognized.[13]

Marriages prohibited.

Marriages between ascendants and descendants, with ascendants or descendants by affinity, between brothers and sisters, uncles and nieces, aunts and nephews are prohibited.[14]

Void marriages.

Bigamous marriages, incestuous marriages,[15] marriages out of state to evade law,[16] and marriages under age of consent if parties separate under that age[17] are void.

A marriage entered into in a foreign state by a person who resides and intends to reside in this state and who is disabled or prohibited from contracting a marriage under the laws of this state is void. The same effect attaches to a marriage contracted in this state by a person residing and intending to reside in a foreign state if such marriage would be void if contracted in such foreign state.[18]

[7]Ann. Code 1912, art. 62, § 3.

[8]Ann. Code 1912, art. 27, § 330; Bagley's Gen. Laws 1914, p. 416.

[9]Ann. Code 1912, art. 62, § § 1, 2.

[10]Ann. Code 1912, art. 27, § 20.

[11]Ann. Code 1912, art. 27, § 321 et seq.

[12]Bagley's Civil Code 1911, p. 1450, as amended by Laws 1920, ch. 549, p. 1132.

[13]Milford v. Worcester, 7 Mass. 48; Norcross v. Norcross, 155 Mass. 425, 29 N. E. 506.

[14]Gen. Laws 1921, ch. 207, § § 1-3.

[15]Gen. Laws, 1921, ch. 207, § § 4, 8.

[16]Gen. Laws 1921, ch. 207, § 10.

[17]Gen. Laws 1921, ch. 207, § 9.

[18]Gen. Laws 1921, ch. 207, § § 10, 11.

Voidable marriages.

Marriages of lunatics or idiots are voidable.[19]

Criminal marriages.

Bigamous marriages, the marriage of a person against whom a divorce was granted within two years,[20] and marriages prohibited because of relationship[21] are criminal.

Marriage age limit.

The marriage age limit for males is fourteen years, and for females twelve years.[22] The consent of the parent or guardian is required for the marriage of a male under twenty-one years and of a female under eighteen years.[23]

§ 828. **Michigan.**

Common-law marriages.

Common-law marriages are recognized.[24]

Marriages prohibited.

Marriages between ascendants and descendants, with ascendants and descendants by affinity, between brothers and sisters, uncles and nieces, aunts and nephews, and cousins of the first degree[25] and bigamous marriages[26] are prohibited. Marriages of insane persons, idiots and persons afflicted with a venereal disease are likewise prohibited.[27]

Void marriages.

Incestuous and bigamous marriages,[28] marriages of insane persons or idiots, marriages under the age of consent if parties separate during nonage and marriages procured by force or fraud are void.[29]

Voidable marriages.

Marriages induced by fraud, marriages below age limit,[30] marriages of persons afflicted with insanity, idiocy, epilepsy or a venereal disease at time of marriage,[31] prohibited marriages, and those marriages which might be declared void, are voidable.[32]

[19]Gen. Laws 1921, ch. 207, § 6.

[20]Gen. Laws 1921, ch. 272, § 15.

[21]Gen. Laws 1921, ch. 272, § 17.

[22]Parton v. Hervey, 1 Gray 119.

[23]Gen. Laws 1921, ch. 207, § 23.

[24]Hutchins v. Kimmell, 31 Mich. 126, 18 Am. Rep. 164; Peet v. Peet, 52 Mich. 464, 18 N. W. 220.

[25]Comp. Laws 1915, §§ 11364-11365.

[26]Comp. Laws 1915, § 11366.

[27]Comp. Laws 1915, § 11367.

[28]Comp. Laws 1915, § 11392.

[29]Comp. Laws 1915, §§ 11392-11393. See Public Laws 1921, No. 352, p. 643.

[30]Comp. Laws 1915, § 11394.

[31]Comp. Laws 1915, § 11394.

[32]Comp. Laws 1915, § 11394.

Criminal marriages.

Incestuous and bigamous marriages,[33] marriages through force, menace or duress,[34] and marriages by persons who have had a venereal disease and have not been cured, or with a person who has been confined as an epileptic, feeble-minded, imbecile or insane patient, is criminal.[35]

Marriage age limit.

The marriage age limit for males is eighteen years and for females sixteen years.[36]

§ 829. **Minnesota.**

Common-law marriages.

Common-law marriages are recognized.[37]

Marriages prohibited.

Marriages between persons nearer of kin than first cousins, bigamous marriages,[38] and marriages of a woman under forty-five years of age or of a man of any age, except to a woman over forty-five, who is epileptic, imbecile, feeble-minded, or insane,[39] and marriages performed within six months after a divorce are prohibited.[40]

Void marriages.

Marriages within the prohibited degrees and bigamous marriages are void.[41]

Voidable marriages.

Marriages induced by force or fraud where the parties do not live together afterward, want of understanding, and marriages below age limit,[42] and marriages of epileptics, imbeciles, feeble-minded persons and insane persons,[43] are voidable.

Criminal marriages.

Marriage of a female compelled by force, menace or duress,[44] incestuous marriages,[45] and bigamous marriages[46] are criminal.

Marriage age limit.

The marriage age limit for males is eighteen years and for females fifteen years.[47]

[33]Comp. Laws 1915, §§ 11465, 11478.

[34]Comp. Laws 1915, § 15214.

[35]Comp. Laws 1915, § 11367.

[36]Comp. Laws 1915, § 11362.

[37]State v. Worthingham, 23 Minn. 528; Le Suer v. Le Suer, 122 Minn. 407, 142 N. W. 593.

[38]Gen. Stat. 1913, § 7090.

[39]Gen. Stat. 1913, § 7090.

[40]Gen. Stat. 1913, § 7090.

[41]Gen. Stat. 1913, § 7106.

[42]Gen. Stat. 1913, § 7107.

[43]Gen. Stat. 1913, § 7107.

[44]Gen. Stat. 1913, § 8658.

[45]Gen. Stat. 1913, § 8700.

[46]Gen. Stat. 1913, §§ 8698, 8699.

[47]Gen. Stat. 1913, § 7089. Parental

§ 830. **Mississippi.**

Common-law marriages.

Common-law marriages are recognized.[48]

Marriages prohibited.

Marriages between ascendants and descendants, brothers and sisters, uncles and nieces, aunts and nephews, marriages with ascendants or descendants by affinity, marriages of whites with negroes or Mongolians of one-eighth blood,[49] and marriages between first cousins are prohibited.[50]

Void marriages.

Incestuous marriages and marriages of whites with negroes or Mongolians are void.[51]

Voidable marriages.

Divorces are granted for causes which are usual grounds for avoiding marriages.[52]

Criminal marriages.

Bigamous marriages[53] and incestuous marriages[54] are criminal.

Marriage age limit.

The marriage age limit for males is twenty-one years and for females eighteen years. These are the ages under which a license is forbidden without the consent of parent or guardian.[55]

§ 831. **Missouri.**

Common-law marriages.

Common-law marriages are not recognized and are especially declared null and void[56] by a recent statute.

Marriages prohibited.

Marriages between lineal ascendants and descendants, brothers and sisters, uncles and nieces, aunts and nephews, first cousins, and marriages between white persons and negroes or Mongolians, are prohibited.[57] Any person of unsound mind, or who is imbecile, feeble-minded or epileptic is prohibited from marrying.[58]

consent is required for males under twenty-one and females under eighteen, unless previously married. Gen. Stat. 1913, §§ 7095, 7214.

[48]Code 1917, § 2556. See also Floyd v. Calvert, 53 Miss. 37.

[49]Code 1917, §§ 2549, 2550, 2551.

[50]See Amendment to Code 1917, § 2549, by Laws 1922, ch. 235.

[51]Code 1917, §§ 2549, 2551.

[52]Code 1917, § 1411.

[53]Code 1917, § 779.

[54]Code 1917, § 756.

[55]Code 1917, § 2552.

[56]Laws 1921, p. 468. On validity of common-law marriages before enactment of this statute, see Dyer v. Brannock, 66 Mo. 391, 27 Am. Rep. 359; State v. Bittick, 103 Mo. 183, 15 S. W. 325, 11 L. R. A. 587, 23 Am. St. 869.

[57]Laws 1921, p. 469.

[58]Laws 1921, p. 469.

Void marriages.

Incestuous marriages; marriages of white persons with negroes or Mongolians,[59] and bigamous marriages[60] are void. All marriages contracted without a license and solemnization,[61] and marriages between persons either of whom is insane, imbecile, feeble-minded or epileptic, are declared to be void.[62] A marriage solemnized by a person who is not legally authorized to solemnize such marriage is void; but such marriage will not be adjudged invalid if entered into and consummated by the parties with full belief that the marriage is valid.[63]

Voidable marriages.

Marriages under age of consent, or other marriages incapable of being contracted are voidable.[64]

Criminal marriages.

Those marriages which are prohibited,[65] and also bigamous marriages[66] are criminal.

Marriage age limit.

The marriage age limit for males is twenty-one years and for females eighteen years. These are the ages under which the consent of parent or guardian is required.[67]

§ 832. **Montana.**

Common-law marriages.

Common-law marriages are recognized.[68]

Marriages prohibited.

Marriages between ascendants and descendants, brothers and sisters of the half as well as the whole blood, marriages between uncles and nieces, aunts and nephews, first cousins and persons either of whom is feeble-minded,[69] and bigamous marriages are prohibited.[70]

Void marriages.

Incestuous marriages and bigamous marriages are void.[71]

[59]Laws 1921, p. 469. See also Marre v. Marre, 184 Mo. App. 198, 168 S. W. 636.

[60]Rev. Stat. 1919, § 7300.

[61]Laws 1921, p. 468.

[62]Laws 1921, p. 469.

[63]Laws 1921, pp. 468-469.

[64]Rev. Stat. 1919, § 7308.

[65]Rev. Stat. 1919, § § 3511, 3513.

[66]Rev. Stat. 1919, § 3506.

[67]Rev. Stat. 1919, § 7308.

[68]Rev. Code 1921, § 5695. See also O'Malley v. O'Malley, 46 Mont. 549, 129 Pac. 501, Ann. Cas. 1914B, 662.

[69]Rev. Codes 1921, § 5699.

[70]Rev. Codes 1921, § 5705.

[71]Rev. Codes, 1921, § § 5699, 5705. Also miscegenetic marriages including marriages between white persons and negroes, Chinese or Japanese. Rev. Codes, 1921, § § 5700-5702.

Voidable marriages.

Marriages under the age of consent, bigamous marriages, marriages induced by force or fraud, and marriages where one party was of unsound mind or under physical disability at time of marriage[72] and incestuous marriages[73] are voidable.

Criminal marriages.

All marriages prohibited by law, incestuous and bigamous marriages,[74] and marriage to a female through abduction and force are criminal.[75]

Marriage age limit.

The marriage age limit for males is eighteen years and for females sixteen years.[76]

§ 833. **Nebraska.**

Common-law marriages.

Common-law marriages are recognized.[77]

Marriages prohibited.

Marriages between ascendants and descendants, brothers and sisters of the half as well as the whole blood, marriages between uncles and nieces, aunts and nephews, and between first cousins of the whole blood are prohibited.[78]

Void marriages.

Marriages of white persons with persons of one-eighth or more negro, Japanese or Chinese blood,[79] bigamous marriages, marriages contracted when insanity or idiocy existed at the time,[80] and incestuous marriages are void.[81]

Voidable marriages.

Marriages under the age of consent with separation during nonage, marriages procured by force or fraud without subsequent voluntary cohabitation are voidable;[82] void marriages may be so decreed.[83]

[72]Rev. Codes 1921, § § 5698, 5729.

[73]Rev. Codes 1921, § 5728.

[74]Rev. Codes 1921, § § 5699, 11025-11028, 11029.

[75]Rev. Codes 1921, § 11004.

[76]Rev. Codes 1921, § 5696. Parental consent is required for males under twenty-one and females under eighteen. Rev. Codes 1921, § § 5673, 5712.

[77]Coad v. Coad, 87 Nebr. 290, 127 N. W. 455; Bailey v. State, 36 Nebr. 808, 55 N. W. 241.

[78]Rev. Stat. 1913, § § 1542, 8769.

[79]Rev. Stat. 1913, § 1542.

[80]Rev. Stat. 1913, § 1542; but such marriage may be recognized by the incapable person after restoration of reason. Rev. Stat. 1913, § 1598.

[81]Rev. Stat. 1913, § 8769.

[82]Rev. Stat. 1913, § 1557.

[83]Rev. Stat. 1913, § 1558.

Criminal marriages.

Bigamous marriages[84] and incestuous marriages are criminal.[85]

Marriage age limit.

The marriage age limit for males is eighteen years and for females sixteen years.[86]

§ 834. **Nevada.**

Common-law marriages.

Common-law marriages are recognized.[87]

Marriage prohibited.

Marriages between persons nearer of kin than second cousins, or first cousins of the half blood are prohibited.[88]

Void marriages.

Incestuous marriages and bigamous marriages are void.[89]

Voidable marriages.

Marriages entered into by fraud, marriages below the age limit, marriages where there was want of understanding when there has been no subsequent cohabitation are voidable.[90]

Criminal marriages.

Incestuous,[91] or bigamous[92] marriages, and marriages between white persons and negroes, Mongolians or Indians are criminal.[93]

Marriage age limit.

The marriage age limit for males is eighteen years and for females sixteen years.[94] Such marriages may be confirmed by arriving at the prescribed age.[95]

§ 835. **New Hampshire.**

Common-law marriages.

Common-law marriages are recognized under certain circumstances.[96]

[84]Rev. Stat. 1913, § 8768.

[85]Rev. Stat. 1913, §§ 8770, 8771, as amended by Laws 1919-1921, ch. 242.

[86]Rev. Stat. 1913, § 1541. Parental consent is required for males under twenty-one and females under eighteen. Rev. Stat. 1913, §§ 1544, 1627.

[87]State v. Zichfeld, 23 Nev. 304, 46 Pac. 802, 34 L. R. A. 784, 62 Am. St. 800.

[88]Rev. Laws 1912, § 2339.

[89]Rev. Laws 1912, § 2354.

[90]Rev. Laws 1912, §§ 2355, 2356.

[91]Rev. Laws 1912, § 6458.

[92]Rev. Laws 1912, § 6456.

[93]Rev. Laws 1912, § 6514.

[94]Rev. Laws 1912, § 2339.

[95]Rev. Laws 1912, § 2356. Parental consent is required for males under twenty-one and females under eighteen, not previously married. Rev. Laws 1912, § 2339.

[96]Pub. Stat. 1901, p. 590, § 15. See also Dunbarton v. Franklin, 19 N. H. 257.

Marriages prohibited.

Marriages between ascendants and descendants, their wives or husbands, step ascendants and descendants, brothers and sisters, uncles and nieces, aunts and nephews, and first cousins are prohibited.[97] The marriage of a man to a woman under forty-five years of age is also forbidden if either of them is epileptic, imbecile, feeble-minded, or an idiot or insane person.[98] The marriage of a person suffering from a venereal disease is also prohibited except certain conditions be complied with.[99]

Void marriages.

Incestuous[1] and bigamous marriages[2] are void.

Voidable marriages.

Marriages may be decreed to have been null and void upon proceedings to test their validity.[3]

Criminal marriages.

Bigamous[4] and incestuous marriages[5] are criminal. A marriage contracted by an epileptic, imbecile, feeble-minded, idiot, or insane person,[6] or a marriage by one suffering from a venereal disease is criminal and punishable as such.[7]

Marriage age limit.

The marriage age limit for males is fourteen years and for females thirteen years.[8]

§ 836. **New Jersey.**

Common-law marriages.

Common-law marriages are recognized.[9]

Marriages prohibited.

Marriages between lineal ascendants and descendants, brothers and sisters, uncles and nieces, aunts and nephews, bigamous marriages,[10] and marriages of persons who have been confined as epi-

[97]Pub. Stat. 1901, p. 588, § § 1, 2. See also Hayes v. Rollins, 68 N. H. 191, 44 Atl. 176.

[98]Laws 1915, p. 217.

[99]Laws 1921, pp. 61, 279.

[1]Pub. Stat. 1901, p. 588, § 3; p. 590, § 1.

[2]Pub. Stat. 1901, p. 590, § 1.

[3]Pub. Stat. 1901, p. 590, § 2.

[4]Pub. Stat. 1901, p. 821, § 5.

[5]Pub. Stat. 1901, p. 822, § 7.

[6]Laws 1915, p. 217.

[7]Laws 1921, pp. 61, 279.

[8]Supplement 1913, p. 438. Parental consent is required for males under eighteen and females under sixteen. Supplement 1913, p. 439.

[9]Comp. Laws Supp. 1911-15, p. 926, § 16. Atlantic City R. Co. v. Goodin, 62 N. J. L. 394, 42 Atl. 333, 45 L. R. A. 671, 72 Am. St. 652; State v. Thompson, 76 N. J. L. 197, 68 Atl. 1068; Chamberlin v. Chamberlin, 68 N. J. Eq. 736, 62 Atl. 680, 3 L. R. A. (N. S.) 244, 111 Am. St. 658.

[10]Comp. Stat. Supp. 1911-15, p. 923, § 5.

leptic, insane or feeble-minded patients without certificate of recovery are prohibited.[11]

Void marriages.

Bigamous marriages and incestuous marriages[12] are void.

Voidable marriages.

Marriages within the prohibited degrees, and bigamous marriages are voidable.[13]

Criminal marriages.

Marriages within the prohibited degrees of relationship, come within the penal statute;[14] and the marriage of an epileptic, insane, or feeble-minded patient who has not recovered is declared criminal.[15]

A marriage of a female under eighteen compelled through seduction is criminal and subjects the offender to criminal punishment.[16]

Marriage age limit.

The marriage age limit for males is twenty-one years and for females eighteen years. These are the ages below which the consent of a parent or guardian is required.[17]

§ 837. New Mexico.

Common-law marriages.

Common-law marriages are probably not legal, but there is no decision directly in point. The act does not specifically deny recognition.[18]

Marriages prohibited.

Marriages between ascendants and descendants, brothers and sisters, uncles and nieces, aunts and nephews are prohibited.[19]

Void marriages.

Incestuous marriages[20] and marriages of males under eighteen and females under fifteen are void.[21]

[11]Comp. Stat. Supp. 1911-15, p. 924, § 7. Also the marriage of a person who knows himself to be afflicted with a venereal disease. Laws 1917, p. 52.

[12]Comp. Stat. 1911, p. 1762.

[13]Comp. Stat. 1911, pp. 1762, 3217.

[14]Comp. Stat. 1911, p. 1760.

[15]Comp. Stat. 1911, p. 1778.

[16]Laws 1921, p. 43.

[17]Comp. Stat. 1911, p. 3219; Compiled Stat. 1910, p. 925. See also p. 2022 and Revision 1912, ch. 199, § 8.

[18]Ann. Stat. 1915, §§ 3435, 3444.

[19]Ann. Stat. 1915, § 3430.

[20]Ann. Stat. 1915, § 3434.

[21]Ann. Stat. 1915, §§ 3431, 3434.

Voidable marriages.

A marriage contracted at time of which insanity existed is voidable.[22]

Criminal marriages.

The marriage of a female by force, menace, or duress,[23] prohibited[24] and bigamous marriages are declared criminal.[25]

Marriage age limit.

The marriage age limit for males is eighteen years, and for females fifteen years.[26]

Parental consent is required for all marriages occurring under twenty-one years of age.[27]

§ 838. **New York.**

Common-law marriages.

Common-law marriages are recognized.[28]

Marriages prohibited.

Marriages between lineal ascendants and descendants, brothers and sisters, uncles and nieces, aunts and nephews,[29] and marriages of persons divorced in the state for his or her fault during the life of the other, or until consent of court after three years are prohibited.[30]

Void marriages.

Bigamous and incestuous marriages are void.[31]

Voidable marriages.

Marriages induced by force, duress, or fraud, marriages under age of consent, marriages with former husband or wife living for five years without knowledge of spouse, and marriages contracted at the time of which there is any physical incapacity or a want of understanding, are voidable.[32]

[22]Ann. Stat. 1915, § 3425.

[23]Ann. Stat. 1915, § 1496.

[24]Ann. Stat. 1915, §§ 3432, 3433.

[25]Ann. Stat. 1915, § 1775.

[26]Ann. Stat. 1915, § 3431. Marriages under these ages may be confirmed by parties after arriving at the marriageable age. Ann. Stat. 1915, § 3434.

[27]Ann. Stat. 1915, §§ 2554, 3427, 3431, 3442.

[28]Ziegler v. Cassidy's Sons, 220 N. Y. 98, 115 N. E. 471, Ann. Cas. 1917E, 248.

[29]Birdseye's Ann. Laws 1917, p. 1835. See also Wightman v. Wightman, 4 Johns. Ch. 343.

[30]Birdseye's Ann. Laws 1917, p. 1851, as amended by Laws 1919, ch. 265.

[31]Birdseye's Ann. Laws 1917, p. 1835.

[32]Birdseye's Ann. Laws 1917, p. 1842. See also Kahn v. Kahn, 62 Misc. 550, 115 N. Y. S. 1028.

Criminal marriages.

Marriages within the prohibited degrees of relationship[33] and bigamous marriages,[34] are declared criminal. The statute also makes criminal a marriage of a female compelled by menace, force, or duress.[35]

Marriage age limit.

The marriage age limit for males is eighteen years and for females eighteen years.[36]

Parental consent is required for the marriage of males under twenty-one and of females under eighteen.[37]

§ 839. North Carolina

Common-law marriages.

Common-law marriages are not recognized.[38]

Marriages prohibited.

Marriages between persons related nearer than first cousins, including double cousins, marriages between whites and negroes or Indians or of negro or Indian descent to the third generation, and bigamous marriages are prohibited.[39]

Void marriages.

Prohibited marriages, marriages under age, bigamous marriages, marriages of persons impotent physically or incapable from want of will or understanding are void.[40]

Voidable marriages.

All void marriages may be declared void during the lifetime of the parties upon application. Marriages void by miscegenation may be so declared at any time.[41]

Criminal marriages.

Marriage to a woman under the age limit,[42] marriage of a white with a negro,[43] incestuous marriages,[44] and bigamous marriages are declared criminal.[45]

[33]Birdseye's Ann. Laws 1917, p. 5843. See Wightman v. Wightman, 4 Johns. Ch. 343.

[34]Birdseye's Ann. Laws 1917, p. 5654.

[35]Birdseye's Ann. Laws 1917, p. 5603.

[36]Birdseye's Ann. Laws 1917, p. 1842. Bliss' Code Civ. Proc. 1913, § 1744.

[37]Birdseye's Ann. Laws 1917, pp. 1862-1863.

[38]State v. Wilson, 121 N. Car. 650, 28 S. E. 416. Marriage is not invalid, however, because solemnized without a license. Maggett v. Roberts, 112 N. Car. 71, 16 S. E. 919.

[39]Con. Stat. 1919, § § 2496, 4340.

[40]Con. Stat. 1919, § 2495.

[41]Con. Stat. 1919, § 2495.

[42]Con. Stat. 1919, § 4444.

[43]Con. Stat. 1919, § 4340.

[44]Con. Stat. 1919, § § 4337, 4338.

[45]Con. Stat. 1919, § 4342.

Marriage age limit.

The marriage age limit for males is sixteen years and for females fourteen years.[46] However, consent of guardian or parent is necessary to all marriages of minors under the age of eighteen.[47]

§ 840. **North Dakota.**

Common-law marriages.

Common-law marriages are not recognized.[48]

Marriages prohibited.

Marriage between lineal ascendants and descendants, brothers and sisters, uncles and nieces, aunts and nephews, and first cousins are prohibited.[49]

Void marriages.

Incestuous[50] and bigamous marriages are void.[51] The same is true of a miscegenetic marriage, that is one between a white person and a person of one-eighth or more negro blood.[52]

Voidable marriages.

Marriages contracted at the time of which a mental or physical disability exists,[53] marriages below the age limit, marriages induced by fraud or force unless the parties afterward lived together,[54] and bigamous marriages are voidable.[55]

Criminal marriages.

Marriages compelled by force, menace, or duress,[56] incestuous marriages,[57] and bigamous marriages are declared criminal.[58]

Marriage age limit.

The marriage age limit for males is eighteen years and for females fifteen years.[59] Parental consent is required for males under twenty-one and females under eighteen.[60]

[46]Con. Stat. 1919, § 2494. Marriages under this age may be subsequently ratified. Sims v. Sims, 121 N. Car. 297, 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. 665; State v. Parker, 106 N. Car. 711, 11 S. E. 517. It is a misdemeanor to contract marriage with a female under fourteen. Con. Stat. 1919, § 4444.

[47]Con. Stat. 1919, § 2500.

[48]Schumacher v. Great Northern R. Co., 23 N. Dak. 231, 136 N. W. 85.

[49]Comp. Laws, 1913, § 4359.

[50]Comp. Laws, 1913, § 4359.

[51]Comp. Laws 1913, § 4360.

[52]Comp. Laws 1913, § § 9582-3.

[53]Comp. Laws 1913, § 4373.

[54]Comp. Laws 1913, § 4368.

[55]Comp. Laws 1913, § 4360, 4368.

[56]Comp. Laws 1913, § 9570.

[57]Comp. Laws 1913, § 9614.

[58]Comp. Laws 1913, § 9610.

[59]Comp. Laws 1913, § 4358.

[60]Comp. Laws 1913, § 4362.

§ 841. **Ohio.**

Common-law marriages.

Common-law marriages are recognized.[61]

Marriages prohibited.

Marriages between lineal ascendants and descendants, brothers and sisters, uncles and nieces, aunts and nephews, and first cousins are prohibited.[62] A marriage contracted while either spouse is living is also prohibited.[63]

Void marriages.

A divorce will be granted where either party has husband or wife living.[64] A marriage under the age of consent,[65] and a marriage contract of one affected with congenital imbecility of mind is void.[66]

Voidable marriages.

A marriage contracted by a person affected with imbecility of mind will be declared void at the suit of the guardian.[67] The marriage of a female under sixteen is voidable.[68]

Criminal marriages.

Bigamous marriages and incestuous marriages are declared criminal.[69]

Marriage age limit.

The marriage age limit for males is eighteen years and for females sixteen years.[70]

§ 842. **Oklahoma.**

Common-law marriages.

Common-law marriages are recognized.[71]

Marriages prohibited.

Marriages between lineal ascendants and descendants, stepfather and stepdaughter, stepmother and stepson, father-in-law

[61]Umbenhower v. Labus, 85 Ohio 238, 97 N. E. 832.

[62]Gen. Code 1921, § 11181.

[63]Gen. Code 1921, § 11181.

[64]Gen. Code 1921, § 11979. See Smith v. Smith, 5 Ohio St. 32.

[65]Gen. Code 1921, § 11181. See Shafler v. State, 20 Ohio St. 1.

[66]Waymire v. Getmore, 22 Ohio St. 271.

[67]Waymire v. Getmore, 22 Ohio St. 271.

[68]11 Ohio Dec. 413.

[69]Gen. Code 1921, §§ 13022, 13023.

[70]Gen. Code 1921, § 11181. Parental consent required for males under twenty-one and females under eighteen not previously married. Gen. Code 1921, §§ 11181, 11190.

[71]Love v. Love, 42 Okla. 478, 142 Pac. 305; Coleman v. James, 67 Okla. ——, 169 Pac. 1064.

and daughter-in-law, mother-in-law and son-in-law, brother and sister, uncle and niece, aunt and nephew, first cousins or second cousins,[72] marriages within six months after a divorce,[73] marriages of whites with negroes,[74] marriages under age of consent,[75] marriages without license,[76] and marriages by persons infected with venereal diseases are prohibited.[77]

Void marriages.

Incestuous marriages are void.[78]

Voidable marriages.

Marriages of parties while wanting in age or understanding are voidable.[79]

Criminal marriages.

Marriages compelled by force, menace, or duress,[80] marriages which are prohibited,[81] and bigamous marriages[82] are declared criminal.

Marriage age limit.

The marriage age limit for males is eighteen years and for females fifteen years.[83]

§ 843. Oregon.

Common-law marriages.

Common-law marriages are not recognized.[84]

Prohibited marriages.

Marriages between first cousins[85] or relatives nearer of kin; bigamous marriages, and marriages of whites with negroes or Mongolians of one-fourth blood are prohibited.[86]

Void marriages.

Incestuous marriages, bigamous marriages, marriages when

[72]Comp. Stat. 1921, § 7489. Fearnow v. Jones, 34 Okla. 694, 126 Pac. 1015, L. R. A. 1916C, 720.

[73]Comp. Stat. 1921, § 510. They may re-marry one another within six months. Thomas v. James, 69 Okla.——, 171 Pac. 855.

[74]Comp. Stat. 1921, § 7499.

[75]Comp. Stat. 1921, § 7490.

[76]Comp. Stat. 1921, § 7491.

[77]Laws 1919, p. 32.

[78]Comp. Stat. 1921, § 7489.

[79]Comp. Stat. 1921, § 7490.

[80]Comp. Stat. 1921, § § 1841, 1842.

[81]Comp. Stat. 1921, § § 1866, 7500.

[82]Comp. Stat. 1921, § § 1862-1865.

[83]Comp. Stat. 1921, § 7490. Parental consent required for males under twenty-one and females under eighteen. Comp. Stat. 1921, § 7490.

[84]Laws 1920, § 9731. Holmes v. Holmes, 1 Sawyer 99, Fed. Cas. 6638.

[85]Laws 1920, § 9721.

[86]Laws 1920, § § 2163, 9721. Legislature of 1921 passed an act requiring a certificate of health before license can be issued. This act, by its own provisions, is to be submitted to popular vote.

either party is one-fourth or more negro, Chinese, or Kanaka blood or more than one-half Indian blood are void.[87]

Voidable marriages.

Marriages induced by fraud or force, and marriages at the time of which either party is wanting in age or understanding are voidable.[88]

Criminal marriages.

Marriage of a female under sixteen years without parents' consent,[89] and void marriages are declared criminal.[90]

Marriage age limit.

Marriage age limit for males is eighteen years and for females fifteen years.[91]

§ 844. **Panama.**[92]

"It is interesting to note that the marriage laws in one of our dependencies, the Panama Canal Zone, reflecting as they do the laws of continental Europe, are nearer the standards recommended by our authorities in at least two particulars than are the laws of most of our states. Thus, common-law marriages are not recognized, and a fifteen days' notice of intention to marry is required. In addition a solemnization must be before a civil official, his secretary, and two witnesses, the celebrant being obliged to inquire of the contracting parties whether they join in matrimony of their own free will, and to inform them of the nature of the contract and of the mutual duties they are to assume."[93]

Marriage age limit.

Males twenty-one and females eighteen may freely contract marriage. Under this age they must have consent of parents or guardians.[94]

§ 845. **Pennsylvania.**

Common-law marriages.

Common-law marriages are recognized.[95]

[87]Laws 1920, §§ 502, 2163.

[88]Laws 1920, §§ 503, 9722.

[89]Laws 1920, § 2085.

[90]Laws 1920, §§ 2073, 2098, 2163-2164.

[91]Laws 1920, § 9720. Parental consent is necessary for marriage of minors under the ages of twenty-one for males and eighteen for females. Laws 1920, § 9732.

[92]See divorce laws, ch. 50.

[93]Am. Mar. Laws (Russell Sage Foundation, 1919), p. 13, note 1.

[94]Civil Code 1904, §§ 116, 120.

[95]Commonwealth v. Stump, 53 Pa. 132, 91 Am. Dec. 198; Richard v. Brehm, 73 Pa. 140, 13 Am. Rep. 733.

Prohibited marriages.

Marriages between ascendants and descendants, stepparents and stepchildren, brothers and sisters, uncles and nieces, aunts and nephews,[96] first cousins,[97] and marriages with the wives or husbands of ascendants or descendants are prohibited.[98]

Void marriages.

Bigamous marriages,[99] and marriages prohibited by law are void.[1]

Voidable marriages.

Consent obtained by force, fraud, or coercion, if not subsequently ratified renders contract voidable.[2]

Criminal marriages.

Bigamous marriages[3] and incestuous marriages[4] are criminal.

Marriage age limit.

The marriage age limit for males is twenty-one years and for females twenty-one years. These are the ages under which consent of parent or guardian is required.[5]

The common-law age, fourteen for males and twelve for females presumably applies, but there is no other statutory provision.[6]

§ 846. **Philippine Islands.**

Prohibited marriages.

Marriages between ascendants and descendants of consanguinity and affinity legitimate or natural, between collaterals by legitimate consanguinity or affinity to the fourth degree, between collaterals by natural consanguinity or affinity to the second degree; marriages between adoptive parents and children and the same by affinity, between the legitimate descendants of the adopter and adopted, while the adoption continues, marriages between convicted adulterers, and a marriage between a surviving spouse and the author of the death of the deceased spouse is prohibited.[7] Marriage of a minor without the consent of parent or guardian, or of a person who has not requested advice, marriage of a widow within three hundred and one days of the

[96]Stat. 1920, § 7907.

[97]Stat. 1920, § § 7907, 4547-8. McClain v. McClain, 40 Pa. Super. Ct. 248.

[98]Stat. 1920, § 7907.

[99]Stat. 1920, § § 7710-7713, 9143.

[1]Stat. 1920, § 9141.

[2]Stat. 1920, § 7872.

[3]Stat. 1920, § § 7710-7713.

[4]Stat. 1920, § 7907.

[5]Stat. 1920, § 14556.

[6]See Ward's Estate, 30 Pittsburg L. J. 394.

[7]Civil Code 1899, art. 84.

dissolution of her former marriage or before childbirth, marriage of a guardian or his descendants to his ward before approval of his accounts is likewise prohibited.[8]

The government may waive the prohibition as to widows, as to the third and fourth degrees of collateral consanguinity, as to collateral affinity and as to adoptive relatives.[9]

Void marriages.

Bigamous marriages,[10] marriages by error as to person, marriages procured by compulsion or intimidation, marriages by abduction, marriages not celebrated by competent judge and without witnesses, and incestuous marriages are void.[11]

Voidable marriages.

Marriages under the age of consent, marriages of persons of unsound mind, and of persons physically impotent, and marriages of persons in holy or canonical orders are voidable.[12]

Criminal marriages.

Marriage of a minor without consent of parent,[13] marriage of a widow within three hundred and one days after death of her husband, or before delivery,[14] incestuous marriages,[15] bigamous marriages,[16] marriages notwithstanding impediment,[17] and marriage of a guardian with ward before approval of his accounts is declared criminal.[18]

Marriage age limit.

The marriage age limit for males is fourteen years and for females twelve years.[19]

§ 847. Porto Rico.

Marriages prohibited.

Marriage between ascendants and descendants by consanguinity or affinity, brothers and sisters, uncles and nieces, aunts and nephews, first cousins, uncles and great nieces, aunts and great nephews, parents and their children, by adoption or otherwise, between adopted persons and surviving spouse of adopter, between adoptive parents and surviving spouse of adopted person,

[8]Civil Code 1899, art. 45.
[9]Civil Code 1899, art. 85.
[10]Civil Code 1899, art. 83; Comp. Acts Phil. Com. 1908, § 3767.
[11]Civil Code 1899, art. 101; Comp. Acts Phil. Com. 1908, § 3766.
[12]Civil Code 1899, art. 83.
[13]Penal Code 1900, art. [illegible]
[14]Penal Code 1900, art. 476.
[15]Penal Code 1900, art. 443.
[16]Penal Code 1900, art. 471.
[17]Penal Code 1900, arts. 472, 473.
[18]Penal Code 1900, art. 478.
[19]Civil Code 1899, art. 83; Comp. Acts Phil. Com. 1908, § 3765.

marriage between convicted adulterers for five years after judgment, and marriage with the murderer of a spouse is prohibited.[20]

The district court may waive the impediment of the fourth degree of consanguinity.[21]

Void marriages.

All marriages not contracted in accordance with the Civil Code,[22] except natural marriages[23] are void.

Voidable marriages.

Marriages below the age limit, marriages by violence or intimidation, marriage of a person under mental or physical disability at time of marriage, bigamous marriages, marriages without consent of parent or guardian, marriage of a woman within three hundred and one days of dissolution of her former marriage or before birth of child, and marriage of a tutor or his descendants with his ward until accounts are settled is voidable.[24]

Criminal marriages.

Bigamous marriages,[25] incestuous marriages,[26] and marriages procured by force, menace, or duress are criminal.[27]

Marriage age limit.

The marriage age limit for males is eighteen years and for females sixteen years.[28]

§ 848. **Rhode Island.**

Common-law marriages.

Common-law marriages are recognized.[29]

Prohibited marriages.

Marriage between ascendants and descendants, brothers and sisters, uncles and nieces, aunts and nephews and marriage with ascendants or descendants by affinity is prohibited.[30]

Void marriages.

Incestuous marriages,[31] bigamous marriages, and marriages with idiots or lunatics are void.[32]

[20]Rev. Stat. 1913, § 3205.
[21]Rev. Stat. 1913, § 3206.
[22]Rev. Stat. 1913, § 3203.
[23]Laws of 1903, p. 116. But see Rev. Stat. 1913, §§ 3202, 3203.
[24]Rev. Stat. 1913, § 3204.
[25]Rev. Stat. 1913, §§ 5713-5716.
[26]Rev. Stat. 1913, § 5717.
[27]Rev. Stat. 1913, § 5701.
[28]Rev. Stat. 1913, § 3204.
[29]Chase Petitioner, 26 R. I. 351, 58 Atl. 978, 69 L. R. A. 493, 3 Ann. Cas. 1050; Williams v. Herrick, 21 R. I. 401, 43 Atl. 1036, 79 Am. St. 809.
[30]Gen. Laws 1909, p. 846, §§ 1, 2. Except Jews. Gen. Laws 1909, p. 846, § 4.
[31]Gen. Laws 1909, p. 846, § 3.
[32]Gen. Laws 1909, p. 846, § 5.

Voidable marriages.

Divorces are to be decreed in case of marriages originally void or voidable and in case of defendants deemed to be civilly dead or presumed to be actually dead.[33]

Criminal marriages.

Bigamous marriages,[34] and incestuous marriages are criminal.[35]

Marriage age limit.

The marriage age limit for males is twenty-one years and for females twenty-one years. These are the ages below which the consent of parent or guardian is required.[36]

§ 849. **South Carolina.**

Common-law marriages.

Common-law marriages are recognized.[37]

Prohibited marriages.

Marriages between ascendants or descendants by consanguinity or affinity, brothers and sisters, stepparents and stepchildren, uncles and nieces, aunts and nephews and marriages of idiots and lunatics are prohibited.[38]

Void marriages.

Marriages of whites with Indians, negroes, mulattoes, mestizoes, or half-breeds,[39] and bigamous marriages[40] are void.

Voidable marriages.

Marriages wanting in consent or such as to show that there was no contract are voidable.[41]

Criminal marriages.

Bigamous marriages,[42] marriages by abduction,[43] marriages of whites with an Indian, negro, mulatto, mestizo, or half-breed,[44] and incestuous marriages[45] are criminal.

[33]Gen. Laws 1909, p. 857, § 1.

[34]Gen. Laws 1909, p. 1276, § 1.

[35]Gen. Laws 1909, p. 1277, § 9.

[36]Gen. Laws 1909, p. 848, § 11; Laws 1909-10, p. 167. There is no further statutory provision. The common-law ages apply (fourteen for males and twelve for females). Capewell v. Capewell, 21 R. I. 101, 41 Atl. 1005.

[37]Freyer v. Freyer, Richardson's Equity Cases, 92 ff.

[38]Code 1912, § 3743.

[39]Crim. Code 1912, § 385, Code 1912, § 3757. See Tedder v. Tedder, 108 S. Car. 271, 94 S. E. 19.

[40]Code 1912, § 3754.

[41]Code 1912, § 3753.

[42]Crim. Code 1912, § 381.

[43]Crim. Code 1912, § 380.

[44]Crim. Code 1912, § 385; Code 1912, § 3757.

[45]Crim. Code 1912, § 388.

Marriage age limit.

There is no provision as to age limit, but no license to males under eighteen or females under fourteen may be issued.[46]

§ 850. **South Dakota.**

Common-law marriages.

Common-law marriages are recognized.[47]

Marriages prohibited.

Marriages between lineal ascendants and descendants, brothers and sisters of the half blood as well as whole blood, uncles and nieces, aunts and nephews, first cousins of the half blood as well as whole blood and step-parents and stepchildren are prohibited.[48]

Void marriages.

Incestuous[49] and bigamous marriages[50] and miscegenetic marriages[51] are void.

Voidable marriages.

A marriage contracted at the time of which any physical or mental disability exists, marriage induced by force or fraud, and the marriage of a person under the age of consent is voidable.[52]

Criminal marriages.

Marriage of a female induced by force, menace, or duress,[53] marriage by false personation,[54] prohibited marriages except those of step-relatives[55] and bigamous marriages[56] are criminal.

Marriage age limit.

The marriage age limit for males is eighteen years and for females fifteen years.[57]

§ 851. **Tennessee.**

Common-law marriages.

Common-law marriages are not recognized for every purpose but generally are to establish civil liability.[58]

[46]Code 1912, § 3745. Parental consent in writing for marriage of anyone under eighteen. Code 1912, § 3745.

[47]Rev. Code 1919, § 120. See also Svendsen v. Svendsen, 37 S. Dak. 353, 158 N. W. 410.

[48]Rev. Code 1919, §§ 106, 107.

[49]Rev. Code 1919, §§ 106, 107.

[50]Rev. Code 1919, § 108.

[51]This means the marriage of a white person with an African, Korean, Malayan or Mongolian. Rev. Code 1919, § 128.

[52]Rev. Code 1919, §§ 104, 107.

[53]Rev. Code 1919, § 4099.

[54]Rev. Code 1919, § 4245.

[55]Rev. Code 1919, § 3864.

[56]Rev. Code 1919, §§ 3860-3863.

[57]Rev. Code 1919, § 104. Consent of parent or guardian is necessary to validate marriage of minors. Rev. Code 1919, § 115.

[58]Smith v. Bank, 7 Cates 12, 115

Marriages prohibited.

Marriage with a lineal ancestor or descendant, with the lineal ancestor or descendant of either parent, with the child of a grandparent, with the lineal descendant of husband or wife, with the husband or wife of a parent or lineal descendant,[59] and marriage between whites and negroes or descendants of negroes to the third generation is prohibited.[60] A bigamous marriage is prohibited, except where the other spouse has been absent from the state and unheard from for five years which dissolves the former marriage.[61]

Void and voidable marriages.

The court, if satisfied that the plaintiff is entitled to such relief, may pronounce a marriage null and void from the beginning,[62] in cases of bigamous marriages, where either party is impotent, where the woman was pregnant at time of marriage, where either party was incapable of consenting, such as in cases of duress, force or fraud or insanity,[63] and of incestuous marriages.[64]

Criminal marriages.

Marriage of a female compelled by force, menace, or duress,[65] marriages of whites with negroes or descendants of negroes to the third generation,[66] bigamous marriages,[67] and incestuous marriages[68] are criminal.

Marriage age limit.

The marriage age limit for males is fourteen years and for females twelve years.[69]

§ 852. **Texas.**

Common-law marriages.

Common-law marriages are recognized.[70]

Tenn. 12, 89 S. W. 392; Bashaw v. State, 1 Yerg. 177. See 6 Yerg. 364; Andrews v. Page, 3 Heisk. 667. Rogers v. Park, 4 Hun 480; Johnson v. Johnson, 1 Cold. 631.

[59]Shannon's Code 1918, § 4185.

[60]Shannon's Code 1918, § 4186.

[61]Shannon's Code 1918, § 4188.

[62]Shannon's Code 1918, § 4218.

[63]Shannon's Code 1918, §§ 6760, 4201, and note 9. Notes 11 and 12 under Shannon's Code 1918, § 4200.

[64]Shannon's Code 1918, § 4185.

[65]Shannon's Code 1918, § 6460.

[66]Shannon's Code 1918, § 4187.

[67]Shannon's Code 1918, § 6760.

[68]Shannon's Code 1918, §§ 6757-6759.

[69]Warwick v. Cooper, 5 Sneed 660; Governor v. Rector, 10 Humph. 57. Parental consent in writing required by any one under eighteen. Shannon's Code 1918, § 4192a. See Public Acts 1919, ch. 156, p. 595.

[70]Harlan v. Harlan (Tex. Civ. App.), 125 S. W. 950; Berger v. Kirby (Tex.), 153 S. W. 1130; Grigsby v. Reib (Tex.), 153 S. W. 1124.

Marriages prohibited.

Marriages between lineal ascendants and descendants, brothers and sisters, uncles and nieces, aunts and nephews, marriage with ascendants or descendants of spouse, or with surviving spouse of parent or child,[71] and marriages of whites with colored persons[72] are prohibited.

Void marriages.

Marriages of whites with negroes are void.[73]

Voidable marriages.

Consent obtained by force or fraud, non-age, insanity at time of marriage, and physical incapacity renders the marriage voidable.[74]

Criminal marriages.

Prohibited marriages[75] and bigamous marriages[76] are declared criminal.

Marriage age limit.

The marriage age limit for males is sixteen years and for females fourteen years.[77]

§ 853. **Utah.**

Common-law marriages.

Common-law marriages are not recognized.[78]

Marriages prohibited.

Marriages between ascendants and descendants, brothers and sisters, uncles and nieces, aunts and nephews, and any persons more nearly related than the fourth degree according to the civil law,[79] bigamous marriages, marriages between whites and negroes or Mongolians, marriages of lunatics or idiotic persons, of persons afflicted with syphilis or gonorrhea, marriages at time of which male is under sixteen or female is under fourteen years of age, and marriages of divorced persons before a final judgment in case of appeal are prohibited.[80]

[71]Complete Stat. 1920, Crim. Code, arts. 487, 488. See Houston Oil Co. v. Griggs (Tex.), 181 S. W. 833.

[72]Complete Stat. 1920, Civil Code, art. 4613.

[73]Complete Stat. 1920, Civil Code, art. 4613.

[74]Complete Stat. 1920, Civil Code, art. 4630.

[75]Complete Stat. 1920, Crim. Code, arts. 483, 486.

[76]Complete Stat. 1920, Crim. Code, art. 481.

[77]Complete Stat. 1920, Civ. Code, art. 4609. See also (on parental consent) art. 4611.

[78]Comp. Laws 1917, § 2967.

[79]Comp. Laws 1917, § 2966.

[80]Comp. Laws 1917, § 2967.

Void marriages.

Incestuous marriages,[81] marriages of idiots, or lunatics, bigamous marriages, marriages by an unauthorized person, marriages under age of consent, marriages between a white person and a negro or Mongolian, or with one afflicted with syphilis or gonorrhea, are void.[82]

Voidable marriages.

Consent obtained by force or fraud, insanity at time of marriage, physical incapacity, female marrying under fourteen years of age or male under sixteen years of age, and male under twenty-one and female under eighteen years without consent of parents renders marriage voidable.[83]

Criminal marriages.

Marriages by false personation,[84] bigamous marriages,[85] and incestuous marriages[86] are declared criminal.

Marriage age limit.

The marriage age limit for males is sixteen years and for females fourteen years.[87]

§ 854. **Vermont.**

Common-law marriages.

Common-law marriages are not recognized.[88]

Marriages prohibited.

Marriages between ascendants and descendants, ascendants or descendants of wife or husband, brothers and sisters, uncles and nieces, aunts and nephews, marriages with ascendant or descendant of spouse or with surviving spouse of ascendant or descendant,[89] and marriages of persons infected with any venereal disease are prohibited.[90]

Void marriages.

Bigamous[91] and incestuous marriages[92] are void.

If any person residing or intending to reside in this state who is disqualified to marry under the laws of this state goes into another state and contracts a marriage, such marriage is void.

[81]Comp. Laws 1917, § 2966.

[82]Comp. Laws 1917, § 2967.

[83]Comp. Laws 1917, § 3007.

[84]Comp. Laws 1917, § 8340.

[85]Const. art. 3, § 1.

[86]Comp. Laws 1917, § 8089.

[87]Comp. Laws 1917, § 2967. See also Comp. Laws 1917, § 1190, requiring parental consent for males under twenty-one and females under eighteen not before married.

[88]Morrill v. Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411.

[89]Gen. Laws 1917, §§ 3510-3512.

[90]Gen. Laws 1917, § 7035.

[91]Gen. Laws 1917, § 3513.

[92]Gen. Laws 1917, §§ 3510-3512, 7012.

A marriage contracted in this state between persons, citizens of another state, whose marriage in that state would be invalid there, is null and void under the statutes of this state.[93]

Voidable marriages.

Marriages at time of which any mental or physical disability exists,[94] marriages induced by force or fraud, and marriages below age limit are voidable.[95]

Criminal marriages.

Marriages contracted within three years by libellee to other than libellant,[96] and bigamous[97] and incestuous marriages[98] are criminal.

Marriage age limit.

The marriage age limit for males is twenty-one years and for females eighteen years. These are the ages under which consent of parent or guardian is required.[99]

§ 855. Virginia.

Common-law marriages.

Common-law marriages are not recognized.[1]

Marriages prohibited.

Marriage between ascendants and descendants, brothers and sisters, uncles and nieces, aunts and nephews, marriage with surviving spouse of ascendant or descendant or with ascendant or descendant of spouse is prohibited.[2]

Void marriages.

Marriages between white persons and colored persons, bigamous marriages,[3] and marriages under age of consent and separation during nonage are void.[4]

Voidable marriages.

Void marriages may be so declared.[5] Marriages of persons within the prohibited degrees, and marriages of insane persons and persons physically incapable may be annulled.[6]

[93]Gen. Laws 1917, §§ 3514, 3515.

[94]This class of cases includes, under certain circumstances, persons afflicted with gonorrhea or syphilis. Gen. Laws 1917, §§ 3547, 7035.

[95]Gen. Laws 1917, §§ 3547, 3548.

[96]Gen. Laws 1917, §§ 3602, 3603.

[97]Gen. Laws 1917, § 7009.

[98]Gen. Laws 1917, § 7012.

[99]Gen. Laws 1917, §§28, 3795. As there is no further statutory provision, the common-law ages apply (fourteen for males and twelve for females). Fisher v. Bernard, 65 Vt. 663, 27 Atl. 316.

[1]See Offield v. Davis, 100 Va. 250, 40 S. E. 910.

[2]Code 1919, §§ 5084, 5085.

[3]Code 1919, §§ 5087, 4546.

[4]Code 1919, § 5090.

[5]Code 1919, §§ 5100, 5101, 5102.

[6]Code 1919, §§ 5087, 5089, 5090.

Criminal marriages.

Marriages through abduction,[7] bigamous[8] and incestuous marriages,[9] and marriages of whites with colored persons[10] are declared penal.

Marriage age limit.

The marriage age limit for males is fourteen years and for females twelve years.[11]

§ 856. **Washington.**

Common-law marriages.

Common-law marriages are apparently not recognized, though the decisions have been somewhat conflicting.[12]

Marriages prohibited.

Marriage between those nearer related than second cousins, between ascendants or descendants of wife or husband, wife or husband of ascendant or descendant, a bigamous marriage, marriage by persons afflicted with any contagious venereal disease, and by persons who are habitual drunkards, criminals and insane persons is prohibited.[13]

Voidable marriages.

Marriages contracted when consent is obtained by force or fraud and when either party is insane[14] and marriages by those under the age of consent, are voidable.

Void marriages.

Where there is doubt as to what facts render a marriage void the court will give its judgment upon application of either party for a decree of nullity.[15]

Criminal marriages.

All prohibited marriages are criminal.[16]

The marriage is forbidden of an habitual criminal, idiot, imbecile, hereditary epileptic or insane person, unless the woman is over forty-five, and of any person who is afflicted with a contagious venereal disease. Laws 1918, p. 473.

[7]Code 1919, § 4411.

[8]Code 1919, § 4538.

[9]Code 1919, § 4540.

[10]Code 1919, § 4546.

[11]Code 1919, § 5090. Consent of parent or guardian is required to validate marriage of all minors under twenty-one. Code 1919, § 5078.

[12]Meton v. State Industrial Dept., 104 Wash. 652, 177 Pac. 696; Potts v. Potts, 81 Wash. 27, 142 Pac. 448; In re Smith's Estate, 4 Wash. 702, 30 Pac. 1059, 17 L. R. A. 573.

[13]Remington's Comp. Stat. 1922, §§ 8438, 8439; Pierce's Code, § 1791.

[14]Remington's Comp. Stat. 1922, § 8449.

[15]Remington's Comp. Stat. 1922, § 983.

[16]Remington's Comp. Stat. 1922, §§ 2455, 8452.

Marriage age limit.

The marriage age limit for males is twenty-one years and for females eighteen years. These are the ages at which marriage may be contracted,[17] but apparently with the consent of parent or guardian marriage may be contracted earlier.[18]

§ 857. **West Virginia.**

Common-law marriages.

Common-law marriages are not recognized.[19]

Marriages prohibited.

Marriage between ascendants and descendants, brothers and sisters, uncles and nieces, aunts and nephews, marriage of a man with his stepmother, half-sister, uncle's wife, son's wife, wife's daughter, granddaughter, or stepdaughter or nephew's widow, or marriage of a woman with her corresponding male relatives, is prohibited.[20] This prohibition extends to marriages between first cousins and between double cousins.[21]

Voidable marriages.

Marriages below the age limit or at the time of which insanity or a physical disability exists, prohibited marriages, bigamous marriages, and marriages between a white person and a negro are voidable.[22]

Criminal marriages.

Bigamous[23] and incestuous marriages,[24] and marriages between white persons and negroes[25] are criminal.

Marriage age limit.

The marriage age limit for males is eighteen years and for females sixteen years.[26]

[17]Remington's Comp. Stat. 1922, § 8451.

[18]Remington's Comp. Stat. 1922, § 8451. It is unlawful to issue a license to a female under fifteen. Remington's Comp. Stat. 1922, § 8451. See also § 8449 and In re Hollopeter, 51 Wash. 41.

[19]Beverlin v. Beverlin, 29 W. Va. 732, 3 S. E. 36.

[20]Code 1913, §§ 3609, 3610. See Martin v. Martin, 54 W. Va. 301, 46 S. E. 120, 1 Ann. Cas. 612, construing W. Va. Code, Ch. 64, § § 1, 3, 4.

[21]Code 1913, § § 3609, 3610, as amended by Acts 1917, pp. 75, 76.

[22]Hogg's Code 1913, § 3636.

[23]Code 1913, § 5305.

[24]Code 1913, § 5306a.

[25]Code 1913, § 5311.

[26]Hogg's Code 1913, § 3637. See also § 3603 on parental consent (required for any one under twenty-one).

§ 858. **Wisconsin.**

Common-law marriages.

Common-law marriages are not recognized.[27]

Marriages prohibited.

Marriages between parties nearer of kin than second cousins whether of the half or of the whole blood, bigamous marriages,[28] marriages contracted within one year after divorce of either party unless authorized by the judge who granted divorce, and marriages by epileptics are prohibited.[29]

Void marriages.

Marriages of insane persons or idiots,[30] marriages of divorced persons within one year after decree,[31] and incestuous marriages and bigamous marriages[32] are void.

If any person residing or intending to continue to reside in this state who is disabled or prohibited from contracting a marriage in this state goes into another state and there marries, such marriage shall be null and void.

The marriage of a citizen of another state in which such marriage is prohibited and void, shall not be contracted in this state.[33]

Voidable marriages.

Marriages induced by fraud or force or contracted when either party is incapable of consent for want of age or understanding or when the parties do not live together after acquiring knowledge, freedom, or capacity, the marriage is voidable. When there exists insanity at time of marriage, nonage, impotency, consanguinity, or bigamy the marriage may be annulled.[34]

Criminal marriages.

Prohibited marriages are criminal.[35]

Marriage age limit.

The marriage age limit for males is eighteen years and for females fifteen years.[36]

§ 859. **Wyoming.**

Common-law marriages.

The status of such marriages is not clear. It has been held,

[27]Stat. 1921, § 2339n-1.

[28]Stat. 1921, § 2330.

[29]Stat. 1921, §§ 2330, 2374; Laws 1917, ch. 218. See also Laws 1909, ch. 323, and Laws 1911, ch. 239, and Dallman v. Dallman, 159 Wis. 480, 149 N. W. 137.

[30]Stat. 1921, §§ 2330, 4593m.

[31]Stat. 1921, §§ 2330, 2374.

[32]Stat. 1921, §§ 4577, 4582.

[33]Stat. 1921, § 2330m.

[34]Stat. 1921, § 2351.

[35]Stat. 1921, §§ 4577, 4582.

[36]Stat. 1921, § 2329.

however, that a ceremonial marriage without a license is valid, and that conduct as man and wife creates a presumption of marriage.[37]

Marriages prohibited.

Marriage between lineal ascendants and descendants, brothers and sisters, of half as well as of whole blood, uncles and nieces, aunts and nephews, and first cousins is prohibited.

This prohibition does not extend to any persons not related by consanguinity. Also marriages between a white person and either a negro, mulatto, Mongolian or Malay, are prohibited.[38]

Void marriages.

Marriage while a former husband or wife is living, marriage of an insane person or an idiot, and incestuous marriages are void.[39]

Voidable marriages.

Marriages below the age limit, and marriages procured by fraud or force are voidable. All these marriages may be ratified by voluntary cohabitation afterward.[40]

Criminal marriages.

Bigamous[41] and incestuous marriages[42] are criminal.

Marriage age limit.

The marriage age limit for males is eighteen years and for females sixteen years.[43]

[37]Connors v. Connors, 5 Wyo. 433, 40 Pac. 966; Weidenhoft v. Primm, 16 Wyo. 340, 94 Pac. 453.

[38]Comp. Stat. 1920, § § 4983, 4972.

[39]Comp. Stat. 1920, § 4983.

[40]Comp. Stat. 1920, § 4984.

[41]Comp. Stat. 1920, § 7193.

[42]Comp. Stat. 1920, § 7194.

[43]Comp. Stat. 1920, § 4956. Consent of parent and guardian is necessary to validate the marriage of minors under twenty-one years. Comp. Stat. 1920, § 4959.

CHAPTER 50

SYNOPSIS OF THE DIVORCE STATUTES OF THE STATES AND TERRITORIES

Section

865. Alabama.
866. Alaska.
867. Arizona.
868. Arkansas.
869. California.
870. Colorado.
871. Connecticut.
872. Cuba.
873. Delaware.
874. District of Columbia.
875. Florida.
876. Georgia.
877. Hawaii.
878. Idaho.
879. Illinois.
880. Indian Territory.
881. Indiana.
882. Iowa.
883. Kansas.
884. Kentucky.
885. Louisiana.
886. Maine.
887. Maryland.
888. Massachusetts.
889. Michigan.
890. Minnesota.
891. Mississippi.
892. Missouri.
893. Montana.
894. Nebraska.
895. Nevada.
896. New Hampshire.
897. New Jersey.
898. New Mexico.

Section
899. New York.
900. North Carolina.
901. North Dakota.
902. Ohio.
903. Oklahoma.
904. Oregon.
905. Panama.
906. Pennsylvania.
907. Philippine Islands.
908. Porto Rico.
909. Rhode Island.
910. South Carolina.
911. South Dakota.
912. Tennessee.
913. Texas.
914. Utah.
915. Vermont.
916. Virginia.
917. Washington.
918. West Virginia.
919. Wisconsin.
920. Wyoming.

§ 865. **Alabama.**

Grounds for absolute divorce.

Absolute divorce may be granted for adultery, crime against nature, whether with mankind or beast, either before or after marriage, imprisonment for two years in the penitentiary, for voluntary abandonment for two years,[1] for habitual drunkenness after marriage or addiction to narcotic drugs,[2] for incurable impotency at the time of marriage,[3] and for pregnancy of wife before marriage, without knowledge or agency of husband.[4]

Divorce for pregnancy at time of marriage bastardizes issue.[5]

[1]Civil Code 1907, § 3793. See Winkles v. Powell, 173 Ala. 46, 55 So. 536; Dabbs v. Dabbs, 196 Ala. 164, 71 So. 696.

[2]Gen. Acts 1911, p. 631. See MacMahon v. MacMahon, 170 Ala. 338, 54 So. 165.

[3]Civil Code 1907, § 3793. See Bennett v. Bennett, 169 Ala. 618, 53 So. 986, L. R. A. 1916C, 693; Bass v. Bass, 165 Ala. 223, 51 So. 753.

[4]Civil Code 1907, § 3794.

[5]Civil Code 1907, § 3807.

Cruelty attended by actual violence which endangers life or health, or where there is reasonable apprehension of such danger will justify absolute divorce.[6]

When wife has lived separate and apart from bed and board of husband for five years and without support for two years next preceding the bill for divorce, and has been bona fide resident of the state during such period the court may grant a divorce.[7] Insanity is a sufficient reason for divorce when the party has been confined in an asylum for a period of twenty successive years after marriage, and where such party is incurably insane at time of filing of bill.[8]

Grounds for partial divorce.

Legal separations are granted for cruelty by either party, or any cause that would justify an absolute decree of divorce at the option of the plaintiff.[9]

Nonage.

Where the male is under seventeen[10] and female is under fourteen the marriage may be annulled.[11]

Such marriages are voidable and divorce is the proper remedy, but if the plaintiff cohabits with the defendant after arriving at lawful age, the marriage is ratified.[12]

Residence.

If the defendant is a non-resident, one year's residence must be alleged and proved on behalf of the plaintiff,[13] except in case of divorce for abandonment, where three years' residence on the part of the plaintiff must be alleged and proved.[14]

Jurisdiction.

Chancery courts and city courts with equity powers have jurisdiction in all cases of divorce and suits for alimony.[15] But this

[6]Civil Code 1907, § 3795, as amended by Gen. Laws 1915, p. 370. See also Morrison v. Morrison, 165 Ala. 191, 51 So. 743. On Duress, see Bostick v. State, 1 Ala. App. 255, 55 So. 260; Fraud, Johnson v. Johnson, 176 Ala. 449, 58 So. 418, 39 L. R. A. (N. S.) 518, Ann. Cas. 1915A, 828.

[7]Civil Code 1907, § 3795, as amended by Laws 1915, p. 370; Laws 1919, p. 878. See Barrington v. Barrington, 200 Ala. 315, 76 So. 81.

[8]Civil Code 1907, § 3793, as amended by Laws 1911, p. 631, and Laws 1919, p. 839.

[9]Civil Code 1907, § 3809.

[10]Civil Code 1907, § 4879. See White v. Hill, 176 Ala. 480, 58 So. 444.

[11]Owen v. Coffey, 201 Ala. 531, 78 So. 885.

[12]Civil Code 1907, § 4879 and cases.

[13]Civil Code 1907, § 3802. See Wright v. Wright, 200 Ala. 489, 76 So. 431.

[14]Civil Code 1907, § 3800.

[15]Civil Code 1907, § 3801.

jurisdiction is purely statutory and not of the general jurisdiction of equity courts.[16]

Service.

Service of summons may be made personally or by publication.[17]

Evidence.

No decree can be rendered upon a confession. Where both parties have committed adultery or where one party is guilty with consent of the other for the purpose of obtaining a divorce, or where adultery has been condoned, no divorce will be granted.[18]

After decree pro confesso has been taken, the court, upon written request of complainant, shall render a decree forthwith without the necessity of notice to the defendant.[19]

Alimony.

On granting a decree, alimony must be allowed where the wife has no sufficient estate of her own, but the amount is dependent to some degree upon her guilt or innocence.[20] Alimony must also be allowed during pendency of libel.[21]

A divorce deprives the husband of any control over the wife's separate estate.[22]

An absolute divorce bars dower.[23]

Care and custody of children.

The court may decree the care and custody of the children to either party.[24]

Remarriage.

Remarriage of parties may be permitted by decree of court[25] or by order on petition when the decree is silent,[26] but not within sixty days or during pendency of an appeal.[27]

§ 866. **Alaska.**

Grounds for declaring marriage void.

Marriages prohibited by law on account of consanguinity or

[16]Martin v. Martin, 173 Ala. 106, 55 So. 632.

[17]Civil Code 1907, § 3796.

[18]Civil Code 1907, § 3799.

[19]Laws 1915, p. 358.

[20]Civil Code 1907, §§ 3804, 3805, 3806.

[21]Civil Code 1907, § 3803. But respondent may introduce evidence to disprove marriage and defeat allowance of alimony. Ex parte Jones, 168 Ala. 183, 53 So. 261.

[22]Civil Code 1907, § 4486.

[23]Civil Code 1907, § 3816.

[24]Civil Code 1907, § 3808. See Coleman v. Coleman, 198 Ala. 225, 73 So. 473.

[25]Ex parte Edwards, 183 Ala. 659, 62 So. 775.

[26]Civil Code 1907, § 3796.

[27]Civil Code 1907, § 3811.

because former husband or wife is living, are void whether so declared or not. Where there is want of legal age or sufficient understanding; or when consent is obtained by force or fraud marriages may be declared void.[28]

Action to declare marriage valid.

When either party brings suit to declare marriage void as provided by statute[29] the other party may have the same declared valid,[30] and a judgment for either party shall be final.[31]

Grounds for dissolution of marriage.

Impotency, adultery, conviction of felony, wilful desertion for two years, cruel and inhuman treatment calculated to impair health or endanger life, and habitual gross drunkenness contracted since marriage and continuing for one year prior to commencement of action are sufficient grounds of dissolution of marriage.[32]

Residence.

In an action to declare marriage void the plaintiff must simply be an inhabitant at the commencement of the action, when marriage has been solemnized in the district. Otherwise he must have been an inhabitant for three years. In an action for the dissolution of the marriage contract the plaintiff must be an inhabitant of the district at the commencement of the action and for two years prior thereto, without regard to where the marriage took place or the cause of action arose.[33]

Pleas in bar.

In action for dissolution of marriage on account of adultery, the defendant may admit the adultery and show in bar that the act was committed by procurement or connivance of plaintiff, that the act was forgiven expressly or impliedly by voluntary cohabitation of parties after knowledge thereof, that the plaintiff is guilty of adultery, or that the action was not commenced within one year after discovery of act.[34]

Where the action is for conviction of felony, desertion, cruelty or drunkenness the defendant may admit the charge but

[28]Comp. Laws 1913, §§ 1294, 1295.

[29]Comp. Laws 1913, §§ 1294, 1295.

[30]Comp. Laws 1913, § 1298.

[31]Comp. Laws 1913, §§ 1296, 1298.

[32]Comp. Laws 1913, § 1299. On a false charge of adultery as cruelty, see Olsen v. Olsen, 5 Alaska 459; Day v. Day, 5 Alaska 584.

[33]Comp. Laws 1913, §§ 1300, 1301. The non-allegation of two years' residence is fatal to the jurisdiction of the court. Anderson v. Anderson, 5 Alaska 138.

[34]Comp. Laws 1913, § 1302.

show in bar that the act was by procurement of plaintiff or that it was forgiven, and where the action is for conviction of felony that the action was not begun within one year from date of conviction.[35]

Alimony.

Alimony will be allowed in the discretion of the court.[36]

Care and custody of children.

The court, or judge, in his discretion may order husband to pay for the care, custody and maintenance of minor children during the pendency of the action and also for their future care.[37]

Name of wife.

The court has power to change wife's name when she is not party at fault.[38]

Remarriage.

Remarriage is not allowed until appeal is determined.[39]

Modification of decree.

Either party may have a final decree for divorce modified as to alimony or custody or care of children upon motion and notice.[40]

§ 867. **Arizona.**

Grounds for absolute divorce.

Absolute divorce will be granted for adultery, conviction of a felony, cruelty, wilful desertion for one year, for physical incapacity existing at time of marriage, for neglect to provide for wife for one year, for pregnancy by one other than the husband and for habitual intemperance.[41]

Grounds for annulment of marriage.

Any impediment that renders contract void will be grounds for annulment of the marriage.[42]

Grounds for limited divorce.

Any cause which is made by law ground for the granting of absolute divorce and such conduct on part of husband toward his wife as may render it unsafe and improper for her to cohabit

[35]Comp. Laws 1913, § 1302.

[36]Comp. Laws 1913, §§ 1303, 1304.

[37]Comp. Laws 1913, §§ 1303, 1304.

[38]Comp. Laws 1913, § 1304 (6).

[39]Comp. Laws 1913, § 1306. On service by publication, see McFarlane v. Cornelius, 43 Ore. 513, 73 Pac. 325, 74 Pac. 468.

[40]Comp. Laws 1913, § 1305.

[41]Rev. Stat. 1913, § 3859. See Sneed v. Sneed, 14 Ariz. 17, 123 Pac. 312, 40 L. R. A. (N. S.) 99.

[42]Rev. Stat. 1913, § 3858. See McCord v. McCord, 13 Ariz. 377, 114 Pac. 968.

with him will be sufficient to warrant a decree for limited divorce.[43]

Pleadings in bar.

Recrimination, connivance and collusion are good defenses in bar.[44]

Nonage.

Where male is under eighteen and female under fourteen the marriage may be annulled. But if the parties cohabit after arriving at lawful age, the marriage is ratified by their own act.[45]

Residence.

Plaintiff must have resided one year in the state and six months in the county in order to bring suit for divorce.[46]

Jurisdiction.

The superior court has jurisdiction to hear and determine all cases for divorce and suits for alimony.[47]

Service.

Service of summons may be made personally or by publication if the defendant is out of the state.[48]

Evidence.

Confessions and declarations of parties must be corroborated; and no decree of divorce will be given by default.[49]

Alimony.

Alimony and counsel fees may be allowed pendente lite,[50] and upon final decree.[51]

A division of community property may be allowed by the court.[52]

Remarriage.

Remarriage will be permitted after one year unless judgment is appealed from.[53]

Name of wife.

Wife may resume her maiden name after divorce.[54]

[43]Rev. Stat. 1913, § 3875.

[44]Rev. Stat. 1913, § 3863.

[45]Rev. Stat. 1913, § 3832. See also amendment to this section of Code by Laws 1919, p. 18.

[46]Rev. Stat. 1913, § 3860. See Sneed v. Sneed, 14 Ariz. 17, 123 Pac. 312, 40 L. R. A. (N. S.) 99.

[47]Rev. Stat. 1913, § § 338, 3858.

[48]Rev. Stat. 1901, § § 434, 447.

[49]Rev. Stat. 1913, § 3861.

[50]Rev. Stat. 1913, § § 3867, 3876.

[51]Rev. Stat. 1913, § 3869.

[52]Rev. Stat. 1913, § 3862, as amended by Laws 1919, ch. 65.

[53]Rev. Stat. 1913, § 3864, as amended by Laws 1917, ch. 54.

[54]Rev. Stat. 1913, § 3873.

§ 868. **Arkansas.**

Grounds for absolute divorce.

The court will grant a divorce for adultery,[55] for conviction of felony or infamous crime, for cruel or barbarous treatment, or such personal indignity as renders the plaintiff's condition intolerable,[56] for habitual drunkenness, where former husband or wife is living or where either party at time of marriage was and still is impotent.[57]

Grounds for partial divorce.

The court may grant a legal separation for any cause that would justify an absolute decree at its discretion or the option of the plaintiff.[58]

Void marriages.

Consanguinity and miscegenation render a marriage void without legal proceedings.[59]

Nonage.

A marriage contracted between parties either of whom has not reached the legal age of consent may be annulled.[60]

Residence.

The plaintiff must prove a residence in the state for one year prior to commencement of suit, that the cause of divorce existed or occurred in the state, or if out of the state, either that it was a legal cause for divorce in the state where it occurred or existed, or that plaintiff's residence was then in the state, and that the cause of divorce occurred or existed within five years before the commencement of suit.[61]

Jurisdiction.

Chancery courts have jurisdiction of all suits for divorce and alimony.[62]

[55]Crawf. & Moses 1921, § 3500. See Simpkins v. Simpkins, 136 Ark. 588, 207 S. W. 28; Phillips v. Phillips, 102 Ark. 679, 144 S. W. 914. See also Corney v. Corney, 97 Ark. 117, 133 S. W. 813; Poe v. Poe, 93 Ark. 426, 124 S. W. 1029.

[56]Crawf. & Moses 1921, § 3500. See Koehler v. Koehler, 137 Ark. 302, 209 S. W. 283. See also Wheeler v. Wheeler, 99 Ark. 608, 119 S. W. 1113; Wilson v. Wilson, 97 Ark. 643, 134 S. W. 963.

[57]Crawf. & Moses 1921, § 3500. See Goset v. Goset, 112 Ark. 47, 164 S. W. 759.

[58]Crawf. & Moses 1921, § 3500.

[59]Crawf. & Moses 1921, § 7038.

[60]Crawf. & Moses 1921, § 7037.

[61]Crawf. & Moses 1921, § 3505. See Vanness v. Vanness, 128 Ark. 543, 194 S. W. 498.

[62]Crawf. & Moses 1921, § 3500.

Pleas in bar.

Collusion, condonation and recrimination are made special statutory defenses.[63]

Evidence.

The complaint is not taken as true for failure of defendant to answer.[64]

Alimony.

Alimony is allowed upon divorce at wife's instance. She is entitled to one-third of husband's personalty, absolutely, and to one-third of his lands for life. On final judgment each party is restored to undisposed of property which he or she brought into the marriage.[65]

Alimony pendente lite is also allowed.[66]

Where the husband secures divorce through fault of the wife she is not entitled to an allowance.[67]

Name of wife.

The court may restore maiden name to wife.[68]

Remarriage.

Remarriage is permitted after divorce. Where the husband or wife resides beyond the limits of the United States for five successive years without being known by the spouse to be living during such time, a subsequent marriage by the domicil spouse is valid.[69]

§ 869. California.

Grounds for absolute divorce.

The court will grant a divorce on the following grounds: adultery, conviction of felony, extreme cruelty by infliction of grievous bodily injury or grievous mental suffering, wilful desertion for one year, habitual intemperance for one year, and wilful neglect for one year.[70]

[63]Crawf. & Moses 1921, § 3507.

[64]Crawf. & Moses 1921, § 3504.

[65]Crawf. & Moses 1921, §§ 3508, 3509, 3510, 3511. See Poe v. Poe, 93 Ark. 426, 124 S. W. 1029. See also Helmert, Ex parte, 103 Ark. 571, 147 S. W. 1143.

[66]Crawf. & Moses 1921, § 3510.

[67]Crawf. & Moses 1921, § 3511.

[68]Crawf. & Moses 1921, § 3512.

[69]Crawf. & Moses 1921, § 2607.

[70]Deering's Civil Code 1915, §§ 92-105, 106, 107, 124. See also Bibb v. Bibb, 39 Cal. App. 406, 179 Pac. 214; Hutching v. Hutching (Cal.), 188 Pac. 1002; Blanchard v. Blanchard, 10 Cal. App. 203, 101 Pac. 536; Grierson v. Grierson, 156 Cal. 434, 105 Pac. 120.

Grounds for annulment of marriage.

The court may annul the marriage where a former husband or wife is living, or where marriage was under age of consent. Force or fraud is also ground for annulment. An action for force or fraud must be commenced within four years after marriage, but if the parties have cohabited after the fraud was discovered, it is a bar.[71]

Where there is an incurable physical incapacity action for annulment must be begun within four years after marriage.[72]

A marriage may be also annulled for insanity, unless the marriage has been ratified by cohabitation after recovery.[73]

Grounds for partial divorce.

In an action for divorce though the divorce is denied the court may decree support and maintenance of the wife and children.[74]

Nonage.

Where marriage is contracted under the age of consent it may be annulled. But the marriage may be ratified by cohabitation after arriving at lawful age, and such ratification is an absolute bar to annulment for this cause.

An action must be begun within four years after reaching age of consent or by parent or guardian before party has reached that age.[75]

Residence.

A residence of one year in the state and three months in the county is required to entitle a party to bring suit for divorce.[76]

Jurisdiction.

The Superior court has jurisdiction in all suits for divorce.[77]

[71]Deering's Civil Code 1915, § § 82, 84; Millar v. Millar, 175 Cal. 797, 167 Pac. 394, L. R. A. 1918B, 415. See also Gondouin v. Gondouin, 14 Cal. App. 285, 111 Pac. 756.

[72]Deering's Civil Code 1915, § § 82, 83. See Coats v. Coats, 160 Cal. 671, 118 Pac. 441, 36 L. R. A. (N. S.) 844; Hobbs v. Hobbs, 10 Cal. App. 97, 101 Pac. 22.

[73]Deering's Civil Code 1915, § § 82, 83. See also Dunphy v. Dunphy, 161 Cal. 87, 118 Pac. 445; Dunphy v. Dunphy, 161 Cal. 380, 119 Pac. 512, 38 L. R. A. (N. S.) 818, Ann. Cas. 1913B, 1230.

[74]Deering's Civil Code 1915, § 136. See Hodges v. Hodges, 22 N. Mex. 192, 159 Pac. 1007.

[75]Deering's Civil Code 1915, § § 56, 82, 83. See In re Ambrose, 170 Cal. 160, 149 Pac. 43; People v. Souleotes, 26 Cal. App. 309, 146 Pac. 903.

[76]Deering's Civil Code 1915, § 128; Pol. Code, § 52. See Smilie v. Smilie, 24 Cal. App. 420, 141 Pac. 829.

[77]Deering's Civil Code 1915, § 78.

Service.

Service of summons may be made personally or by publication once a week as the court may order, but not less than two months.[78]

Evidence.

Corroborative proof is always required.[79] A confession of adultery is not sufficient.[80]

Alimony.

Alimony will be allowed to wife and means for maintenance of the children when judgment of divorce is denied, pendente lite, or upon decree of divorce.[81]

Remarriage.

Final judgment will not be entered until after one year, when the court may permit remarriage of the parties.[82]

§ 870. **Colorado.**

Grounds for absolute divorce.

Absolute divorce will be allowed upon the following grounds: adultery, conviction of a felony, extreme cruelty or acts causing mental suffering, desertion for one year without reasonable cause, habitual drunkenness for one year, former husband or wife living, impotency at time of marriage or becoming impotent after marriage in consequence of criminal or immoral conduct, and neglect of husband, if in good health, to provide suitable support and maintenance for one year.[83]

Void marriages.

Consanguinity and affinity render a marriage void without legal process.[84]

Residence.

The plaintiff must have been a bona fide resident of the state for one year, except where act is committed in state or one of the parties resided in state at the time. Residence must be proved by at least one other than plaintiff.[85]

[78]Deering's Civil Code 1915, §§ 411-413.

[79]Deering's Civil Code 1915, § 130. See MacDonald v. MacDonald, 155 Cal. 665, 102 Pac. 927.

[80]Deering's Civil Code 1915, § 2079.

[81]Deering's Civil Code 1915, §§ 136-143. See Dunphy v. Dunphy, 161 Cal. 87, 118 Pac. 445.

[82]Deering's Civil Code 1915, § 132. See Elliott's Estate, 165 Cal. 339, 132 Pac. 439.

[83]Laws 1917, ch. 65, § 1. See Sedgwick v. Sedgwick, 50 Colo. 164, 114 Pac. 488, Ann. Cas. 1912C, 653.

[84]Mills' Ann. Stat. 1912, § 1897.

[85]Laws 1917, ch. 65, § 5. See Sedgwick v. Sedgwick, 50 Colo. 164, 114 Pac. 488, Ann. Cas. 1912C, 653.

Jurisdiction.

District court and county courts have jurisdiction in suits for divorce when alimony asked for does not exceed two thousand dollars.[86]

Service.

Summons may be by personal service or by publication. If by publication defendant has fifty days after the four weeks' publication to answer and fifty days after personal service out of the state.[87]

Trial.

No default will be accepted by the court if the defendant fails to appear. The court may appoint an attorney to defend. Every case is tried by a jury.[88]

Alimony.

Temporary and permanent alimony will be decreed to the wife by the court.[89]

Remarriage.

Remarriage is permitted, but not until one year after final decree.[90]

§ 871. Connecticut.

Grounds for absolute divorce.

A divorce may be granted on following grounds: adultery, sentence to imprisonment for life or for any infamous crime involving a violation of conjugal duty and punishable by imprisonment in the state's prison, intolerable cruelty, wilful desertion for three years with total neglect of duty, for seven years' absence, habitual intemperance, and where contract is fraudulent.[91]

Grounds for partial divorce.

No provision is made by statute for separate maintenance, where absolute divorce is not decreed, except in case of habitual drunkenness of the wife.[92]

[86]Laws 1917, ch. 65, § 2. See Smith v. Smith, 61 Colo. 71, 156 Pac. 148.

[87]Laws 1917, ch. 65, § § 3, 4.

[88]Laws 1917, ch. 65, § § 8, 9.

[89]Laws 1917, ch. 65, § 7. See Vigil v. Vigil, 49 Colo. 156, 111 Pac. 833, 31 L. R. A. (N. S.) 578.

[90]Laws 1917, ch. 65, § 10, and amendment Laws 1921, ch. 107. See Griswold v. Griswold, 23 Colo. App. 365, 129 Pac. 560; Loth v. Loth's Estate, 54 Colo. 200, 129 Pac. 827.

[91]Gen. Stat. 1918, § 5280. On fraudulent contract, see Lyman v. Lyman, 90 Conn. 399, 97 Atl. 312. On desertion, see Todd v. Todd, 84 Conn. 591, 80 Atl. 717.

[92]Gen. Stat. 1918, § 5279.

Nonage.

A marriage contracted between parties either of whom is a minor may be annulled.[93]

Residence.

Three years' residence in the state is required unless the cause has arisen subsequently to removal into the state or the cause is habitual intemperance or intolerable cruelty and the marriage was celebrated while the parties were domiciled in the state, in which case residence is sufficient.[94]

Jurisdiction.

The superior court has exclusive jurisdiction.[95]

Service.

Service of summons may be made personally or in such manner as the court may deem reasonable.[96]

Evidence.

If no defense is made the case will not be heard until ninety days after the return day of the writ.[97]

Alimony.

Alimony is allowed and the court may assign to the wife a portion of her husband's estate, the amount to be determined by court from the circumstances.[98]

Care and custody of children.

The court may make such decree concerning the care and custody of the children as is proper.[99]

Name of wife.

The court in its discretion may allow the wife to resume a former or her maiden name.[1]

Remarriage.

Remarriage of the parties is permitted after final decree.[2]

§ 872. **Cuba.**

Causes for divorce.

Adultery on part of wife in every case and on the part of the husband when public scandal or disgrace of the wife results therefrom, personal violence or grave insults, violence by husband to wife to force her to change her religion, proposal of hus-

[93]Gen. Stat. 1918, § 5263.
[94]Gen. Stat. 1918, § 5286.
[95]Gen. Stat. 1918, § 5280.
[96]Gen. Stat. 1918, § 5282.
[97]Gen. Stat. 1918, § 5285.
[98]Gen. Stat. 1918, § 5287. See Olmstead v. Olmstead, 85 Conn. 478, 83 Atl. 628.
[99]Gen. Stat. 1918, §§ 5289-5291.
[1]Gen. Stat. 1918, § 5287.
[2]Gen. Stat. 1918, § 5281.

band to prostitute wife, attempt of husband or wife to corrupt sons or prostitute daughters, and condemnation of spouse to perpetual chains or hard labor are grounds for absolute divorce.[3]

Annulment of marriage.

Lack of reason, impotency, priests bound by pledge of chastity unless they have proper canonical dispensation, bigamy, consanguinity and affinity, marriage contracted by error as to the person, or by compulsion or intimidation, marriage contracted by abductor with abducted while she is in his power, and where marriage is not celebrated by municipal judge or person who should act in his place, and without presence of proper witnesses may be causes for annulment of marriage.[4]

Nonage.

The marriage of a male under fourteen years of age or a female under twelve years of age may be annulled.[5]

Jurisdiction.

Civil tribunals have jurisdiction of all suits for divorce.[6]

Custody of children.

The child or children may be left to remain with the innocent spouse.[7]

§ 873. **Delaware.**

Grounds for absolute divorce.

Divorce may be granted for: adultery,[8] conviction of felony either in or out of the state after marriage, of a crime by the laws of the state deemed a felony, whether such crime shall be perpetrated before or after such marriage, extreme cruelty,[9] desertion for three years,[10] habitual drunkenness,[11] fraud, impotency of either party at time of marriage, and for wilful neglect for three years.[12]

[3]Civil Code 1899, art. 104, says that divorce only produces the suspension of the life in common of the spouses.

[4]Civil Code 1899, §§ 83, 84, 100, 101.

[5]Civil Code 1899, art. 101.

[6]Civil Code 1899, art. 103.

[7]Civil Code 1899, art. 73.

[8]Rev. Code 1915, ch. 86, § 3. See Bancroft v. Bancroft, 4 Boyce (Del.) 9, 85 Atl. 561.

[9]Rev. Code 1915, ch. 86, §§ 1-3. See McClenahan v. McClenahan, 2 Boyce (Del.) 599, 80 Atl. 677.

[10]Rev. Code 1915, ch. 86, §§ 1-3. See Ward v. Ward, 7 Penn. (Del.) 364, 75 Atl. 611.

[11]Rev. Code 1915, ch. 86, §§ 1-3. Does not apply to habitual use of drugs though producing same effect. Smith v. Smith, 7 Boyce (Del.) 283, 105 Atl. 833.

[12]Rev. Code 1915, ch. 86, §§ 1-3.

Grounds for annulment of marriage.

A marriage may be annulled on grounds of consanguinity and affinity, insanity, bigamy, or miscegenation.[13]

Grounds for partial divorce.

An absolute divorce, or a divorce from bed and board, at the discretion of the court may be decreed for the procurement of the marriage by fraud, for wilful neglect on the part of the husband for three years to provide for his wife the necessities of life suitable for her condition, or for want of age.[14]

Nonage.

Marriage of parties under age of consent may be annulled. Such marriages may be ratified by cohabitation after the parties have arrived at legal age, and such ratification is an absolute defense to divorce.[15]

Residence.

The residence must be actual and bona fide at the time of bringing the libel in all actions. Two years' residence is required in all actions based on any grounds except adultery and bigamy when committed within the state, and no divorce will be allowed for a cause committed without the state unless it was there a ground for the same relief asked for.[16]

Jurisdiction.

Superior courts have jurisdiction to try and determine the issues in petitions of divorce and to grant the final decree.[17]

Service.

Summons on defendant may be had by personal service or by publication. If by publication the court of chancery orders the sheriff to publish for one month and personal notice is required where practical.[18]

Evidence.

Confessions are not admissible unless corroborated.[19]

No divorce is granted where the cause arose in another state

[13]Rev. Code 1915, ch. 86, § 1. See State v. Collins, 6 Boyce (Del.) 260, 99 Atl. 87.

[14]Rev. Code 1915, ch. 86, § 4.

[15]Rev. Code 1915, ch. 86, § 3.

[16]Rev. Code 1915, ch. 86, §§ 9-11. See Cohen v. Cohen, 3 Boyce (Del.) 361, 84 Atl. 122; Sindowski v. Sindowski, 2 Boyce (Del.) 547, 84 Atl. 805.

[17]Rev. Code 1915, ch. 86, § 6. See Pleasanton v. Pleasanton, 7 Boyce (Del.) 292, 105 Atl. 836.

[18]Rev. Code 1915, ch. 86, §§ 7-10. See Doswell v. Doswell, 7 Boyce (Del.) 98, 103 Atl. 17.

[19]Rev. Code 1915, ch. 86, § 20.

and the petitioner was a nonresident at the time, unless for such causes as are recognized under the laws of such other state.[20]

No decree obtained in another state by an inhabitant of Delaware for a cause not good in Delaware will be recognized.[21]

Alimony.

Alimony will be allowed to the wife pendente lite or upon decree of absolute divorce for husband's aggression.[22]

Name of wife.

The court in its discretion may allow the wife to assume her maiden name or that of a deceased husband.[23]

Remarriage.

Remarriage is allowed, but it is probable that a party found guilty of adultery can not marry a co-respondent.[24]

Final judgment is rendered after one year from decree nisi.[25]

§ 874. District of Columbia.

Grounds for absolute divorce.

Adultery will be a ground for absolute divorce. The co-respondent must be made a party defendant and served with process.[26]

Grounds for annulment of marriage.

Marriage contracts may be declared void: Where either party had former husband or wife living at the time of the marriage, unless the former marriage had been dissolved, where the marriage was contracted during the lunacy of either party, unless there has been voluntary cohabitation after lunacy, where the marriage was brought about by fraud or coercion, where either party was matrimonially incapacitated and has continued so ever since, or where either party had not arrived at age of legal consent to contract marriage, unless there has been a voluntary cohabitation after becoming of legal age, but in such cases only as to party not capable of consenting.[27]

Grounds for partial divorce.

Drunkenness, cruelty, desertion, or consanguinity are grounds for annulment of marriage.[28]

[20]Rev. Code 1915, ch. 86, §§ 9, 11.
[21]Rev. Code 1915, ch. 86, § 29.
[22]Rev. Code 1915, ch. 86, §§ 12-16.
[23]Rev. Code 1915, ch. 86, § 25.
[24]Rev. Code 1893, p. 598.
[25]Rev. Code 1915, ch. 86, § 23.
[26]Code 1911, §§ 966, 983.
[27]Code 1911, § 966. See also Williamson v. Williamson, 34 App. D. C. 536; Alexander v. Alexander, 36 App. D. C. 78.
[28]Code 1911, §§ 966, 1283.

Nonage.

Where male is under twenty-one years of age and female under eighteen the marriage may be annulled. But marriages under these ages may take place with the consent of the parents or guardians, which consent validates them.[29]

Residence.

Applicant must have been bona fide resident of district for three years before application is made.[30]

Jurisdiction.

The Supreme court of the District has jurisdiction to hear and determine the issues upon petition for divorce and to grant the final decree.[31]

Service.

Summons is issued for personal service and if returned not found, upon affidavit that the defendant is a non-resident or has been absent from the district for six months, the court may order publication three weeks before the term.[32]

Evidence.

No decree can be rendered on default; and admissions of answer must be proved by other evidence.[33]

Alimony.

Alimony temporary and permanent may be granted, and the court may retain the right of dower.[34]

Remarriage.

The innocent party only can remarry.[35]

§ 875. Florida.

Grounds for absolute divorce.

Divorce may be granted for: Adultery, consanguinity, extreme cruelty, habitual indulgence of violent and ungovernable temper, wilful, obstinate and continued desertion for the period of one year, habitual intemperance, impotency, divorce obtained in another state or country, and when another spouse is living at time of marriage.[36]

[29]Code 1911, § 1292.

[30]Code 1911, § 971.

[31]Code 1911, § 963.

[32]Code 1911, §§ 105, 108, 186, 231, 1536.

[33]Code 1911, § 964.

[34]Code 1911, §§ 975, 976.

[35]Code 1911, § 966.

[36]Rev. Gen. Stat. 1920, § 3191. See also Powell v. Powell, 77 Fla. 181, 81 So. 105; Wetherington v. Wetherington, 57 Fla. 551, 49 So. 549; Hooker v. Hooker, 65 Fla. 53, 61 So. 121, 43 L. R. A. (N. S.) 964; Prall v. Prall, 56 Fla. 521, 47 So. 916; Prall v. Prall, 58 Fla. 496, 50 So. 867, 26 L.

Grounds for partial divorce.

The statutes require all divorces to be a vinculo, but a wife may bring action for alimony on the ground of desertion for one year, or for adultery, cruel and inhuman treatment, or for any other cause for divorce. If the husband is able to maintain the wife and children and refuses, the wife may bring suit in chancery for maintenance.[37]

Void marriages.

Marriages are void without legal process when contracted between whites and blacks, or Indians.[38]

Marriages contracted while either former husband or wife is still living are absolutely void and the offspring, if any, are illegitimate.[39]

Nonage.

The legal age of consent, for both parties is twenty-one years. Under these ages consent of parent or guardian in writing under oath is necessary for the granting of a license unless the party has been previously married.[40]

Residence.

The complainant must have resided in the state two years. But where the defendant has been guilty of adultery in the state, any citizen of the state may obtain a divorce at any time, and the two years' residence shall not be required of complainant.[41]

Jurisdiction.

Circuit court in chancery has jurisdiction to hear and determine the issues in all divorce cases.[42]

Service.

Service of summons may be made personally or, in case of a nonresident defendant, by publication, four weeks for other state or eight weeks for other country.[43]

Alimony.

Alimony is allowed the wife while the suit is pending and upon decree of divorce.[44]

R. A. (N. S.) 577; Hudson v. Hudson, 59 Fla. 529, 51 So. 857, 29 L. R. A. (N. S.) 614, 138 Am. St. 141, 21 Ann. Cas. 278.

[37]Rev. Gen. Stat. 1920, §§ 3190, 3196, 3197.

[38]Rev. Gen. Stat. 1920, § 3938. See Whittington v. McCaskill, 65 Fla. 162, 61 So. 236, 44 L. R. A. (N. S.) 630, Ann. Cas. 1915B, 1001.

[39]Rev. Gen. Stat. 1920, § 3192.

[40]Rev. Gen. Stat. 1920, § 3933.

[41]Rev. Gen. Stat. 1920, § 3189. See Prall v. Prall, 58 Fla. 496, 50 So. 867, 26 L. R. A. (N. S.) 577.

[42]Rev. Gen. Stat. 1920, § 3188.

[43]Rev. Gen. Stat. 1920, § 3193. See Taylor v. Taylor, 64 Fla. 521, 60 So. 116.

[44]Rev. Gen. Stat. 1920, §§ 3194,

Care and custody of children.

The court may make an order for the care and custody of the children.[45]

Remarriage.

Remarriage of the parties is not prohibited by statute.

§ 876. Georgia.

Grounds for absolute divorce.

Divorce from bonds of matrimony will be granted for: Intermarriage by persons within the prohibited degrees of relationship, mental incapacity at time of marriage, impotency at time of marriage, force, menace, duress, or fraud in obtaining marriage, pregnancy of wife at time of marriage unknown to husband, adultery, wilful and continued desertion for three years, and conviction of an offense involving moral turpitude where penalty is two years or more in penitentiary.[46]

In cases of cruel and abusive treatment or habitual intoxication, the jury may grant either an absolute or partial divorce.[47]

Grounds for partial divorce.

Divorces from bed and board may be granted on any grounds which were held sufficient in the English courts prior to May 4, 1784.[48]

Void marriages.

A marriage contracted between relatives or persons of close affinity, or between whites and blacks is absolutely void without legal process.[49]

Nonage.

The legal age of consent for males is seventeen years and for females fourteen years and marriages under these ages may be annulled. But these marriages may be ratified by cohabitation

3195, 3196, 3197. See Meeker v. Meeker, 74 Fla. 442, 76 So. 197.

[45]Rev. Gen. Stat. 1920, § 3201.

[46]Park's Civil Code 1914, § 2945. See Pinnebad v. Pinnebad, 134 Ga. 496, 68 S. E. 73; Aultman v. National Bank of Tifton, 140 Ga. 250, 78 S. E. 833; Moss v Moss, 147 Ga. 311, 93 S. E. 875; Siniard v. Siniard, 145 Ga. 541, 89 S. E. 517; Rorie v. Rorie, 132 Ga. 719, 64 S. E. 1070; Wood v. Wood, 135 Ga. 385, 69 S. E. 549.

[47]Park's Civil Code 1914, § 2946. See Cureton v. Cureton, 132 Ga. 745, 65 S. E. 65; Stoner v. Stoner, 134 Ga. 368, 67 S. E. 1030; Pedrick v. Pedrick, 134 Ga. 662, 68 S. E. 515.

[48]Park's Civil Code 1914, § 2947.

[49]Park's Civil Code 1914, § § 2931, 2935, 2941.

after arriving at lawful age and such cohabitation is an absolute bar to divorce proceedings.[50]

Residence.

Plaintiff must have had an actual residence in the state for twelve months before commencing proceedings.[51]

Jurisdiction.

The superior court has jurisdiction to grant divorces in all cases.[52]

Evidence.

No judgment will be entered by default, but the allegations in a petition must be established by evidence.[53] Confessions of a party as to cruel treatment or acts of adultery should be corroborated in order to be deemed sufficient to a grant of divorce.[54]

Procedure.

Where the defendant is a non-resident suit may be brought where the plaintiff resides[55] and the defendant served by publication.[56]

In ex parte proceedings it is the duty of the court to see that the grounds are legal and are substantiated by proof or to appoint the solicitor-general or some other attorney of the court to discharge that duty for him.[57]

Concurrent verdicts of two juries at different terms of court are necessary before a decree for absolute divorce will be entered.[58]

Alimony.

The jury rendering final verdict makes provision for the division of property.[59]

[50]Park's Civil Code 1914, § 2931. See Powers v. Powers, 138 Ga. 65, 74 S. E. 759; Americus Gas & Electric Co. v. Coleman, 16 Ga. App. 17, 84 S. E. 493; Crapps v. Smith, 9 Ga. App. 400, 71 S. E. 501. An infant wife may sue for divorce. Bentley v. Bentley, 149 Ga. 707, 102 S. E. 21.

[51]Park's Civil Code 1914, § 2950. Domicil of married woman that of her husband, with two exceptions. Park's Civil Code 1914, § 2183; Pearlstine v. Pearlstine, 148 Ga. 756, 98 S. E. 264. See also Conklin v. Conklin, 148 Ga. 640, 98 S. E. 221.

[52]Park's Civil Code 1914, § 2944.

[53]Park's Civil Code 1914, § 2959.

[54]Park's Civil Code 1914, § 2949.

[55]Park's Civil Code 1914, § 2951.

[56]Park's Civil Code 1914, § 2951.

[57]Park's Civil Code 1914, § 2974.

[58]Park's Civil Code 1914, § 2944. See Rorie v. Rorie, 132 Ga. 719, 64 S. E. 1070.

[59]Park's Civil Code 1914, § 2956. See Stalvey v. Stalvey, 132 Ga. 307, 64 S. E. 91. See also Davis v. Davis, 134 Ga. 804, 68 S. E. 594, 30 L. R. A. (N. S.) 73, 20 Ann. Cas. 20; Long v. Long, 147 Ga. 771, 95 S. E. 676; Buffington v. Cook, 147 Ga. 681, 95 S. E. 214.

Temporary alimony may be allowed pending suit, or before suit is brought, where the parties are living bona fide in a state of separation.[60]

Permanent alimony is granted in all cases of absolute divorce, or in cases of voluntary separation, and where the wife, against her will, is either abandoned or driven away from home by her husband.[61]

After a separation, no transfer by the husband of any part of the property, except for a bona fide payment of a pre-existing debt or debts, shall pass the title of property so as to avoid the vesting thereof according to the final verdict of the jury in the cause.[62]

The verdict of the jury specifies the kind of divorce granted, and the disposition to be made of the property scheduled.[63]

A schedule of the property belonging to the parties is attached to the petition for divorce.[64]

Care and custody of children.

The innocent party is entitled to the care and custody of the children.[65]

Remarriage.

The jury shall determine the rights and disabilities of the parties. These disabilities may subsequently be removed by legal proceedings. But in case of divorce a mensa et thoro neither party is free to remarry.[66]

Absence of one party to a marriage for five years without information of the fate of the absentee excuses marriage by the other.[67]

§ 877. Hawaii.

Grounds for absolute divorce.

Divorce will be granted on the following grounds: Adultery, wilful and utter desertion for the term of six months, sentence to imprisonment for life, or for seven years or more, when it is

[60]Park's Civil Code 1914, §§ 2976, 2986.

[61]Park's Civil Code 1914, § 2983.

[62]Park's Civil Code 1914, § 2955.

[63]Park's Civil Code 1914, § 2956.

[64]Park's Civil Code 1914, § 2954. On writ of ne exeat in connection with alimony. See Crapps v. Crapps, 148 Ga. 510, 97 S. E. 680. See also Killingsworth v. Killingsworth, 148 Ga. 590, 97 S. E. 539; Thomas v. Thomas, 148 Ga. 567, 97 S. E. 523.

[65]Park's Civil Code 1914, § 2971.

[66]Park's Civil Code 1914, §§ 2964, 2966, 2968, 2970.

[67]See Grand Lodge K. of P. v. Barnard, 9 Ga. App. 71, 70 S. E. 678.

shown to the satisfaction of the judge that either party has contracted leprosy, and is incapable of cure, extreme cruelty, and habitual intemperance.

When the husband, being of sufficient ability to provide suitable maintenance for his wife, neglects or refuses to do so for a term of not less than sixty days; or where incurable insanity of either party has existed for three years or more the court may grant a divorce.[68]

Grounds for annulment of marriage.

The court will annul a marriage on any of the following grounds: consanguinity nearer than the fourth degree, nonage, former husband or wife living, lunacy or idiocy, and impotency or physical incapacity when entering into the marriage state.[69]

Grounds for partial divorce.

If the party applying for a divorce does not insist upon a decree from the bonds of matrimony, a divorce only from bed and board is granted, for extreme cruelty, habitual drunkenness, refusal or neglect of husband to provide his wife with the necessaries of life.[70]

Nonage.

Suit to annul a marriage on ground that male is under eighteen and female under fifteen years of age may be brought by parent or guardian.[71]

Residence.

Two years' residence is required.[72]

Jurisdiction.

The circuit judge of the circuit in which parties to the action last lived as husband and wife has exclusive jurisdiction except in cases based on a charge that leprosy has been contracted, in which cases such judge has concurrent jurisdiction with the judges of the first judicial circuit.[73]

Libel.

The libel must be signed by the libellant and sworn to. No

[68]Laws 1919, act 10, p. 11.

[69]Rev. Laws 1915, § 2916.

[70]Rev. Laws 1915, § 2944. See also Laws 1919, act 10, p. 11.

[71]Rev. Laws 1915, §§ 2905, 2917.

[72]Rev. Laws 1915, § 2927.

[73]Rev. Laws 1915, § 2927, as amended by Laws 1919, acts 33, 172. In the First Judicial Circuit the legislature has established a Court of Domestic Relations in which jurisdiction of all questions relative to divorce and alimony is exercised by the circuit judge sitting in that court. See Laws 1921, art. 183, p. 238.

jurisdiction shall be entertained until thirty days after service of summons and copy of libel upon defendant.[74]

Service.

Personal service is required, but upon proper showing being made that libellee is without the territory or can not be found the judge may order service by publication.[75]

Evidence.

Admissions of the respondent are not competent evidence except to prove the original marriage.[76]

Alimony.

Temporary alimony and suit money may be granted wife where it appears to the court such alimony is necessary. Upon final decree of divorce permanent alimony will be granted wife.[77]

Remarriage.

Remarriage is permitted upon presenting a certified copy of decree of divorce which must be presented to the agent issuing the license to marry.[78]

§ 878. **Idaho.**

Grounds for absolute divorce.

Adultery on the part of either party will justify a divorce.[79] Such action must be commenced within two years of discovery by the injured party.[80] Divorce will also be granted for extreme cruelty,[81] wilful desertion for one year, wilful neglect for one year, habitual intemperance for one year,[82] conviction of felony, an action for which must be commenced within one year of termination of sentence or pardon, and for permanent insanity. But no divorce shall be granted on the ground of insanity unless such insane person has been regularly confined in an insane asylum for at least six years next preceding the commencement of the action for divorce. No action shall be maintained upon this ground unless the plaintiff shall have been an actual resident

[74]Rev. Laws 1915, § 2928, as amended by Laws 1919, act 168.

[75]Rev. Laws 1915, § 2929, as amended by Laws 1919, act 43.

[76]Rev. Laws 1915, § 2931.

[77]Rev. Laws 1915, §§ 2935, 2936. On effect of divorce on wife's property and her right of dower see Rev. Laws 1915, §§ 2942, 2943.

[78]Rev. Laws 1915, § 2939.

[79]Comp. Laws 1919, § 4627.

[80]Comp. Laws 1919, § 4638. See Donaldson v. Donaldson, 31 Idaho 180, 170 Pac. 94.

[81]Comp. Laws 1919, § 4627. See Spofford v. Spofford, 18 Idaho 115, 180 Pac. 1054.

[82]Comp. Laws 1919, § 4627. See De Cloedt v. De Cloedt, 24 Idaho 277, 133 Pac. 664.

of the state for at least one year next preceding the commencement of the action.[83]

Grounds for annulment of marriage.

Persons when married not of the age of legal consent and such marriage contracted without the consent of his or her parents, or of the persons having charge of him or her, unless after attaining the age of consent such party for any time freely live and cohabit with the other as husband and wife, may be annulled. Actions for this cause must be begun within four years after arriving at the age of consent, or by the parent or guardian at any time before arriving at lawful age.

Where either party has a former husband or wife living and the marriage with such former husband or wife is then in force, or where either party was of unsound mind at time of marriage, unless such party after coming to reason, freely cohabits with the other as husband and wife, the marriage will be annulled.

Where the consent of either party was obtained by fraud or force, unless such party afterward with full knowledge of the facts, freely cohabits with the other as husband and wife, the actions for fraud must be brought within four years from date of discovery.

Where either party was at the time of the marriage physically incapable of entering into the marriage state and such incapacity continued and appeared to be incurable the court will annul the marriage.[84]

Marriage between persons of near relation or close affinity, or between whites and blacks is absolutely void without legal proceedings.[85]

Nonage.

Marriage of parties under legal age of consent may be annulled at suit of either party.[86] But these marriages may be ratified by cohabitation after arriving at legal age and such ratification is an absolute bar to divorce.[87]

Residence.

Twelve months in the state and six months in the county where the cause for action arose outside of the state is required.[88]

[83]Comp. Laws 1919, § § 4627, 4638, 7037.

[84]Comp. Laws 1919, § § 4620, 4621.

[85]Comp. Laws 1919, § § 4595, 4596.

[86]Comp. Laws 1919, § § 4592, 4620.

[87]Comp. Laws 1919, § 4620.

[88]Comp. Laws 1919, § 4639.

Jurisdiction.

The district court has exclusive jurisdiction in all actions for divorce.[89]

Service.

Summons may be made by personal service or by publication. If by publication, it must not be for less than one month.[90]

Evidence.

No divorce can be granted upon the default of the defendant nor upon the uncorroborated testimony of the parties. Proof, if not taken before the court, must be by written questions and answers.[91]

The trial may be private.[92]

Alimony.

Alimony will be allowed while the suit is pending and upon a decree of divorce.[93]

Remarriage.

Remarriage of the parties is permitted.[94]

A person is not guilty of bigamy whose former spouse at the time of the marriage has been absent five years, is not known to be living and is believed to be dead.[95]

§ 879. Illinois.

Grounds for absolute divorce.

Divorce will be granted upon the following grounds: Impotency, former husband or wife living at time of marriage, adultery, desertion for two years without reasonable cause, habitual drunkenness for two years, an attempt to take the life of the other by poison or other means showing malice, extreme and repeated cruelty, and conviction of felony or other infamous crime.[96]

Grounds for partial divorce.

Separate maintenance may be decreed to the wife without

[89]Comp. Laws 1919, § 4653.

[90]Comp. Laws 1919, §§ 6675, 6677.

[91]Comp. Laws 1919, § 4641.

[92]Comp. Laws 1919, § 6476.

[93]Comp. Laws 1919, §§ 4642-4648.

[94]Comp. Stat. 1919, § 8283.

[95]Comp. Stat. 1919, § 8283.

[96]Hurd's Rev. Stat. 1921, ch. 40, § 1. See also Zimmerman v. Zimmerman, 242 Ill. 552, 90 N. E. 192; Kinkaid v. Kinkaid, 256 Ill. 548, 100 N. E. 217; Duenser v. Supreme Council of Royal Arcanum, 262 Ill. 475, 104 N. E. 801, 51 L. R. A. (N. S.) 726; Winter v. Dibble, 251 Ill. 200, 95 N. E. 1093; Garrett v. Garrett, 252 Ill. 318, 96 N. E. 882; Trenchard v. Trenchard, 245 Ill. 313, 92 N. E. 243. As to mental capacity, party must be capable of understanding marriage contract. Hagenson v. Hagenson, 258 Ill. 197, 101 N. E. 606.

divorce when she is living apart and separate from her husband without her fault.[97]

Nonage.

The legal age for marriage of minors with consent of parent or guardian is eighteen for males and sixteen for females. Since the statutes no where state that such marriage is invalid, the statute on legal consent is directory only.[98]

Residence.

One year's residence is required unless the offense was committed in the state or while one or both parties resided in the state.[99]

Jurisdiction.

The circuit court has jurisdiction of all cases of divorce. Proceedings are the same as in the chancery courts. In Cook County the superior court has jurisdiction.[1]

Service.

Summons may be by personal service or by publication. If by publication it must be for four successive weeks thirty days before return day.[2]

The suit must be prosecuted in the county of complainant's residence, but the defendant may be served in any county in the state.[3]

Evidence.

In cases of default the court hears the cause by the examination of witnesses in open court. Confessions of defendant are not admitted unless the judge or jury is satisfied they were made in sincerity and without fraud or collusion.[4]

When the charge is denied either party may demand a jury trial.[5]

Alimony.

The court may, pending suit for divorce, compel the husband to pay the wife's legal expenses, as well as alimony, and, when a divorce is decreed, the court may make suitable orders touch-

[97]Hurd's Rev. Stat. 1921, ch. 68, § 22.

[98]Hurd's Rev. Stat. 1921, ch. 89, § 3. See Reifschneider v. Reifschneider, 241 Ill. 92, 89 N. E. 255.

[99]Hurd's Rev. Stat. 1921, ch. 40, § 2. See Lyons v. Lyons, 272 Ill. 329, 111 N. E. 977.

[1]Hurd's Rev. Stat. 1921, ch. 40, § 4.

[2]Hurd's Rev. Stat. 1921, ch. 22, § 11; ch. 100, § 9.

[3]Hurd's Rev. Stat. 1921, ch. 40, § 5.

[4]Hurd's Rev. Stat. 1921, ch. 40, § § 8, 9.

[5]Hurd's Rev. Stat. 1921, ch. 40, § 7.

ing her alimony and the maintenance, care, custody, and support of the children, and may alter the same from time to time.

A woman who shall in good faith intermarry with a man whose first wife is still living may be awarded alimony, provided this is not inconsistent with the rights of the other wife.[6]

Remarriage.

Remarriage is not permitted until after one year from decree and in case of adultery until after two years. Violation of this law is punishable with a penitentiary sentence of from one to three years, and the marriage is declared void.[7]

§ 880. **Indian Territory.**[8]

Grounds for absolute divorce.

The court will grant a divorce on the following grounds: adultery, conviction of felony or other infamous crime, habitual drunkenness for one year, cruel and barbarous treatment that endangers the life, wilful desertion for one year or where one absents himself or herself from the other without reasonable cause for one year, where either party was at the time of the marriage and still is impotent, former husband or wife living at time of marriage, and where either party subsequent to the marriage has become permanently or incurably insane.[9]

Grounds for annulment of marriage.

Either party under the age of consent, mentally or physically incapable or who has consented on account of force or fraud may have the marriage annulled.[10]

Marriage between near relatives or persons of close affinity, or between a white person and a colored person,[11] is void without legal proceedings.

Nonage.

Marriage below the age of consent may be annulled.[12]

Residence.

A party seeking divorce must be a resident in the territory for one year next preceding the commencement of the action.[13]

[6]Hurd's Rev. Stat. 1921, ch. 40, §§ 15, 18-20. See also Wilson v. Cook, 256 Ill. 460, 100 N. E. 222, 43 L. R. A. (N. S.) 365; Arado v. Arado, 281 Ill. 123, 117 N. E. 816, 4 A. L. R. 28.

[7]Hurd's Rev. Stat. 1921, ch. 40, § 1a. See Powell v. Powell, 282 Ill. 357, 118 N. E. 786.

[8]See Oklahoma.

[9]Stat. 1899, § 1844.

[10]Stat. 1899, §§ 2992, 2993.

[11]Stat. 1899, §§ 2992, 2993.

[12]Stat. 1899, § 2991.

[13]Stat. 1899, § 1850.

Jurisdiction.

The circuit court has jurisdiction in all cases of divorce and suits for alimony.[14]

Service.

Summons may be had by personal service or by publication. If by publication the notice must appear once a week for four successive weeks.[15]

Evidence.

No divorce shall be granted on admissions or by default.

Either party may testify, but the testimony must be corroborated.[16]

The plaintiff must prove that the cause of divorce occurred or existed in the territory, or, if out of the territory, that it was a legal cause of divorce in the state or territory where it occurred or existed, or that the plaintiff's residence was then in the territory.

The plaintiff must prove that the cause of divorce existed or occurred within five years next prior to the commencement of the suit.[17]

Alimony.

The court may allow the wife maintenance pending the action, and a reasonable fee for her attorney, and may enforce the payment of the same by order.[18]

On final decree, the court shall make such orders touching the alimony of the wife and the care and custody of the children, if there be any, as in the circumstances of the parties and the nature of the case seems just and reasonable.[19]

§ 881. Indiana.

Grounds for absolute divorce.

A divorce will be granted for adultery, except when the offense has been committed with the connivance or consent of the party seeking the divorce, or when the party seeking the divorce has voluntarily cohabited with the other with knowledge of the fact, or has failed to file a petition for two years after discovery of same, or when the party seeking the divorce has been guilty

[14]Stat. 1899, § 1844.
[15]Stat. 1899, §§ 3180, 3194, 3195.
[16]Stat. 1899, § 1849.
[17]Stat. 1899, § 1850.
[18]Stat. 1899, § 1851.
[19]Stat. 1899, §§ 1853-1855. See Adams v. Adams, 30 Okla. 327, 120 Pac. 566.

of adultery under such circumstances as would have entitled the opposite party, if innocent, to a decree.[20]

The following conditions are also grounds for divorce: Impotency existing at the time of marriage, abandonment for two years, cruel and inhuman treatment, habitual drunkenness, pregnancy by other than husband, husband's failure to make suitable provision for his family for a period of two years, and the conviction subsequent to the marriage in any country of either party of an infamous crime.[21]

Grounds for annulment of marriage.

Insanity or want of age at time of contract will be sufficient cause of annulment of the marriage.[22]

Grounds for separation for limited time.

The court will grant a limited divorce for adultery, desertion or neglect to provide for wife for six months, for habitual cruelty or intolerable strife, habitual drunkenness or confirmed habitual use of drugs and for gross and wanton neglect of conjugal duty for six months.[23]

Void marriages.

Marriages between parties nearer of kin than second cousins, marriages of persons of different color, or where either party thereto has a former husband or wife living, if the marriage was solemnized within the state are prohibited and are void without legal proceedings.[24]

Nonage.

The age of consent for a male is eighteen years and for a female sixteen years. Marriage under these ages and without consent of parent or guardian may be annulled.[25]

Residence.

Plaintiff must establish a residence in the state for two years immediately preceding the filing of the petition, and of six months in the county, by evidence of at least two witnesses who are resident freeholders and householders of the state.

Plaintiff must file with the petition an affidavit, sworn to by

[20]Burns' Ann. Stat. 1914, §§ 1067, 1068.

[21]Burns' Ann. Stat. 1914, § 1067. See Zweig v. Zweig, 46 Ind. App. 594, 93 N. E. 234; Cooper v. Cooper, 51 Ind. App. 374, 99 N. E. 782; Dickinson v. Dickinson, 54 Ind. App. 53, 102 N. E. 389. An infamous crime is one punishable by imprisonment in the penitentiary.

[22]Burns' Ann. Stat. 1914, § 1060.

[23]Burns' Ann. Stat. 1914, § 1091.

[24]Burns' Ann. Stat. 1914, § 1059.

[25]Burns' Ann. Stat. 1914, § 8357.

himself, stating the length of time he has been a resident of the state, and stating particularly the place, town, city, or township in which he has resided for the last two years, and stating also his occupation which shall be sworn to before the clerk of the court in which the petition is filed.[26]

Jurisdiction.

Superior and circuit courts have jurisdiction of all divorce suits.[27]

Service.

Summons may be by personal service or by publication. If by publication the notice must appear once a week for three successive weeks thirty days before trial.[28] A trial for absolute divorce or limited divorce shall not be heard until sixty days after service of summons.[29]

Evidence.

A decree will not be granted upon default without proof.[30]

Alimony.

Upon decreeing a divorce in favor of the wife or refusing one to the husband, the court may require the husband to pay all reasonable expenses of the wife in connection with the prosecution or defense.

Alimony may be awarded within the discretion of the court, and made payable in a gross sum or by installments, upon giving satisfactory security.[31]

Remarriage.

Where a judgment of divorce has been granted by default against a party upon notice by publication, such defaulted party may appear and have the case reopened at any time during the two years next succeeding rendition of the decree, and during that period it shall not be lawful for the party who has been granted the divorce to remarry.[32]

§ 882. **Iowa.**

Grounds for absolute divorce.

A divorce may be granted for the following causes: Adultery, wilful desertion for two years, conviction of felony after mar-

[26]Burns' Ann. Stat. 1914, § 1066. See Canther v. Canther, 46 Ind. App. 504, 91 N. E. 813; Hoffman v. Hoffman, 67 Ind. App. 230, 119 N. E. 18.

[27]Burns' Ann. Stat. 1914, § 1066.

[28]Burns' Ann. Stat. 1914, § 1070.

[29]Acts 1923, ch. 165.

[30]Burns' Ann. Stat. 1914, § 1077.

[31]Burns' Ann. Stat. 1914, §§ 1083-1088.

[32]Burns' Ann. Stat. 1914, § 1065.

riage, habitual drunkenness after marriage, cruelty, and pregnancy of the wife at the time of the marriage by a man other than the husband, unless such husband has an illegitimate child then living which was unknown to the wife at the time of their marriage.[33]

Grounds for annulment of marriage.

Consanguinity and affinity, impotency at time of marriage, idiocy or insanity, and former husband or wife living, provided that the parties have not cohabited after former husband or wife died are grounds for annulment of the marriage.[34]

Nonage.

The marriage of a male under sixteen years of age and a female fourteen may be annulled, provided the parties have not cohabited together after arriving at legal age. Actions on ground of nonage must be commenced within six months after arriving at legal age.[35]

Residence.

One year's residence is required, to bring suit for divorce, except where the defendant is a resident of the state and served by personal service. The petition must show that the plaintiff has been for the last year a resident of the state, specifying the town and county in which he has so resided.[36]

Jurisdiction.

The district court has jurisdiction in all suits for divorce and alimony.[37]

[33]Code 1897, § § 3174, 3175. See also Buswell v. Buswell, 146 Iowa 52, 124 N. W. 770; Caldwell v. Caldwell, 141 Iowa 192, 119 N. W. 599. On desertion, see Love v. Love, 185 Iowa 930, 171 N. W. 257. The wife may be entitled to divorce without proof of physical violence. Carson v. Carson (Iowa), 171 N. W. 584. See also Luettjohann v. Luettjohann, 147 Iowa 286, 126 N. W. 172; Martin v. Martin, 150 Iowa 223, 129 N. W. 816; Goeldner v. Goeldner, 158 Iowa 415, 139 N. W. 889.

[34]Code 1897, § 3182. See Richardson v. King, 157 Iowa 287, 135 N. W. 640. See also Back v. Back, 148 Iowa 223, 125 N. W. 1009, Ann. Cas. 1912B, 1025, Wittick v. Wittick, 164 Iowa 485, 145 N. W. 913. On former husband or wife living, see Ricard v. Ricard, 143 Iowa 182, 121 N. W. 525, 26 L. R. A. (N. S.) 500, 136 Am. St. 763, 20 Ann. Cas. 1346. On Fraud see Wood v. Wood, 143 Iowa 440, 121 N. W. 1090; Sherman v. Sherman, 174 Iowa 145, 156 N. W. 301.

[35]Code 1897, § 3140.

[36]Code 1897, § 3172. See Williamson v. Williamson, 179 Iowa 489, 161 N. W. 482; Scott v. Scott, 174 Iowa 740, 156 N. W. 834.

[37]Code 1897, § 3171; Holmes v. Holmes, 186 Iowa 336, 170 N. W. 793. See also Scott v. Scott, 174

Service.

Summons may be by personal service or by publication. If by publication, the notice must appear once a week for four weeks.[38]

Evidence.

The testimony of plaintiff must be corroborated.

The trial must be public.[39]

Alimony.

Alimony may be allowed either husband or wife and the court may order one party to pay to the clerk of court a sum of money for the separate support of the adverse party and the children to enable such party to prosecute or defend the action, and such order may be enforced by attachment.[40]

Remarriage.

Remarriage is not allowed until one year after divorce. Marriage prior to that time is punishable as a misdemeanor.[41]

§ 883. **Kansas.**

Grounds for absolute divorce.

A divorce may be granted for any of the following causes: Adultery, former husband or wife living at the time of the subsequent marriage, abandonment for one year, impotency, extreme cruelty, fraudulent contract, habitual drunkenness, gross neglect of duty, conviction of felony and imprisonment in penitentiary therefor, subsequent to the marriage, and pregnancy by other than husband at the time of marriage.[42]

Grounds for annulment of marriage.

Want of age or understanding at time of marriage unless ratified will justify an annulment.[43]

Grounds for partial divorce.

Suit for alimony without petition for divorce may be brought for the same causes as for an absolute divorce.[44]

Iowa 740, 156 N. W. 834; Delbridge v. Sears, 179 Iowa 526, 160 N. W. 218.

[38]Code 1897, § § 3518, 3535.

[39]Code 1897, § 3173. See Shors v. Shors, 133 Iowa 22, 110 N. W. 16.

[40]Code 1897, § § 3177, 3178. See Russell v. Russell, 156 Iowa 674, 137 N. W. 925.

[41]Code Supp. 1913, § 3181. See Lee v. Lee, 150 Iowa 611, 130 N. W. 128.

[42]Gen. Stat. 1915, § 7571. See Lightfoot v. Lightfoot, 103 Kans. 188, 173 Pac. 286; Bunger v. Bunger, 85 Kans. 564, 117 Pac. 1017, Ann. Cas. 1913A, 126; Bunger v. Bunger, 90 Kans. 39, 132 Pac. 1004.

[43]Gen. Stat. 1915, § 7585. On Fraud, see Entsminger v. Entsminger, 99 Kans. 362, 161 Pac. 607.

[44]Gen. Stat. 1915, § 7586.

Nonage.

The age of consent for a male is seventeen years and for a female fifteen years. These are ages below which the consent of the probate judge is required and such marriage may be annulled.[45]

Residence.

Plaintiff must be an actual resident in good faith of the state for one year, and a resident of the county in which the action is brought at the time the petition is filed.[46]

A wife who resides in the state at the time of applying for a divorce shall be deemed a resident of the state, although her husband resides elsewhere.[47]

Jurisdiction.

The district court has jurisdiction in suits for divorce and alimony.[48]

Service.

Personal service of summons or service by publication may be made on defendant.[49]

If service is made by publication, it must be made for three weeks, returnable not less than forty-one days from the date of the first publication, and copies mailed to defendant within three days after publication.[50]

Custody of children.

The court may make provision for the custody of the children or give them to either party.[51]

Evidence.

The petition must be verified.[52]

Defendant in his answer may deny the truth of the petition and set up his cause for divorce.[53]

Each party may testify, but must be corroborated.[54]

[45]Gen. Stat. 1915, §§ 6139, 7585. For marriage at common-law ages of fourteen and twelve see Browning v. Browning, 89 Kans. 98, 130 Pac. 852, Ann. Cas. 1914C, 1288.

[46]Gen. Stat. 1915, § 7572. See also McCormick v. McCormick, 82 Kans. 31, 107 Pac. 546; Howell v. Herriff, 87 Kans. 389, 124 Pac. 168, Ann. Cas. 1913E, 429.

[47]Gen. Stat. 1915, § 7573.

[48]Gen. Stat. 1915, § 158; Const., art. 2, § 18.

[49]Gen. Stat. 1915, § 7574. See Bell v. Bell, 97 Kans. 616, 156 Pac. 778.

[50]Gen. Stat. 1915, § 7574.

[51]Gen. Stat. 1915, §§ 7577, 7580, 7581, and amendments by Laws 1919, ch. 236.

[52]Gen. Stat. 1915, § 7574.

[53]Gen. Stat. 1915, § 7575.

[54]Gen. Stat. 1915, § 7579.

Alimony.

Alimony pendente lite[55] and permanent alimony[56] may be allowed.

Remarriage.

Marriage is unlawful and void within six months after divorce decree entered or thirty days after final judgment on appeal.[57]

§ 884. **Kentucky.**

Grounds for absolute divorce.

Divorce may be granted on any of following grounds: Impotency or malformation which prevents sexual intercourse, living apart without any cohabitation for five consecutive years next before the application,[58] abandonment for one year,[59] living in adultery with another man or woman,[60] condemnation for felony in or out of the state, concealment from the other party of any loathsome disease existing at the time of marriage or contracting such afterward, force, duress, or fraud in obtaining the marriage, and uniting with any religious society whose creed and rules require a renunciation of the marriage covenant or forbid husband and wife from cohabiting.

Divorce will be granted to wife, when not in fault, for the following causes: Confirmed habits of drunkenness on the part of the husband of not less than one year's duration, accompanied with a wasting of his estate, and without any suitable provision for the maintenance of his wife or children;[61] habitually behaving toward the wife by the husband for not less than six months in such cruel and inhuman manner as to indicate a settled aversion to her, or to destroy permanently her peace or happiness;[62]

[55]Gen. Stat. 1915, § 7577, as amended by Laws 1919, ch. 236.

[56]As to order of court dividing property, see Gen. Stat. 1915, § 7581, and Putnam v. Putnam, 104 Kans. 47, 177 Pac. 838. See also Scott v. Scott, 80 Kans. 489, 103 Pac. 1005, 25 L. R. A. (N. S.) 132, 133 Am. St. 217, 18 Ann. Cas. 564; Kjellander v. Kjellander, 90 Kans. 102, 132 Pac. 1170, 45 L. R. A. (N. S.) 943.

[57]Gen. Stat. 1921, § 7582.

[58]Carroll's Stat. 1922, § 2117. See Mutter v. Mutter, 123 Ky. 754, 97 S. W. 393. Hale v. Hale, 137 Ky. 39, 127 S. W. 475.

[59]Carroll's Stat. 1922, § 2117. Kelly v. Kelly, 183 Ky. 172, 209 S. W. 335. See also Bishop v. Bishop, 155 Ky. 679, 160 S. W. 176; Mayes v. Mayes (Ky.), 115 S. W. 717.

[60]Carroll's Stat. 1922, § 2117. See Williams v. Williams, 136 Ky. 71, 123 S. W. 337; Baker v. Baker, 136 Ky. 617, 124 S. W. 866.

[61]Carroll's Stat. 1922, § 2117. See Fowler v. Fowler, 138 Ky. 326, 127 S. W. 1014.

[62]Carroll's Stat. 1922, § 2117. Rogers v. Rogers, 13 Ky. L. 526, 17 S. W. 573; Hooe v. Hooe, 122 Ky. 590, 29 Ky. L. 113, 92 S. W. 317,

and such cruel beating or injury, or attempt to injure the wife by the husband, as indicates outrageous temper in him, or probable danger to her life, or great bodily harm from her remaining with him. Divorce will be granted to the husband where the wife is pregnant by another man without the husband's knowledge at the time of marriage;[63] when not in like fault, habitual drunkenness on the part of the wife of not less than one year's duration; and for adultery by the wife, or such lewd, lascivious behavior on her part as proves her to be unchaste, without actual proof of adultery.[64]

Grounds for annulment of marriage.

A marriage procured by force or fraud and a marriage under the age of consent not thereafter ratified may be annulled.[65]

Grounds for partial divorce.

Separations may be granted for the same causes as absolute divorces are granted for, or for such causes as the court, in its discretion, may determine.[66]

Nonage.

Marriage of a male under fourteen years of age and of a female under twelve is absolutely void without legal proceedings.[67]

If male is under sixteen years and female under fourteen years the marriage may be annulled, if without consent of parent or guardian.[68]

Residence.

One year's residence is required and if the act complained of was done while plaintiff was out of the state it must have been cause of divorce in state where committed.[69]

5 L. R. A. (N. S.) 729, 13 Ann. Cas. 214. See also Rolfsen v. Rolfsen (Ky.), 115 S. W. 213; Grow v. Grow, 134 Ky. 816, 121 S. W. 654; McClintock v. McClintock, 147 Ky. 409, 144 S. W. 68; Axton v. Axton, 182 Ky. 286, 206 S. W. 480.

[63]Carroll's Stat. 1922, § 2117. See Wesley v. Wesley, 181 Ky. 135, 204 S. W. 165.

[64]Carroll's Stat. 1922, § 2117. See Messick v. Messick, 177 Ky. 337, 197 S. W. 792; Smith v. Smith, 181 Ky. 55, 203 S. W. 884; Wesley v. Wesley, 181 Ky. 135, 204 S. W. 165; Birdsong v. Birdsong, 182 Ky. 58, 206 S. W. 22.

[65]Carroll's Stat. 1922, § 2100. See Shepherd v. Shepherd, 174 Ky. 615, 192 S. W. 658.

[66]Carroll's Stat. 1922, § 2121.

[67]Carroll's Stat. 1922, § 2097.

[68]Carroll's Stat. 1922, § 2100.

[69]Carroll's Stat. 1922, § 2120. See Auxier v. Auxier, 155 Ky. 174, 159 S. W. 678; Smith v. Davis, 170 Ky. 379, 186 S. W. 176; Cummings v. Cummings, 133 Ky. 1, 117 S. W. 289.

Jurisdiction.

Equity courts of general jurisdiction only may grant a divorce and decree alimony.[70]

Service.

Personal service of summons or warning order sixty days before term day may be made upon defendant.[71]

Evidence.

No judgment by default will be allowed.

Two witnesses or one witness and strong corroborating circumstances are necessary to sustain charge of adultery or lewdness, and one witness only for other grounds. The good character and credibility of the witnesses must be certified or proved.

The county attorney must defend.[72]

The action must be brought in the county of the wife's residence, if in the state, otherwise in the county where the husband resides.

Suit must be commenced within five years of act.[73]

No jury trial will be allowed.[74]

If the act complained of was committed outside the state, it must be a good cause where committed as well as in the state.[75]

Alimony.

The court may allow the wife maintenance while the suit for divorce is pending, and upon final decree of divorce she will be allowed a portion of his property as alimony.[76]

Remarriage.

Remarriage is permitted, but a person can have but one divorce except for adultery or for causes for which a divorce may be granted to both husband and wife.[77]

Name of wife.

The court may permit the wife to assume her maiden name after a final decree of divorce.[78]

[70]Carroll's Stat. 1922, § 2117. See Sebastian v. Rose, 135 Ky. 197, 122 S. W. 120.

[71]Carroll's Civil Code of Practice 1895, § § 48, 56.

[72]Carroll's Stat. 1922, § 2119.

[73]Carroll's Stat. 1922, § 2120. Johnson v. Johnson, 183 Ky. 421, 209 S. W. 385.

[74]Carroll's Stat. 1922, § 2117.

[75]Carroll's Stat. 1922, § 2120.

[76]Carroll's Stat. 1922, § § 2121-2126. See Green v. Green, 152 Ky. 486, 153 S. W. 775; Shehan v. Shehan, 152 Ky. 191, 153 S. W. 243.

[77]Carroll's Stat. 1922, § 2118.

[78]Carroll's Stat. 1922, § 2122.

§ 885. **Louisiana.**

Grounds for absolute divorce.

Divorce will be granted for the following causes: Adultery, condemnation to infamous punishment,[79] habitual intemperance, or excessive or outrageous cruelty such as to render condition of plaintiff insupportable,[80] and seven years' continuous separation.[81]

Where there has been judgment of separation from bed and board between the parties and one year has elapsed from the finding of such judgment and no reconciliation has taken place a divorce may be granted.[82]

Grounds for annulment of marriage.

Consanguinity, force or fraud, former husband or wife living at time of subsequent marriage, and want of free consent, are sufficient grounds for annulment.[83]

Grounds for partial divorce.

Separation from bed and board may be claimed for: Adultery, condemnation to an infamous punishment, habitual intemperance, or excesses, or cruel treatment or outrages, if such conduct is of such a nature as to render living together insupportable;[84] public defamation, abandonment,[85] and attempt on the life of the other.

When one of the married persons has been charged with an infamous offense and has actually fled from justice, and the other produces proof to the judge before whom the action for separation is brought that the person accused has actually been

[79]Marr's Ann. Rev. Stat. 1915, § 4470. Not incarceration for insanity. Ryals v. Ryals, 130 La. 244, 57 So. 904.

[80]Rev. Code 1912, art. 138, 139.

[81]Laws of 1916, act 269, p. 557. See Hurry v. Hurry, 141 La. 954, 76 So. 160; Hurry v. Hurry, 144 La. 877, 81 So. 378. For grounds of divorce in general see Hurry v. Hurry, 141 La. 954, 76 So. 160; Hava v. Chavigny, 143 La. 365, 78 So. 594; Gastauer v. Gastauer, 132 La. 941, 61 So. 879; Milner v. Tutwiler, 124 La. 689, 50 So. 654.

[82]Marr's Ann. Rev. Stat. 1915, § § 4470, 4475. Satterwhite v. Satterwhite, 144 La. 308, 80 So. 547.

[83]Rev. Code 1912, arts. 91, 93, 94, 95, 110, 113. See Qualey v. Waldron, 126 La. 258, 52 So. 479, 27 L. R. A. (N. S.) 803, 20 Ann. Cas. 1374; Pray v. Pray, 128 La. 1037, 55 So. 666; Fowler v. Fowler, 131 La. 1088, 60 So. 694.

[84]Rev. Code 1912, art. 138; Millet v. Millet, 144 La. 921, 81 So. 400. See also Carbajal v. Fernandez, 130 La. 812, 58 So. 581.

[85]Rev. Code 1912, art. 138; King v. King, 122 La. 582, 47 So. 909. See also Martin v. Martin, 133 La. 948, 63 So. 477.

guilty of such offense and has fled from justice the offended party may sue for separation.[86]

Nonage.

The age of consent of the male is fourteen years and of the female twelve years. Marriage below these ages without ratification upon reaching age of consent may be annulled.[87]

Residence.

If the marriage was solemnized in the state, action may be brought by the wife regardless of the domicil of the husband.[88]

Jurisdiction.

The district court has jurisdiction to grant decrees of divorce and alimony.[89]

Service.

Personal service or service by leaving summons at last known place of residence, or upon a person appointed by the court against whom the suit is prosecuted is sufficient.[90]

Evidence.

Where the defendant is not present in court, an attorney is appointed by the court to represent him or her.

No divorce will be granted for any cause except adultery and conviction of infamous crime until one year after a decree of separation has been entered.[91]

Alimony.

Alimony is allowed *pendente lite* and after divorce, and, if the wife has obtained the divorce and she has not sufficient means for her maintenance, the court may, in its discretion, allow her out of her husband's property alimony not exceeding one-third of his income, which is revocable by the court when it becomes unnecessary, or she has contracted a second marriage.[92]

Remarriage.

Remarriage is allowed except with paramour.[93]

Wife may not remarry until ten months after final decree.[94]

[86]Rev. Code 1912, art. 138; Boagni v. Breaux, 143 La. 363, 78 So. 594.

[87]Rev. Code 1912, art. 92.

[88]Rev. Code 1912, art. 142. See also George v. George, 143 La. 1032, 79 So. 832; Stevens v. Allen, 139 La. 658, 71 So. 936, L. R. A. 1916E, 1115; Maddux v. Maddux, 143 La. 625, 79 So. 79.

[89]Const., art. 133. The Supreme Court also has jurisdiction in suits involving alimony. Const., art. 85; Ghisalberti v. Calamari, 143 La. 507, 78 So. 751.

[90]Rev. Code 1912, art. 141.

[91]Rev. Code 1912, art. 139.

[92]Rev. Code 1912, arts. 148, 160.

[93]Rev. Code 1912, art. 161.

[94]Rev. Code 1912, art. 137.

§ 886. **Maine.**

Grounds for absolute divorce.

The following are the causes for divorce: Adultery, extreme cruelty, impotency, utter desertion continued for three successive years next prior to the filing of the libel, gross and confirmed habits of intoxication from the use of intoxicating liquors, opium, or other drugs, cruel and abusive treatment, or, on the libel of the wife; where the husband, being of sufficient ability or being able to labor and provide for her, grossly or wantonly and cruelly refuses or neglects to provide suitable maintenance for her.[95]

Void marriages.

Consanguinity and affinity, former husband or wife living at time of subsequent marriage and insanity or idiocy render marriage void.[96]

Nonage.

The consent of parent or guardian is required to validate the marriage of a male under twenty-one years of age and of a female under eighteen.[97]

Residence.

One year's residence is required, unless plaintiff resided in the state when the cause of action accrued or the parties were married in the state.[98]

Jurisdiction.

The Supreme court has jurisdiction of libels for divorce, except in Cumberland county.[99]

Service.

Summons may be served personally, or as ordered by the trial judge.[1]

Evidence.

Both parties may testify.[2]

Alimony.

While the wife's libel is pending, the court, or any justice thereof in vacation, may order the husband to pay to the clerk of the court, for the benefit of the wife, sufficient money for the

[95]Rev. Stat. 1916, ch. 65, § 2. See Trask v. Trask, 114 Maine 60, 95 Atl. 352.

[96]Rev. Stat. 1916, ch. 64, § § 1-3; ch. 65, § 1.

[97]Rev. Stat. 1916, ch. 64, § 5.

[98]Rev. Stat. 1916, ch. 65, § 2. See Walker v. Walker, 111 Maine 404, 89 Atl. 373.

[99]Rev. Stat. 1916, ch. 65, § 2.

[1]Rev. Stat. 1916, ch. 65, § § 3, 4.

[2]Rev. Stat. 1916, ch. 65, § 2.

defense or prosecution thereof, and to make reasonable provision for her separate support.[3]

The court may grant alimony upon a final decree or afterward to the wife, may enter such a decree for the care and custody of the minor children as it thinks right, may change the name of the wife at her request, and may enforce obedience by appropriate process.[4]

Custody of children.

The court upon granting a decree of divorce may decree concerning the care and custody of the minor children, in its discretion giving the custody to one of the parents or to a society.[5]

Name of wife.

The court may change the name of the wife after allowing a decree of divorce.[6]

Remarriage.

A decree of divorce effectually and fully abrogates the marriage contract, and neither party may remarry without being guilty of adultery.[7]

§ 887. **Maryland.**

Grounds for absolute divorce.

Divorce will be granted for the following causes: Adultery by either party, or fornication by wife before marriage unknown to husband, abandonment for three years, impotency at time of marriage, and any cause which renders a marriage null and void ab initio.[8]

Grounds for annulment of marriage.

Consanguinity and affinity, and the existence of a present marriage are grounds for annulment.[9]

Grounds for partial divorce.

A limited divorce may be granted for cruel treatment, excessively vicious conduct, and for abandonment and desertion.[10]

[3]Rev. Stat. 1916, ch. 65, § 6.

[4]Rev. Stat. 1916, ch. 65, §§ 9-14.

[5]Rev. Stat. 1916, ch. 65, § 14, as amended by Laws 1917, ch. 175, p. 172.

[6]Rev. Stat. 1916, ch. 65, § 14, as amended by Laws 1917, ch. 175.

[7]State v. Weatherby, 43 Maine 258.

[8]Ann. Code 1912, art. 16, § 37. See Heinmuller v. Heinmuller, 133 Md. 491, 105 Atl. 745. See also Etheridge v. Etheridge, 120 Md. 11, 87 Atl. 497; Dicus v. Dicus, 131 Md. 87, 101 Atl. 697; Foxwell v. Foxwell, 118 Md. 471, 84 Atl. 552; Taylor v. Taylor, 112 Md. 666, 77 Atl. 133; Pattison v. Pattison, 132 Md. 362, 103 Atl. 977.

[9]Ann. Code 1912, art. 62, §§ 1, 2, 14.

[10]Ann. Code 1912, art. 16, § 38, and amendment Laws 1920, p. 1163. See

Nonage.

The assent of parent or guardian is required for the marriage of a male under twenty-one years of age and of a female under eighteen years.[11]

Residence.

Two years' residence is required. The residence of either party gives the court jurisdiction.[12]

Jurisdiction.

Equity courts have jurisdiction,[13] but the circuit courts for the counties and the superior court in the city of Baltimore may inquire into and declare void any marriage contrary to the table of prohibited degrees and any second marriage when the first subsists.[14]

The bill must be filed where the plaintiff or defendant resides, and if the defendant is a nonresident then where the plaintiff resides.[15]

If the defendant is a nonresident, he or she may be summoned by publication.[16]

Service.

Summons may be by personal service or by publication the same as in chancery causes. If by publication, notice must appear once a week for four successive weeks, at least fifteen days before the time fixed for the appearance of the defendant.[17]

Evidence.

Confessions by parties must be corroborated.[18]

Care and custody of children.

The court may in all cases award the custody and guardianship of children in its discretion.[19]

Alimony.

May be awarded pending the suit or when a divorce is decreed.[20]

Etheridge v. Etheridge, 120 Md. 11, 87 Atl. 497; Hubbard v. Hubbard, 127 Md. 617, 96 Atl. 860.

[11]Ann. Code 1912, art. 62, § 7, as amended by Laws 1920, ch. 549, p. 1132.

[12]Ann. Code 1912, art. 16, §§ 36, 39.

[13]Ann. Code 1912, art. 16, § 36; Wimbrough v. Wimbrough, 125 Md. 619, 94 Atl. 168, Ann. Cas. 1916E, 920. Emerson v. Emerson, 120 Md. 584, 87 Atl. 1033.

[14]Ann. Code 1912, art. 62, § 14.

[15]Ann. Code 1912, art. 16, § 36.

[16]Ann. Code 1912, art. 16, § 36.

[17]Ann. Code 1912, art. 16, § 36.

[18]Ann. Code 1912, art. 16, § 41.

[19]Ann. Code 1912, art. 16, § 38, as amended by Laws 1920, ch. 574.

[20]Ann. Code 1912, art. 16, §

The court may allow alimony in an independent cause.[21]

Remarriage.

Remarriage by the parties is not forbidden.[22]

§ 888. **Massachusetts.**

Grounds for absolute divorce.

Divorce may be granted on the following grounds: Adultery, impotency, utter desertion continued for three successive years next prior to the filing of the libel, gross and confirmed habits of intoxication, and cruel and abusive treatment.

A divorce may also be decreed if either party has been sentenced to confinement at hard labor for life or five years or more in the state's prison, or in a jail or house of correction. After a divorce for such cause no pardon granted to the party so sentenced shall restore such party to his or her conjugal rights.[23]

Separation.

When the husband fails to support his wife, or has deserted her, or when the wife for justifiable cause is actually living apart from the husband, the probate court may make an order for the maintenance of the wife and children.[24]

Grounds for annulment of marriage.

The court may annul a marriage where either party is insane or is an idiot.[25]

Where the parties are nearly related or are of close affinity the marriage is void without legal process.[26] The same is true when either party had a husband or life living at time of marriage.[27]

Nonage.

The marriage of minors where male is under fourteen and female under twelve, will be void if minors separate during such nonage.[28]

16. See McSherry v. McSherry, 113 Md. 395, 77 Atl. 653.

[21]Ann. Code 1912, ch. 16, § 14.

[22]Newbold v. Newbold, 133 Md. 170, 104 Atl. 366.

[23]Gen. Laws 1921, ch. 208, §§ 1, 2, 3, 4, 5. See Holt v. Holt, 204 Mass. 25, 90 N. E. 392; La Flamme v. La Flamme, 210 Mass. 156, 96 N. E. 62, 39 L. R. A. (N. S.) 1133. Unsoeld v. Unsoeld, 216 Mass. 594, 104 N. E. 462.

[24]Gen. Laws 1921, ch. 208, § 20.

[25]Gen. Laws 1921, ch. 207, § 5. Fraud. Anders v. Anders, 224 Mass. 438, 113 N. E. 203; Batty v. Greene, 206 Mass. 561, 92 N. E. 715, 138 Am. St. 407; Safford v. Safford, 224 Mass. 392, 113 N. E. 181.

[26]Gen. Laws 1921, ch. 207, § § 3, 8.

[27]Gen. Laws 1921, ch. 207, § § 4, 8.

[28]Gen. Laws 1921, ch. 207, § 9. See Parton v. Hervey, 1 Gray (Mass.) 119.

But marriage under these ages may be ratified by cohabitation after arriving at age of consent, and such ratification is an absolute bar to divorce.

Residence.

No divorce will be granted if the parties have never lived together in the commonwealth, nor for a cause which occurred in another state or country unless before such cause occurred the parties had lived together as husband and wife[29] in the commonwealth and one of them lived in the commonwealth when the cause occurred.[30]

If the libellant has lived in the commonwealth for five years last preceding the filing of the libel, or if the parties were inhabitants of the commonwealth at the time of their marriage, and the libellant has lived in the commonwealth for three years last preceding such filing, a divorce may be decreed for any cause allowed by law, whether it occurred in the commonwealth or elsewhere, unless it appears that the libellant has removed into the commonwealth for the purpose of obtaining a divorce.[31]

Jurisdiction.

Libels for divorce must be filed, heard, and determined in the superior court or probate court held for the county in which one of the parties lives, except that if the libellant has left the county in which the parties lived together, and the libellee still lives therein, the libel may be heard and determined in the court held for that county.[32]

Service.

The court or clerk may order the libellee to be summoned to appear and answer at the court having jurisdiction of the cause, by the publication of the libel in one or more newspapers, or by delivering to the libellee an attested copy of the libel and a summons, or in such other manner as it or he may require.[33]

Alimony,

The court may require the husband to pay into court for the

[29]Gen. Laws 1921, ch. 208, § § 4, 5. Weston v. Weston, 143 Mass. 274, 9 N. E. 557. See Winans v. Winans, 205 Mass. 388, 91 N. E. 394; 28 L. R. A. (N. S.) 992. Friedrich v. Friedrich, 230 Mass. 59, 119 N. E. 449.

[30]Gen. Laws 1921, ch. 208, § 5.

[31]Gen. Laws 1921, ch. 208, § 5.

[32]Gen. Laws 1921, ch. 208, § 6, as amended by Laws 1922, ch. 532, § 5. See Sampson v. Sampson, 223 Mass. 451, 112 N. E. 84; Friedrich v. Friedrich, 230 Mass. 59, 119 N. E. 449; Stone v. Duffy, 219 Mass. 178, 106 N. E. 595.

[33]Gen. Laws 1921, ch. 208, § 8.

use of the wife during the pendency of the libel an amount which may enable her to maintain or defend the libel, and may require him to pay to the wife alimony during the pendency of the libel.[34]

Upon a divorce, or upon petition at any time after a divorce, the superior court may decree alimony to the wife, or a part of her estate, in the nature of alimony, to the husband.[35]

Custody of children.

Upon a decree of divorce the court may make such decree as it considers expedient relative to the care, custody and maintenance of the minor children of the parties, and may determine with which of the parents the children or any of them shall remain.[36]

Name of wife.

The court upon granting a divorce to a woman may allow her to resume her maiden name or the name of a former husband.[37]

Remarriage.

After a decree of divorce has become absolute, either party may marry again as if the other were dead, except the party from whom the divorce was granted shall not marry within two years after the decree has become absolute.[38]

§ 889. **Michigan.**

Grounds for absolute divorce.

Divorce will be granted on the following grounds: Adultery,[39] physical incapacity, habitual drunkenness, desertion for two years, extreme cruelty, sentence of imprisonment for three years, and failure to support.

A divorce may also be granted, in the discretion of the court, to any resident of the state whose husband or wife shall have obtained a divorce in any other state.[40]

Grounds for partial divorce.

The court upon petition will grant a divorce for extreme cru-

[34]Gen. Laws 1921, ch. 208, § 17.

[35]Gen. Laws 1921, ch. 208, § 34.

[36]Gen. Laws 1921, ch. 208, § 28.

[37]Gen. Laws 1921, ch. 208, § 23.

[38]Gen. Laws 1921, ch. 208, § 24.

[39]Comp. Laws 1915, § 11397. See Germaine v. Germaine, 204 Mich. 640, 171 N. W. 377; Thompson v. Thompson, 205 Mich. 124, 171 N. W. 347; Goodspeed v. Goodspeed, 204 Mich. 44, 170 N. W. 90.

[40]Comp. Laws 1915, § 11397. See Emery v. Emery, 181 Mich. 146, 147 N. W. 452; Tierney v. Tierney, 169 Mich. 600, 135 N. W. 654; Wagner v. Wagner, 203 Mich. 328, 168 N. W. 1019; Delor v. Delor, 159 Mich. 624, 124 N. W. 544; Begrow v. Begrow, 162 Mich. 349, 127 N. W. 256, 139 Am. St. 502; McDuffee v. McDuffee, 169 Mich. 410, 135 N. W. 242.

elty, for desertion for two years, or for neglect of the husband to provide and maintain his family.[41]

Decrees may be made absolute for the same causes in the discretion of the court[42] if asked.[43]

Void marriages.

Consanguinity and affinity, force and fraud and an already existing marriage of either one of the parties will render the marriage void without legal process.[44]

Where one party has been sentenced to imprisonment for life the court will recognize the marriage as null and void.[45]

Nonage.

To give validity to the marriage the male must be eighteen years of age and the female sixteen.[46] These marriages are void without legal process if the parties separate under this age, but the marriage may be ratified after arriving at full age, if the parties cohabit.[47]

Residence.

One year of residence is required if the cause arose in the state, or two years if the cause arose elsewhere.

No divorce is granted in any case unless the defendant is domiciled in the state at the time the cause arose, or, was served with order or by publication or appeared.[48]

Jurisdiction.

The circuit court and courts of chancery of the county where the parties or one of them reside may decree a divorce.[49]

Service.

Summons may be by personal service if defendant resides in the state. If a non-resident, the court issues an order to defendant to appear within a period not exceeding four months. The order must be published within twenty days of issuing and for six consecutive weeks.

Personal service outside of the state is equivalent to publication.[50]

[41]Comp. Laws 1915, § 11398. See Case v. Case, 159 Mich. 491, 122 N. W. 538, 124 N. W. 565.

[42]Comp. Laws 1915, § 11399. See Coon v. Coon, 163 Mich. 644, 129 N. W. 12.

[43]Comp. Laws 1915, § 11399.

[44]Comp. Laws 1915, § 11392. Unchastity before marriage. See Sylvester v. Sylvester, 180 Mich. 512, 147 N. W. 454.

[45]Comp. Laws 1915, § 11396.

[46]Comp. Laws 1915, § 11362.

[47]Comp. Laws 1915, § 11393.

[48]Comp. Laws 1915, § 11400.

[49]Comp. Laws 1915, § 11397.

[50]Comp. Laws 1915, § 11400.

No trial is allowed until two months after filing of bill, except for desertion.[51]

Evidence.

Confessions must be corroborated.

Either party may testify except as to adultery.[52]

Alimony.

Alimony and suit money will be allowed.

In case of absolute divorce the court makes such provision for the care of children as may seem advisable. The wife takes all her real estate and dower interest in the real estate of her husband, if the divorce be for any other cause than her adultery, in which case she forfeits her dower.

Such allowances may also be made as the court may determine proper from the property that shall have come to the husband by reason of marriage, or such amount of money as the court may see fit in lieu thereof. In case of failure of the husband to pay such allowance as shall be decreed, the court may award execution for the collection of the same or may sequester his real and personal estate.[53]

Remarriage.

Remarriage is permitted in the discretion of the court but the time set by the court shall not exceed two years.[54]

§ 890. Minnesota.

Grounds for absolute divorce.

Divorce will be granted on the following grounds: Adultery, impotency, cruel and inhuman treatment, conviction for crime, wilful desertion for one year next preceding filing of complaint and habitual drunkenness for one year immediately preceding filing of complaint.[55]

[51]Comp. Laws 1915, § 11400.

[52]Comp. Laws 1915, § 11428.

[53]Comp. Laws 1915, §§ 11404, 11406-11417, 11436-11450. See Laws 1919, No. 415; Gunn v. Gunn, 205 Mich. 198, 171 N. W. 371. See also Streicher v. Streicher, 202 Mich. 588, 168 N. W. 409; Bialy v. Bialy, 167 Mich. 559, 133 N. W. 496, Ann. Cas. 1913A. 800; Delor v. Donovan, 157 Mich. 587, 122 N. W. 196; Kellogg v. Donovan, 167 Mich. 95, 132 N. W. 501; Austin v. Austin, 173 Mich. 47, 138 N. W. 237, Ann. Cas. 1914D, 749; Gittings v. Gittings, 197 Mich. 446, 163 N. W. 900.

[54]Comp. Laws 1915, § 11434.

[55]Gen. Stat. 1913, § 7111. See Martinson v. Martinson, 116 Minn. 128, 133 N. W. 460; Jokela v. Jokela, 111 Minn. 403, 127 N. W. 391; Long v. Long, 135 Minn. 259, 160 N. W. 687, L. R. A. 1917C, 159. Gen Stat. 1913, § 7090 provides that "no marriage shall be contracted while either of the parties has a husband or wife

Grounds for annulment of marriage.

Nonage, lack of understanding, and force or fraud may be grounds for annulment of marriage.[56]

Subsequent voluntary cohabitation may remove these grounds.[57]

Grounds for partial divorce.

A partial divorce may be granted for cruel and inhuman treatment, conduct rendering it unsafe and improper for the wife to cohabit with the husband, and for abandonment and neglect of husband to provide for his family.[58]

Void marriages.

Marriage of parties within the prohibited degrees of relationship or affinity, and while either has a spouse living, is void without legal process.[59]

Nonage.

Where parties are under age of consent at time of marriage it may be annulled.[60] But these marriages may be ratified by cohabitation after arriving at lawful age.[61]

Residence.

One year's residence is required except where adultery was committed in the state while one party was a resident.[62]

Jurisdiction.

All actions for separation or divorce are brought in the district court.[63]

Service.

Summons may be by personal service or by publication. If by publication, notice must appear once a week for three weeks returnable in six weeks.[64]

living, nor within six months after either has been divorced from a former spouse; nor between parties who are nearer of kin than second cousins, whether of the half or whole blood computed by the rules of the civil law; nor between persons either of whom is epileptic, feeble-minded or insane." On epilepsy see Behsman v. Behsman, 144 Minn. 95, 174 N. W. 611, and note in 7 A. L. R. 1503.

[56]Gen. Stat. 1913, § 7107.

[57]Gen. Stat. 1913, § 7109. See State v. Yoder, 113 Minn. 503, 130 N. W. 10.

[58]Gen. Stat. 1913, § 7134. See Heinze v. Heinze, 107 Minn. 43, 119 N. W. 489.

[59]Gen. Stat. 1913, § 7106.

[60]Gen. Stat. 1913, § 7107.

[61]Gen. Stat. 1913, § 7109.

[62]Gen. Stat. 1913, § 7112. See Searles v. Searles, 140 Minn. 385, 168 N. W. 133.

[63]Gen. Stat. 1913, § 7108.

[64]Gen. Stat. 1913, §§ 7116, 7738. See Roberts v. Roberts, 135 Minn. 397, 161 N. W. 148, L. R. A. 1917C, 1140; State v. Doyle, 107 Minn. 498, 120 N. W. 902.

Answer may be made within thirty days from the last publication.[65]

Evidence.

Actions on the ground of adultery must be brought within three years from date of discovery of offense.[66]

Alimony.

Alimony pendente lite and upon final decree of divorce will be allowed.[67]

Custody of children.

The court may decree concerning the care and custody of the minor children of the divorced parties as it may deem suitable.[68]

Name of wife.

Court may in its discretion change the name of the wife after granting a decree of divorce.[69]

Remarriage.

Either party may remarry after six months.[70]

§ 891. **Mississippi.**

Grounds for absolute divorce.

The following are causes for an absolute divorce: Adultery, consanguinity and affinity, conviction and sentence to penitentiary, habitual cruel and inhuman treatment, wilful desertion for two years, habitual drunkenness, habitual use of opium or other like drug, former husband or wife living, impotency, insanity or idiocy and pregnancy by other than husband.[71]

Nonage.

Licenses to marry are forbidden without the consent of parent or guardian to a male under the age of twenty-one years or a female under eighteen years.[72]

Residence.

One year's residence is required unless both parties are dom-

[65]Gen. Stat. 1913, § 7117.

[66]Gen. Stat. 1913, § 7113. Admission or confessions require corroboration. Gen. Stat. 1913, § 8465. See Hertz v. Hertz, 126 Minn. 65, 147 N. W. 825.

[67]Gen. Stat. 1913, §§ 7119, 7124, 7126, 7127, 7128, 7129.

[68]Gen. Stat. 1913, § 7121.

[69]Gen. Stat. 1913, § 7133.

[70]Gen. Stat. 1913, § 7090.

[71]Ann. Code 1917, § 1411. See also Wilson v. Wilson, 104 Miss. 347, 61 So. 453; Aldridge v. Aldridge, 116 Miss. 385, 77 So. 150. On duress, see Main v. Main, 113 Miss. 165, 74 So. 138. On prior existing marriage, see Clark v. Clark, 115 Miss. 726, 76 So. 638.

[72]Ann. Code 1917, § 2552.

iciled in the state or service has been made on the defendant in the state.[73]

Jurisdiction.

Chancery courts have jurisdiction in all cases of divorce and suits for alimony.[74]

Service.

Summons may be by personal service or by publication.

Personal service within or without the state, and, if service is made by publication, publication should be made once a week for three consecutive weeks.[75]

Evidence.

Trial may be in open court.

Either party may testify.

No divorce allowed except from the bonds of matrimony.[76]

Alimony.

Alimony may be allowed after the decree in the discretion of the court.[77]

Remarriage.

Remarriage is not permitted to libellee in the discretion of the court, when divorce is granted for adultery.[78]

§ 892. **Missouri.**

Grounds for absolute divorce.

Divorce may be granted on the following grounds: impotency at time of marriage, wife or husband living at time of marriage, adultery, absence one year without reasonable cause, conviction of felony or infamous crime since marriage, habitual drunkenness for space of one year, and cruel or barbarous treatment.

Where one party offers such indignities to the other as shall render his or her condition intolerable; or when the husband shall be guilty of such conduct as to constitute him a vagrant within the meaning of the law respecting vagrants; or where prior to the contract of marriage, or the solemnization thereof, either party shall have been convicted of a felony or infamous crime in any state, territory, or country, without knowledge on the part of the other party of such fact at the time of such marriage; or

[73]Ann. Code 1917, § 1417.

[74]Ann. Code 1917, § 289 (b).

[75]Ann. Code 1917, § 1419.

[76]Ann. Code 1917, § 1421.

[77]Ann. Code 1917, § 1415. See Guess v. Smith, 100 Miss. 457, 56 So. 166; Ann. Cas. 1914A, 300; Winkler v. Winkler, 104 Miss. 1, 61 So. 1, Ann. Cas. 1915C, 1250.

[78]Ann. Code 1917, § 1412.

where the intended wife, at the time of contracting marriage or at the time of the solemnization thereof, shall have been pregnant by any other man than her intended husband, and without his knowledge at the time of such solemnization. The court may grant a divorce when injured party, for any of the causes above enumerated, obtains a divorce from the bonds of matrimony but such divorce affects in no way the legitimacy of the children of such marriage.[79]

Grounds for annulment of marriage.

Where either is incapable to contract for any reason the marriage may be annulled.[80]

Nonage.

There is no statute designating the age of consent to marry in the absence of such provision, but the common-law ages prevail.

Residence.

One year's residence is required, unless the acts were committed in the state, or while one of the parties resided in the state.[81]

Jurisdiction.

The circuit court of the county has jurisdiction in all cases of divorce and alimony.[82]

Service.

Summons may be by personal service or by publication.

[79]Rev. Stat. 1919, §§ 1801, 1803; Wehrenbrecht v. Wehrenbrecht, 200 Mo. App. 452, 207 S. W. 290; Nolker v. Nolker (Mo.), 208 S. W. 128; Sutermeister v. Sutermeister (Mo.), 209 S. W. 955; Davis v. Davis (Mo.), 206 S. W. 580; Milster v. Milster, 200 Mo. App. 603, 209 S. W. 620; Ashburn v. Ashburn, 101 Mo. App. 365, 74 S. W. 394. See also Donohue v. Donohue, 159 Mo. App. 610, 141 S. W. 465; Willett v. Willett (Mo. App.), 196 S. W. 1058; Tarrant v. Tarrant, 156 Mo. App. 725, 137 S. W. 56; Donley v. Donley, 150 Mo. App. 660, 131 S. W. 356; Clark v. Clark (Mo. App.), 128 S. W. 218; Cunningham v. Cunningham (Mo. App.), 206 S. W. 240; Hartwig v. Hartwig, 160 Mo. App. 284, 142 S. W. 797; Tegethoff v. Tegethoff, 198 Mo. App. 167, 199 S. W. 460.

[80]Rev. Stat. 1919, §§ 2370, 8280, 8281. Duress: Marre v. Marre, 184 Mo. App. 198, 168 S. W. 636; mental incapacity: Henderson v. Rissor, 141 Mo. App. 540, 126 S. W. 203; civil contract: Knost v. Knost, 229 Mo. 170, 129 S. W. 665; fraud, loathsome disease: Jordan v. Missouri &c. Co., 136 Mo. App. 192, 116 S. W. 432.

[81]Rev. Stat. 1919, § 1804. See Winkler v. Winkler, 273 Mo. 60, 199 S. W. 981; Keller v. Keller (Mo. App.), 129 S. W. 492; Taubman v. Davis (Mo. App.), 203 S. W. 654.

[82]Rev. Stat. 1919, § 1802; Chapman v. Chapman, 194 Mo. App. 483, 185 S. W. 221. Can not nonsuit plaintiff under Rev. Stat. 1919, § 1410; Stauffer v. Stauffer (Mo.), 207 S. W. 240.

If the defendant is a nonresident, he or she must be served with a notice of the suit once a week for four consecutive weeks, the last insertion to be at least fourteen days before the term day.

Personal service without the state is equivalent to publication.[83]

Evidence.

All trials must be by the court.[84]

Alimony.

Alimony will be allowed in the discretion of the court upon granting a decree of divorce.[85]

Custody of children.

The court has power to decree concerning the care, custody and earnings of minor children.[86]

Remarriage.

Remarriage is not prohibited by statute.

§ 893. Montana.

Grounds for absolute divorce.

Absolute divorce may be granted for: Adultery, conviction of felony, extreme cruelty, wilful desertion for one year, habitual intemperance for one year, and wilful neglect for one year.[87]

Grounds for annulment of marriage.

The courts will annul a marriage where it is sufficiently charged that force or fraud obtained, that former husband or wife is living, that some physical incapacity exists, that the parties are under age of consent, or that one of parties is of unsound mind.[88]

Marriages between near relatives or persons of close affinity, and between whites and blacks are void without legal process.[89]

Grounds for partial divorce.

The court will grant a decree for separation and separate maintenance on the same grounds as for absolute divorce.[90]

[83]Rev. Stat. 1919, §§ 1770, 1778; Kunzi v. Hickman, 243 Mo. 103, 147 S. W. 1002.

[84]Rev. Stat. 1919, §§ 1802, 1804.

[85]Rev. Stat. 1919, §§ 1806, 1807. See Lemp v. Lemp, 249 Mo. 295, 155 S. W. 1057, Ann. Cas. 1914D, 307.

[86]Rev. Stat. 1919, §§ 1813, 1814.

[87]Rev. Code 1921, § 5736. See Farwell v. Farwell, 47 Mont. 5, 133 Pac. 958, Ann. Cas. 1915C, 78, and also Franklin v. Franklin, 40 Mont. 348, 106 Pac. 353, 26 L. R. A. (N. S.) 490, 20 Ann. Cas. 339.

[88]Rev. Code 1921, § 5729. See Carroll v. Huston, 48 Mont. 524, 139 Pac. 458.

[89]Rev. Code 1921, §§ 5699, 5700, 5701, 5702.

[90]Rev. Code 1921, §§ 5736, 5768.

Nonage.

Consent of parents is necessary to validate marriage of minors.[91]

Residence.

The plaintiff must be a resident of the state for one year prior to bringing action.[92]

Jurisdiction.

The district court has jurisdiction in all cases for divorce and annulment of marriage.[93]

Service.

Summons may be by personal service or by publication. If by publication, not less than four consecutive weeks.

Personal service out of state is equivalent to publication.[94]

Evidence.

No decree by default will be granted; all facts alleged must be proved.[95]

Hearing may be private at discretion of court.[96]

Alimony.

Alimony will be allowed during pendency of the suit.

In case of absolute divorce the court makes such provision for care of children as may seem advisable. The wife takes all her real estate and dower interest in the real estate of the husband, if the divorce be for any other cause than her adultery, in which case she forfeits her dower.

The court may require the husband to give reasonable security for payment of alimony.[97]

Remarriage.

Remarriage is not denied to a party whose former marriage was duly annulled or dissolved.[98]

§ 894. **Nebraska.**

Grounds for absolute divorce.

Absolute divorce will be granted for: Adultery, physical incapacity at time of marriage, sentence to three years' imprisonment or more, two years' wilful abandonment, habitual drunkenness, and extreme cruelty.[99]

[91]Rev. Code 1921, § 5712.

[92]Rev. Code 1921, § 5766.

[93]Rev. Code 1921, § 8829.

[94]Rev. Code 1921, §§ 9111, 9117, 9118.

[95]Rev. Code 1921, § 5767.

[96]Rev. Code 1921, § 8848.

[97]Rev. Code 1921, §§ 5771, 5772, 5777. See State v. Smith, 42 Mont. 211, 111 Pac. 732.

[98]Rev. Code 1921, § 5705.

[99]Rev. Stat. 1913, §§ 1567, 1568;

Grounds for annulment of marriage.

Consanguinity and affinity, nonage, force or fraud, already existing marriage of one of parties, insanity, idiocy, miscegenation, or any physical incapacity will justify court in annulling the marriage.[1]

Grounds for partial divorce.

Divorce from bed and board may be had for extreme cruelty, utter desertion for two years, and to the wife for wilful failure of the husband to provide for her.[2]

Nonage.

A marriage under age of consent may be annulled. But such marriages may be ratified by cohabitation after the parties have arrived at legal age and such ratification is an absolute bar to divorce on this ground.[3]

Residence.

Complainant for cause arising within state must have resided in the state one year immediately preceding the filing of the complaint, unless the marriage was solemnized in the state, and the plaintiff shall have resided therein from the marriage to the filing of the complaint. For cause arising without the state, two years' bona fide residence is required.[4]

Jurisdiction.

The juvenile court has jurisdiction to hear and determine all causes for divorce or alimony or involving custody of children.[5]

Service.

Summons may be by personal service, or by publication once a week for four consecutive weeks.[6]

Stackhouse v. Stackhouse, 88 Nebr 184, 129 N. W. 257.

[1]Comp. Stat. 1911, § 2; Rev. Stat. 1913, §§ 1542, 1557, 1558, 1596, 1598, 1599, 1600. See Melcher v. Melcher, 102 Nebr. 790, 169 N. W. 720, 4 A. L. R. 492. See also Kanaly v. Bronson, 97 Nebr. 322, 149 N. W. 781; Caulk v. Caulk, 91 Nebr. 638, 136 N. W. 845; Kutch v. Kutch, 85 Nebr. 702, 124 N. W. 108; Kutch v. Kutch, 88 Nebr. 114, 129 N. W. 169; Svanda v. Svanda, 93 Nebr. 404, 140 N. W. 777, 47 L. R. A. (N. S.) 666; Adams v. Scott, 93 Nebr. 537, 141 N. W. 148.

[2]Rev. Stat. 1913, § 1568; James v. James, 103 Nebr. 278, 171 N. W. 904. See also McGrew v. McGrew, 87 Nebr. 423, 127 N. W. 121; Pedersen v. Pedersen, 88 Nebr. 55, 128 N. W. 649; Preuit v. Preuit, 88 Nebr. 124, 129 N. W. 175; Unzicker v. Unzicker, 101 Nebr. 837, 166 N. W. 241.

[3]Rev. Stat. 1913, § 1596.

[4]Rev. Stat. 1913, § 1569; Williams v. Williams, 101 Nebr. 369, 163 N. W. 147; Miller v. Miller, 89 Nebr. 239, 131 N. W. 203, 34 L. R. A. (N. S.) 360.

[5]Laws 1919, ch. 206.

[6]Rev. Stat. 1913, § 1571.

Evidence.

Parties may be witnesses,[7] but their statements must be corroborated.

Action for impotency must be brought within two years after marriage.[8]

Alimony.

The court may decree alimony during the pendency of the suit for the support of the minor children, and upon final decree may make such decree of alimony as in its discretion is suitable. The court has power to enforce its decree.[9]

Custody of children.

The court may decree concerning the care, custody and maintenance of the minor children as it deems fit, and may modify its decree.[10]

Remarriage.

The party obtaining a decree may not remarry within six months, but the other party must not remarry during the pendency of appeal.[11]

§ 895. **Nevada.**

Grounds for absolute divorce.

Absolute divorce may be granted on the following grounds: Adultery, conviction of felony or infamous crime, extreme cruelty, wilful desertion for one year, drunkenness, impotency at time of marriage, and wilful neglect to provide for one year.[12]

Grounds for annulment of marriage.

Want of understanding, nonage, or fraud may be grounds for annulment of marriage.[13]

[7]Rev. Stat. 1913, § 1572; Pierce v. Pierce, 96 Nebr. 511, 148 N. W. 151.

[8]Rev. Stat. 1913, §§ 1600, 1601.

[9]Rev. Stat. 1913, § § 1576, 1577 as amended by Laws 1917, ch. 28, 1578 as amended by Laws 1919, ch. 206, 1584, 1585, 1589; Laws 1915, ch. 186. See Nathan v. Nathan, 102 Nebr. 59, 165 N. W. 955; Bates v. Bodie, 245 U. S. 520, 62 L. ed. 444, 38 Sup. Ct. 182, L. R. A. 1918C, 355.

[10]Laws 1917, ch. 28; Laws 1919, ch. 206.

[11]Rev. Stat. 1913, § 1606. See J. P. Leininger Lumber Co. v. Dewey, 86 Nebr. 659, 26 N. W. 87, 21 Ann. Cas. 471.

[12]Rev. Laws 1912, § 5838, as amended by Laws 1913, ch. 10; Laws 1915, ch. 28; Laws 1923, ch. 213. See Worthington v. District Court, 37 Nev. 212, 142 Pac. 230, L. R. A. 1916A, 696, Ann. Cas. 1916E, 1097; McAllister v. McAllister, 37 Nev. 92, 139 Pac. 781; Kapp v. District Court, 31 Nev. 444, 103 Pac. 235; Robinson v. Robinson, 41 Nev. 276, 169 Pac. 333.

[13]Rev. Laws 1912, § § 2355, 2356.

Void marriages.

Marriages where the parties are near of kin or persons of close affinity, or have a former husband or wife living, if the marriage was contracted in the state, are void without legal process.[14]

Separation and maintenance.

Where the wife has any valid ground of divorce against the husband she may without petitioning for a decree of divorce maintain an action for separation and maintenance.[15]

Nonage.

The legal age of consent of male is eighteen years and of female sixteen years.[16] A marriage under these ages may be ratified by cohabitation after the parties have arrived at legal age, and such ratification is an absolute bar to divorce on this ground.[17]

Residence.

Six months' residence is required before a petition for divorce can be filed.[18]

Jurisdiction.

District courts have jurisdiction to grant decrees of divorce and alimony.[19]

Service.

Summons may be by personal service or by publication. If by publication, notice must appear three months in succession.[20]

Evidence.

Testimony may be taken the same as in other cases.

Both parties may testify.[21]

Alimony.

Alimony pendente lite and upon decree of divorce will be allowed according to the discretion of the court.[22]

[14]Rev. Laws 1912, § 2354.

[15]Laws 1913, ch. 97.

[16]Rev. Laws 1912, § 2355.

[17]Rev. Laws 1912, § 2356.

[18]Laws 1923, ch. 213. See also State v. Moran, 37 Nev. 404, 142 Pac. 534; Merritt v. Merritt, 40 Nev. 385, 160 Pac. 22, 164 Pac. 644; Fleming v. Fleming, 36 Nev. 135, 134 Pac. 445; Blakeslee v. Blakeslee, 41 Nev. 235, 168 Pac. 950.

[19]Rev. Laws 1912, § 5838.

[20]Rev. Laws 1912, § 5839; Miller v. Miller, 37 Nev. 257, 142 Pac. 218.

[21]Rev. Laws 1912, § 5842.

[22]Rev. Laws 1912, § 5841; Laws 1813, ch. 97. See Paupart v. District Court, 34 Nev. 336, 123 Pac. 769.

Custody of children.

The court may make such disposition of and provision for the children as it may deem proper.[23]

Name of wife.

The court may change name of the wife.[24]

Remarriage.

The divorce decree dissolves all bonds of matrimony and the parties are free.[25]

§ 896. **New Hampshire.**

Grounds for absolute divorce.

Divorce may be granted on the following grounds: Impotency, extreme cruelty, conviction of crime, adultery, cruel treatment, absence for three years, habitual drunkenness for three years, joining any religious sect or society, which professes to believe the relation of husband and wife unlawful, and refusal to cohabit for six months; abandonment for three years, and desertion for three years when the husband has wilfully absented himself from the wife for three years together without making suitable provision for her support and maintenance; or when the wife of any citizen has gone to reside beyond the limits of the state, and has remained absent and separate from her husband for ten years together without his consent, and without returning to claim her marriage rights the court may grant a divorce.

When the wife of any alien or citizen of any other state, living separate, has resided in the state for three years together, her husband having left the United States, with the intention of becoming a citizen of some foreign country, and not having during that period come into the state to claim his marital rights, and not having made suitable provision for his wife's support and maintenance, she may obtain a divorce.[26]

Sentence of death dissolves marriage.[27]

Grounds for annulment of marriage.

If doubt exists whether a marriage is void or not, action may be brought in the Supreme Court to determine that question.[28]

[23]Rev. Laws 1912, § 5840.

[24]Rev. Laws 1912, § 5844.

[25]Rev. Laws 1912, § 5844.

[26]Pub. Stat. 1901, p. 591, § 5. Easter v. Easter, 75 N. H. 270, 73 Atl. 30; Brown v. Brown, 78 N. H. 337, 100 Atl. 604; Hilliard v. Baldwin, 76 N. H. 142, 80 Atl. 139.

[27]Pub. Stat. 1901, p. 786, § 8.

[28]Pub. Stat. 1901, p. 590, § 2; Vigno v. Vigno (N. H.), 106 Atl. 285.

Void marriages.

Marriage of persons near of kin or of close affinity, or who have a husband or wife living is void without legal process.[29]

Separation.

Separation from bed and board may be granted for any cause for which a divorce may be granted.[30]

Nonage.

The legal age of consent for males is fourteen years and for females thirteen years.[31]

Residence.

Actual residence for one year next preceding the commencement of the action, where both parties were domiciled within the state when the action was commenced; where the plaintiff was domiciled within the state when the action was commenced and the defendant was personally served with process within the state; and where one of the parties was domiciled within the state when the action was commenced, and one or the other of them actually resided within the state is required.[32]

Evidence.

All causes must be in existence at the time of filing the petition.[33]

Jurisdiction.

The Supreme court has jurisdiction to grant a divorce.[34]

Service.

Summons may be by personal service or such service as the court shall direct.[35]

Alimony.

Alimony will be allowed to the wife in the discretion of the court.[36]

Remarriage.

Remarriage is not forbidden by statute.

[29]Pub. Stat. 1901, p. 588, § 3, p. 590, § 1.

[30]Laws 1909, ch. 68.

[31]Pub. Stat. 1901, p. 588, § 4. But see Stat. 1907, ch. 80, § 2, and Levy v. Downing, 213 Mass. 334, 100 N. E. 638.

[32]Pub. Stat. 1901, pp. 590, 591, § 3. See also Shatney v. Shatney, 76 N. H. 391, 83 Atl. 124; Hanson v. Hanson, 78 N. H. 560, 103 Atl. 307.

[33]Pub. Stat. 1901, p. 591, § 6.

[34]Pub. Stat. 1901, p. 592, § 8. See also as to superior court, Levy v. Downing, 213 Mass. 334, 100 N. E. 638, citing Laws 1907, ch. 80, § 2.

[35]Pub. Stat. 1901, pp. 698, 699, § § 2, 9.

[36]Pub. Stat. 1901, p. 592, § § 13-18; Laws 1907, ch. 31. See also Wallace v. Wallace, 75 N. H. 217, 72 Atl. 1033.

§ 897. **New Jersey.**

Grounds for absolute divorce.

Divorce may be granted for adultery, and for wilful, continued, and obstinate desertion for two years.[37]

Grounds for partial divorce.

Divorce from bed and board forever or for a limited period may be decreed for extreme cruelty, adultery, or desertion for two years.[38]

Grounds for annulment of marriage.

A marriage may be annulled where former husband or wife is living, for consanguinity and affinity, for impotence, incapacity to consent, and nonage.[39]

Nonage.

The consent of parent or guardian is required to validate a marriage of a male under twenty-one years of age and of a female eighteen years.[40]

Residence.

The plaintiff must be a resident at the commencement of the action, and except in adultery must have had two years' residence.[41]

Jurisdiction.

Courts of chancery have jurisdiction in all suits for divorce.[42]

[37]Comp. Stat. 1910, Divorce, § 2; Gordon v. Gordon, 89 N. J. Eq. 535, 105 Atl. 242. See also Rogers v. Rogers, 81 N. J. Eq. 311, 88 Atl. 370; Lee v. Lee, 77 N. J. Eq. 91, 75 Atl. 562; Howard v. Howard, 77 N. J. Eq. 186, 78 Atl. 195; Johnson v. Johnson, 78 N. J. Eq. 507, 80 Atl. 119; Duke v. Duke, 72 N. J. Eq. 942, 73 Atl 840; Arrowsmith v. Arrowsmith (N. J.), 71 Atl. 702; Provost v. Provost, 73 N. J. Eq. 418, 75 Atl. 1101; Myles v. Myles, 77 N. J. Eq. 265, 76 Atl. 1037. On insanity, see Brainen v. Brainen, 79 N. J. Eq. 270, 82 Atl. 327.

[38]Comp. Stat. 1910, Divorce, § 3, Arrowsmith v. Arrowsmith (N. J.), 71 Atl. 702; Pittis v. Pittis, 82 N. J. Eq. 635, 89 Atl. 749; Lister v. Lister, 86 N. J. Eq. 30, 97 Atl. 170; Thomas v. Thomas, 87 N. J. Eq. 668, 101 Atl. 1055, 103 Atl. 675.

[39]Comp. Stat. 1910, Divorce, § 1; Freda v. Bergman, 77 N. J. Eq. 46, 76 Atl. 460; Schaffer v. Krestovnikow, 88 N. J. Eq. 192, 102 Atl. 246. On fraud, see Allen v. Allen, 85 N. J. Eq. 55, 95 Atl. 363. On unsound mind, see Buffum v. Buffum, 86 N. J. Eq. 119, 97 Atl. 256.

[40]Comp. Stat. 1910, Marriage, § 7. Age of consent eighteen and sixteen. Comp. Stat. 1910, Divorce, § 1; Palmer v. Palmer (N. J.), 80 Atl. 486; Hess v. Kimble, 79 N. J. Eq. 454, 81 Atl. 363; Taub v. Taub, 87 N. J. Eq 624, 101 Atl. 246.

[41]Comp. Stat. 1910, Divorce, § 6; Berger v. Berger, 89 N. J. Eq. 430, 105 Atl. 496. See also Slattery v. Slattery, 87 N. J. Eq. 673, 102 Atl. 873; King v. King, 74 N. J. Eq. 824, 71 Atl. 687, 135 Am. St. 731.

[42]Comp. Stat. 1910, Divorce, § 4.

Service.

Summons may be by personal service or by publication. If by publication, once a week for four successive weeks within twenty days after the date of the order.[43]

Evidence.

A trial by jury may be ordered.[44]

Alimony.

Alimony during pendency of suit and upon decree of divorce may be granted according to the court's discretion and the circumstances of the parties.[45]

Remarriage.

Remarriage is not forbidden.

§ 898. New Mexico.

Grounds for absolute divorce.

Absolute divorce may be granted on the following grounds: Adultery, impotency, cruel and inhuman treatment, pregnancy of wife at time of marriage by another man than her husband, abandonment, conviction of a felony, habitual drunkenness, and neglect by the husband to support the wife.[46]

Grounds for annulment of marriage.

A marriage may be annulled for: Consanguinity, nonage,[47] force and fraud, already existing marriage and insanity.

There is no statutory provision for annulment, but marriage is contemplated by the law as a civil contract for which the consent of parties capable in law of contracting is essential.[48]

No persons are permitted to join others in marriage unless they ascertain that they are capable of contracting marriage.[49]

Nonage.

The age of consent for a male is eighteen years and for a female fifteen years.[50]

[43]Comp. Stat. 1910, Divorce, §§ 7, 14; Laws 1913, ch. 26; Laws 1916, ch. 64. See Henry v. Henry, 81 N. J. Eq. 512, 86 Atl. 1102.

[44]Comp. Stat. 1910, Divorce, § 24.

[45]Comp. Stat. 1910, Divorce, § 25. See Dietrick v. Dietrick, 88 N. J. Eq. 560, 103 Atl. 242.

[46]Ann. Stat. 1915, § 2773; Klasner v. Klasner, 23 N. Mex. 627, 170 Pac. 745.

[47]Ann. Stat. 1915, §§ 3430, 3431, 3434.

[48]Ann. Stat. 1915, § 3425.

[49]Ann. Stat. 1915, § 3432.

[50]Ann. Stat. 1915, § 3427. See Territory v. Harwood, 15 N. Mex. 424, 110 Pac. 556, 29 L. R. A. (N. S.) 504.

Residence.

One year's residence is required.[51]

Jurisdiction.

District courts have jurisdiction to hear and determine all cases of divorce and suits for alimony.[52]

Service.

Summons may be by personal service, or by publication four successive weeks, or by mail, or by such other means as the court may direct. If by publication, the last publication shall be before the time for the defendant to appear.[53]

Alimony.

Alimony may be allowed in the discretion of the court. Suit may be brought for alimony without asking for divorce.[54]

Remarriage.

Remarriage is not forbidden by statute.

§ 899. **New York.**

Grounds for absolute divorce.

Divorce may be granted for adultery, where both parties were residents of the state when the offense was committed; where the parties were married within the state; where the plaintiff was a resident of the state when the offense was committed, and was a resident thereof when the action was commenced; or where the offense was committed within the state and the injured party, when the action was commenced, was a resident of the state. The actual inhabitancy of the state by the wife makes her a resident for the purpose of the action.[55]

Grounds for partial divorce.

Separation is granted by a judgment permitting the parties to live separate from each other, and compelling the husband to support the wife and children for:

Cruel and inhuman treatment of the plaintiff by the defendant.

Such conduct on the part of the defendant towards the plaintiff, as may render it unsafe and improper for the former to cohabit with the latter.

The abandonment of the plaintiff by the defendant.

[51]Ann. Stat. 1915, § 2776, as amended by Laws 1921, ch. 106. See Canavan v. Canavan, 17 N. Mex. 503, 131 Pac. 493, Ann. Cas. 1915B, 1064.

[52]Ann. Stat. 1915, § 2778.

[53]Ann. Stat. 1915, § § 4093, 4095, 4098.

[54]Ann. Stat. 1915, § § 2774, 2778.

[55]Code Civ. Proc. § § 1756-1760. See Burgess v. Burgess, 173 N. Y. S. 505; Olenick v. Olenick, 174 N. Y. S. 140.

Where the wife is the plaintiff, the neglect or refusal of the defendant to provide for her.

This action may be maintained where both parties are residents of the state when the action is commenced; where the parties were married within the state and the plaintiff is a resident thereof when the action is commenced; or where the parties, having been married without the state, have become residents of the state, and have continued to be residents thereof at least one year, and the plaintiff is such a resident when the action is commenced.[56]

Grounds for annulment of marriage.

A marriage may be annulled for force, duress, or fraud, where former husband or wife is living; for incurable physical incapacity and for want of understanding or nonage, unless the parties have cohabited.[57]

Nonage.

Annulment of marriage of parties under age of consent may be allowed at discretion of the court.[58] But these marriages may be ratified by cohabitation after arriving at lawful age, and such cohabitation is an absolute bar to an action for annulment.[59]

Jurisdiction.

The Supreme Court has jurisdiction.

The case may be tried by the court, a referee, or a jury.[60]

The sitting of the court may be private.[61]

Service.

Summons may be by personal service or by publication once a week for six consecutive weeks in two newspapers.

[56]Code Civ. Proc. § § 1762-1767. See Pearson v. Pearson, 173 N. Y. S. 563; Harvey v. Harvey, 175 N. Y. S. 177; De Vide v. De Vide, 174 N. Y. S. 774. See also on N. Y. divorce laws, Sistare v. Sistare, 218 U. S. 1, 54 L. ed. 911, 30 Sup. Ct. 382, 20 Ann. Cas. 1061.

[57]Consol. Laws 1917, § 7, p. 1842; Laws 1919, chs. 144, 202. See Shilman v. Shilman, 174 N. Y. S. 385, affirmed 175 N. Y. S. 681; Domschke v. Domschke, 138 App. Div. 454, 122 N. Y. S. 892 (on fraud); Kruger v. Kruger, 64 Misc. 382, 119 N. Y. S. 189, judgment reversed in, 137 App. Div. 289, 122 N. Y. S. 23 (on want of understanding); Mitchell v. Mitchell, 63 Misc. 580, 117 N. Y. S. 671 (under age of consent); Anonymous v. Anonymous, 69 Misc. 489, 126 N. Y. S. 149 (on physical incapacity). See also Stokes v. Stokes, 198 N. Y. 301, 91 N. E. 793; Walter v. Walter, 217 N. Y. 439, 111 N. E. 1081.

[58]Consol. Laws 1917, § 2, p. 1835; § 7, p. 1842. Mitchell v. Mitchell, 63 Misc. 580, 117 N. Y. S. 671.

[59]Consol. Laws 1917, § 6, p. 1836; § 7, p. 1842. See Donohue v. Donohue, 63 Misc. 111, 116 N. Y. S. 63.

[60]Consol. Laws 1917, § 7, p. 1842.

[61]Ann. Code 1913, § 3261.

The defendant has twenty days to answer after the date of the last publication.[62]

Evidence.

No divorce will be granted if both parties have been guilty of adultery.

The co-respondent may defend as to the charge of adultery.

Action must be commenced within five years after discovery of adultery.[63]

Alimony.

Alimony pendente lite and upon decree of divorce may be allowed.[64]

Remarriage.

Defendant may remarry when three years have elapsed from the time of the decree, and the defendant's conduct has been uniformly good to the satisfaction of the court.[65]

§ 900. **North Carolina.**

Grounds for absolute divorce.

The court may grant an absolute divorce for adultery, impotency, or pregnancy of wife at time of marriage.

If there has been a separation of husband and wife and they have lived separate and apart for five successive years and the plaintiff in the suit for divorce has resided in this state for that period a divorce may be granted.[66]

Grounds for annulment of marriage.

All void marriages may be declared void during the lifetime of the parties. Marriages void by miscegenation may be so declared at any time.[67]

[62]Ann. Code 1913, § 310, as amended by Laws 1919, ch. 277.

[63]Ann. Code 1913, § 3265.

[64]Ann. Code 1913, §§ 3279-3296, as amended by Laws 1918, ch. 189; Laws 1919, ch. 478; People v. Shea, 201 N. Y. 471, 94 N. E. 1060; Turner v. Woolworth, 221 N. Y. 425, 117 N. E. 814.

[65]Consol. Laws 1917, § 8, p. 1851, as amended by Laws 1919, ch. 265. See Dye v. Dye, 140 App. Div. 309, 125 N. Y. S. 242.

[66]Consol. Stat. 1919, § 1659, as amended by Laws 1921, ch. 63. See Alexander v. Alexander, 165 N. Car. 45, 80 S. E. 890; Burroughs v. Burroughs, 160 N. Car. 515, 76 S. E. 478; McKenzie v. McKenzie, 153 N. Car. 242, 69 S. E. 134; Ellett v. Ellett, 157 N. Car. 161, 72 S. E. 861, 39 L. R. A. (N. S.) 1135, Ann. Cas. 1913B, 1215. On ten years' separation see, Cook v. Cook, 164 N. Car. 272, 80 S. E. 178, 49 L. R. A. (N. S.) 1034.

[67]Consol. Stat. 1919, § 1658. On duress see Taylor v. White, 160 N. Car. 38, 75 S. E. 941. On want of understanding, Watters v. Watters,

Grounds for partial divorce.

The superior court may grant a divorce from bed and board on application of the party injured, made as by law provided, in the following cases:

If either party shall abandon his or her family, or shall maliciously turn the other out of doors, or shall by cruel and barbarous treatment endanger the life of the other, or shall offer such indignities to the person of the other, as to render his or her condition intolerable, and life burdensome, or shall become an habitual drunkard.[68]

Nonage.

The age of consent for males is sixteen years and for females fourteen years.[69]

Residence.

It must be alleged and proved that the plaintiff has been a bona fide resident of the state for two years next preceding the commencement of the action.[70]

Jurisdiction.

Superior courts have jurisdiction over all suits for divorce.[71]

Service.

Summons may be by personal service or by publication. If by publication, not less than once a week for four weeks.[72]

Evidence.

The parties are not competent witnesses as to the adultery of the other nor are admissions alone sufficient.[73]

Trial may be by jury.[74]

The plaintiff must have known the cause of action six months before bringing suit.[75]

Alimony.

Alimony pendente lite and permanent may be allowed.[76]

168 N. Car. 411, 84 S. E. 703. On prior existing marriage, Taylor v. White, 160 N. Car. 38, 75 S. E. 941.

[68]Consol. Stat. 1919, § 1660; Dawdy v. Dawdy, 154 N. Car. 556, 70 S. E. 917; Barringer v. Barringer, 153 N. Car. 392, 69 S. E. 279; Jones v. Jones, 173 N. Car. 279, 91 S. E. 960; Sanders v. Sanders, 157 N. Car. 229, 72 S. E. 876.

[69]Consol. Stat. 1919, § 2495; Joyner v. Harris, 157 N. Car. 295, 72 S. E. 970.

[70]Consol. Stat. 1919, § 1661.

[71]Consol. Stat. 1919, § 1655.

[72]Consol. Stat. 1919, §§ 482, 484.

[73]Consol. Stat. 1919, § 1662.

[74]Consol. Stat. 1919, § 1662.

[75]Consol. Stat. 1919, § 1661.

[76]Consol. Stat. 1919, §§ 1664, 1665, 1666. Joyner v. Joyner, 151 N. Car. 181, 65 S. E. 896; Page v. Page, 161

A wife may sue for alimony separate from divorce.[77]

Remarriage.

Either party may marry again unless prohibited or restrained by law.[78]

§ 901. **North Dakota.**

Grounds for absolute divorce.

Divorce may be granted for the following causes: adultery, extreme cruelty or grievous mental suffering, wilful desertion for one year, wilful neglect for one year, habitual intemperance or indulgence in opium or like drug for one year, conviction of felony, and insanity for five years under confinement in state institution.[79]

Grounds for annulment of marriage.

A marriage may be annulled for nonage, force or fraud, unsoundness of mind, prior existing marriage and for incurable impotency.[80]

Partial divorce and separation.

Partial divorce is not provided for by statute, but the court may allow maintenance to the wife even though denying the divorce. It is also possible for the parties to enter into a separation agreement.[81]

Nonage.

The age of consent for males is sixteen years and for females thirteen years. Marriage under these ages may be ratified by cohabitation after majority.[82]

Residence.

The plaintiff must have been a good faith resident for one year before filing the complaint, and must also be a citizen of the

N. Car. 170, 76 S. E. 619; Easley v. Easley, 173 N. Car. 530, 92 S. E. 353; Medlin v. Medlin, 175 N. Car. 529, 95 S. E. 857. See defendant's contention in Arrington v. Arrington, 131 N. Car. 143, 42 S. E. 554, 92 Am. St. 769. Wife may be granted alimony in case of partial divorce. Cram v. Cram, 116 N. Car. 288, 21 S. E. 197; Crews v. Crews, 175 N. Car. 168, 95 S. E. 149.

[77]Consol. Stat. 1919, § 1667.

[78]Consol. Stat. 1919, § 1663.

[79]Comp. Laws 1913, § 4380, as amended by Laws 1915, ch. 121, and by Laws 1917, ch. 241. Wolf v. Wolf, 41 N. Dak. 109, 169 N. W. 577; Random v. Random, 41 N. Dak. 163, 170 N. W. 313. See also Hoellinger v. Hoellinger, 38 N. Dak. 636, 166 N. W. 519; Rindlaub v. Rindlaub, 19 N. Dak. 352, 125 N. W. 479.

[80]Comp. Laws 1913, §§ 4368, 4369.

[81]Comp. Laws 1913, §§ 4401, 4412, 4413.

[82]Comp. Laws 1913, § 4368.

United States or have declared his intention of becoming one, or be an Indian.[83]

Jurisdiction.

The district court of the county where plaintiff resides has jurisdiction.[84]

Service.

Summons may be by personal service or by publication. If by publication once a week for six consecutive weeks.

Personal service out of the state is equivalent to publication.

Service is complete thirty-six days after first publication or fifteen days after personal service out of state.[85]

Evidence.

Divorce will not be granted by default, nor upon the uncorroborated testimony of the parties. The court can not take as final any findings of a referee, but must hear evidence.[86]

Alimony.

Alimony, both temporary and permanent, are allowed. Security can be required by the court.[87]

Remarriage.

Remarriage is permitted under the orders of the court. The court may also modify his decree in that respect and permit remarriage.[88]

§ 902. **Ohio.**

Grounds for absolute divorce.

The court will allow absolute divorce on the following grounds: Already existing marriage, wilful absence of either party for three years, adultery, impotency, extreme cruelty, fraudulent contract, gross neglect of duty, habitual drunkenness for three years, and imprisonment of either party in a penitentiary, the procurement of a divorce without the state by a husband or wife.[89]

Partial divorce and separation.

The court has granted divorce from bed and board, and the one ground seems to be where the one party wilfully deserts the

[83]Comp. Laws 1913, § 4398, as amended by Laws 1915, ch. 122.

[84]Comp. Laws 1913, § 7349.

[85]Comp. Law 1913, §§ 7426, 7428.

[86]Comp. Laws 1913, § 4400; McCanna v. McCanna, 28 N. Dak. 30, 147 N. W. 718.

[87]Comp. Laws 1913, §§ 4402-4406; Hoellinger v. Hoellinger, 38 N. Dak. 636, 166 N. W. 519.

[88]Comp. Laws 1913, § 4379; Woodward v. Blake, 38 N. Dak. 38, 164 N. W. 156.

[89]Gen. Code 1921, § 11979.

other, but in the absence of legislation empowering the court to grant such a divorce the courts will ordinarily refuse to grant them.[90]

Nonage.

The male must be eighteen years of age and female sixteen in order that the marriage be absolutely valid.[91]

Residence.

The plaintiff must be a resident of the state at least one year prior to the filing of the petition, except in actions for alimony alone, and must be a bona fide resident of the county where the action is brought, or the cause of action arose.[92]

Jurisdiction.

The court of common pleas has jurisdiction in all divorce cases.[93]

Service.

Summons may be by personal service or by publication, but no cause will be heard until the expiration of six weeks after first publication.[94]

Evidence.

Either party may testify, but evidence must be corroborated.[95]

Alimony.

The court may allow alimony to either husband or wife during the pendency of the suit or upon decree of divorce out of the property of the other, for adultery, gross neglect, abandonment, ill treatment, habitual drunkenness, or imprisonment in the penitentiary.

The wife may bring an action for alimony alone.[96]

Remarriage.

Remarriage is not forbidden by statute.

§ 903. **Oklahoma.**

Grounds for absolute divorce.

The court will grant an absolute divorce where either of the parties have a former husband or wife living at the time of the marriage; for abandonment for one year, adultery, impotency, pregnancy of wife at time of marriage, extreme cruelty, fraudu-

[90]Jones v. Jones, Wright (Ohio) 155. But see Hesler v. Hesler, Wright (Ohio) 210.

[91]Gen. Code 1921, § 11181.

[92]Gen. Code 1921, § 11980.

[93]Gen. Code 1921, § 11979.

[94]Gen. Code 1921, § 11983.

[95]Gen. Code 1921, § 11988.

[96]Gen. Code 1921, § § 11990-11999. See Fickel v. Granger, 83 Ohio St. 101, 93 N. E. 527, 32 L. R. A. (N. S.) 270, 21 Ann. Cas. 1347; Gilbert v. Gilbert, 83 Ohio St. 265, 94 N. E. 421, 35 L. R. A. (N. S.) 521.

lent contract, habitual drunkenness, gross neglect of duty, and for conviction of a felony and imprisonment in the penitentiary subsequent to marriage.[97]

Grounds for annulment of marriage.

Want of age or understanding may be causes for annulment of the marriage. Cohabitation of such parties will validate the marriage.[98]

Void marriages.

Marriages between near relatives are void without legal process.[99]

Residence.

Plaintiff must be an actual resident in the state for one year prior to bringing proceedings, and a resident of the county in which suit is brought.[1]

Nonage.

Want of age gives the court right to declare the marriage annulled.[2]

Jurisdiction.

The district court may grant a divorce.[3]

Service.

Summons may be by personal service or by publication.[4]

Evidence.

The petition must be verified.[5]

The parties may testify to any material facts, but no divorce can be granted without proof.[6]

Alimony.

Alimony may be allowed either pending proceedings or on final hearing.[7]

[97]Comp. Stat. 1921, § 501. See Robertson v. Robertson, 73 Okla.——, 176 Pac. 387. See also Penn v. Penn, 37 Okla. 650, 133 Pac. 207; Hartshorn v. Hartshorn, 67 Okla. 45, 168 Pac. 822; Stovall v. Stovall, 29 Okla. 125, 116 Pac. 791; Connelley v. Connelley, 43 Okla. 294, 142 Pac. 1113; Lee v. Lee, 38 Okla. 388, 132 Pac. 1070.

[98]Comp. Stat. 1921, § 513. Former marriage, Copeland v. Copeland, 73 Okla.——, 175 Pac. 764.

[99]Comp. Stat. 1921, § 7489. See Fearnow v. Jones, 34 Okla. 694, 126 Pac. 1015.

[1]Comp. Stat. 1921, § 502.

[2]Comp. Stat. 1921, § 513. See Hunt v. Hunt, 23 Okla. 490, 100 Pac. 541, 22 L. R. A. (N. S.) 1202.

[3]Comp Stat. 1921, § 501.

[4]Comp. Stat. 1921, § 503.

[5]Comp. Stat. 1921, § 503.

[6]Comp. Stat. 1921, § 515.

[7]Comp. Stat. 1921, § § 506, 508. See Hartshorn v. Hartshorn, 67 Okla. 45, 168 Pac. 822.

It may also be allowed on proper proceeding without divorce.[8]

Custody of children.

The court has power to decree concerning the care and custody of the children after a divorce is granted.[9]

Remarriage.

Remarriage is permitted after six months from decree except on appeal, then not within thirty days after final judgment on appeal.[10]

§ 904. Oregon.

Grounds for absolute divorce.

The court may declare a divorce in the following cases: Impotency existing at time of marriage and continuing until commencement of suit; adultery; conviction of felony; habitual gross drunkenness contracted since the marriage and continuing for one year before suit; wilful desertion for the period of one year; cruel and inhuman treatment or personal indignities rendering life burdensome.[11]

Grounds for annulment of marriage.

A marriage may be annulled for force, fraud, or want of age or understanding.[12]

Void marriages.

Marriages prohibited because of consanguinity or affinity, former husband or wife living and miscegenation if solemnized in state are void without legal process.[13]

Nonage.

To marry the male must be eighteen years of age and female fifteen. But marriages below these ages may be ratified.[14]

Residence.

In a suit for annulment of marriage consummated in this

[8]Comp. Stat. 1921, § 514.

[9]Comp. Stat. 1921, § 507.

[10]Comp. Stat. 1921, § 510.

[11]Laws 1920, § 507. See Wilhelm v. Wilhelm, 90 Ore. 435, 177 Pac. 57; Nunn v. Nunn, 91 Ore. 384, 178 Pac. 986, Leefield v. Leefield, 85 Ore. 287, 166 Pac. 953; Hanson v. Hanson, 70 Ore. 469, 142 Pac. 348; Herschback v. Herschback, 81 Ore. 151, 158 Pac. 526; Andrew v. Andrew, 53 Ore. 531, 99 Pac. 938; Decker v. Decker, 56 Ore. 381, 108 Pac. 777; Folkenberg v. Folkenberg, 58 Ore. 267, 114 Pac. 99; Ream v. Ream, 81 Ore. 175, 158 Pac. 670; Mosier v. Mosier, 89 Ore. 477, 174 Pac. 732.

[12]Laws 1920, § 503; Coleman v. Coleman, 85 Ore. 99, 166 Pac. 47.

[13]Laws 1920, § 502.

[14]Laws 1920, § 503.

state, residence of the plaintiff at time of bringing suit is sufficient. When consummated in another state residence of both parties is necessary and of the plaintiff for one year.[15]

In a suit for dissolution of marriage one year's residence prior to bringing suit gives court complete jurisdiction over the marriage status.[16]

Jurisdiction.

Circuit courts have jurisdiction to hear and determine suits for divorce.[17]

Suit may be begun in any county in which either party may reside.[18]

Service.

Summons may be by personal service or by publication.[19] If by publication, once a week for six weeks.

Personal service out of the state is equivalent to publication.

Time to answer is on or before the last day prescribed by the order of publication.[20]

Alimony.

Alimony may be allowed during pendency of suit and on final decree of divorce within the discretion of the court.[21]

A decree for alimony may be modified as to care of children.[22]

Remarriage.

Remarriage is prohibited, until an appeal is taken, or until the expiration of six months which is allowed within which to take an appeal.[23]

§ 905. **Panama.**

Grounds for divorce.

A divorce may be granted for: Adultery of wife, concubinage on the part of the husband; habitual drunkenness of either, absolute abandonment by wife of duties of wife and mother, or by

[15]Laws 1920, § 508, as amended by Laws 1921, ch. 213.

[16]Laws 1920, § 509; Hubner v. Hubner, 67 Ore. 557, 136 Pac. 667.

[17]Const. art 7, § 9.

[18]Laws 1920, § 396. See Yakima Joe v. To-is-lap, 191 Fed. 516 (as to Indians).

[19]Laws 1920, § § 55-60.

[20]Laws 1920, § § 55-60. See Hooper v. Hooper, 67 Ore. 187, 135 Pac. 525 (service on district attorney).

[21]Laws 1920, § § 511, 512 and 513, as amended by Laws 1921, ch. 197. See Taylor v. Taylor, 70 Ore. 510, 134 Pac. 1183, 140 Pac. 999; Hengen v. Hengen, 85 Ore. 155, 166 Pac. 525.

[22]Laws 1920, § 514, as amended by Laws 1921, ch. 114.

[23]Laws 1920, § 515; Wallace v. McDaniel, 59 Ore. 378, 117 Pac. 314, L. R. A. 1916C, 744.

husband of duties of husband and father, and cruel treatment, assaults, if the life of the other spouse is endangered thereby, or domestic peace and harmony are rendered impossible.[24]

The judge may briefly and summarily suspend the obligation to cohabit in case of insanity, contagious disease, and any other similar misfortune in either of the spouses, but other conjugal obligations due the unfortunate spouse still subsist.[25]

Void marriages.

A marriage may be annulled in following cases: Error in regard to persons of both contracting parties, or of one of them; male under fourteen or female under twelve; want of consent, as in case of insanity; marriage not properly celebrated; contracted through force or fear; no freedom of consent because woman was abducted; marriage between adulterous woman and her accomplice; if one of the contracting parties has killed or caused to be killed the spouse with whom he united in a former marriage; consanguinity and affinity; bigamy; nonage.[26]

§ 906. **Pennsylvania.**

Grounds for absolute divorce.

Divorce may be granted in the following cases: Incapacity of procreation; former marriage still subsisting; adultery; wilful and malicious desertion on the part of either the husband or wife, and absence from the habitation of the other, without a reasonable cause, for and during the term and space of two years; personal abuse, or such conduct on the part of either husband or wife as to render the condition of the other party intolerable and life burdensome; conviction of crime and sentence therefor for any term exceeding two years, provided that application for divorce be made by the husband or wife of the party convicted and sentenced; hopeless insanity.[27]

Grounds for annulment of marriage.

Fraud, force, or coercion, if not subsequently confirmed by voluntary cohabitation may be grounds for annulment of the marriage.[28]

Consanguinity and affinity render a marriage void without legal process.[29]

[24]Civ. Code 1904, art. 154.

[25]Civ. Code 1904, art. 155. These causes do not authorize a divorce.

[26]Civ. Code 1904, art. 147. Note the similarity to the Spanish law in Porto Rico, Philippines, etc.

[27]Stat. 1920, § 9140.

[28]Stat. 1920, § 9144.

[29]Stat. 1920, § 9141; McClain v. McClain, 40 Pa. Super. Ct. 248.

Grounds for partial divorce.

Divorce may be decreed from bed and board on complaint of the wife for barbarous treatment or adultery by the husband, in which case alimony is allowed to the wife not exceeding the third part of the husband's income.[30]

Residence.

An applicant for divorce must be a citizen and have resided in the state one year prior to filing the libel.[31]

Jurisdiction.

The court of common pleas has jurisdiction.[32]

Service.

Summons may be by a personal service or by publication. If by publication, four weeks in succession prior to the first day of the next term of court after thirty days from date of subpoena.[33]

Evidence.

Either party may testify where the summons was served personally, or where the defendant appears.[34]

The court may appoint a master to take the testimony and report back to the court. [35]

Alimony.

Alimony will be allowed in discretion of the court.[36]

Remarriage.

Remarriage is permitted, except with co-respondent.[37]

§ 907. **Philippine Islands.**

Grounds for absolute divorce.

There seems to be no absolute divorce.[38]

Grounds for partial divorce.

A partial divorce may be granted on the following grounds: Adultery of the wife; adultery of the husband where public scandal or disgrace of wife results; personal violence or grave insults, violence to induce change of wife's religion; proposal of husband to prostitute wife, attempt of either to corrupt sons or prostitute daughters; and condemnation to perpetual chains or hard labor.[39]

[30]Stat. 1920, § 9154.
[31]Stat. 1920, § 9156.
[32]Stat. 1920, § 9158.
[33]Stat. 1920, § 9167.
[34]Stat. 1920, § 9177; Purdon's Dig. 1916, p. 5471, § 5.
[35]Stat. 1920, § 9168.
[36]Stat. 1920, § 9155.
[37]Stat. 1920, § 9191.
[38]Civ. Code 1899, art. 104.
[39]Civ. Code 1899, art. 105.

Grounds for annulment of marriage.

All void and voidable marriages may be annulled by the civil tribunals for the following causes: Nonage, former husband or wife living, unsound mind, consent obtained by fraud, or by force, and incurable physical incapacity.[40]

Nonage.

The age of consent for males is fourteen years and for females twelve years. But these marriages are ratified by living together one day after puberty or if the woman becomes pregnant.[41]

Jurisdiction.

Civil tribunals and courts of first instance have jurisdiction to grant a divorce.[42]

Alimony.

Alimony is allowed by the court when the circumstances justify it.[43]

Custody of children.

In case of a marriage annulled on the ground of force or fraud, the children are left to innocent parent.[44]

§ 908. **Porto Rico.**

Grounds for absolute divorce.

Divorce may be granted in the following cases: Adultery; conviction of felony which involves loss of civil rights; habitual drunkenness or continued and excessive use of opium, morphine or any other narcotics; cruel treatment or grave injury; abandonment for more than one year; incurable impotency which occurred after marriage; attempt to corrupt sons or prostitute daughters; proposal to prostitute wife.[45]

Grounds for annulment of marriage.

A marriage may be annulled on following grounds: Previous marriage undissolved; mental unsoundness; want of age; want of consent of parent or guardian; physical incompetency; want

[40]Civ. Code 1899, art. 103; Comp. Acts Phil. Com. 1908, § 3774. See "Marriage Laws."

[41]Civ. Code 1899, art. 83.

[42]Civ. Code 1899, art. 103; Comp. Acts Phil. Com. 1908, § 3778.

[43]Civ. Code 1899, art. 68 et seq.

[44]Comp. Acts. Phil. Com. 1908, § 3777. See also § 3222, which says that divorced parents are on equal footing, but child over ten may choose. Comp. Acts. Phil. Com. 1908, G. O. No. 68, treats of nullity of marriage, not divorce. The only ground for divorce is adultery. Courts of first instance have jurisdiction. Ibanez v. Ortiz, 5 Phil. 325. See also De la Rama v. De la Rama, 201 U. S. 303.

[45]Rev. Stat. & Codes 1913, § 3234.

of three hundred and one days expired, or of birth of child since dissolution of former marriage of woman; want approval of accounts of tutor or his descendant marrying ward;[46] and procurement of marriage by duress, violence, or intimidation.[47]

Nonage.

The age of consent for males is eighteen years and for females sixteen years.[48]

Residence.

One year's residence immediately preceding action is required unless the act committed in Porto Rico or while one party resided there.[49]

Jurisdiction.

District courts have jurisdiction to hear and determine suits for divorce.[50]

Alimony.

Alimony pendente lite[51] and on divorce may be allowed.[52]

Custody of children.

The children are left with wife during pendency of suit unless strong reasons to the contrary. Final custody is given to the party who wins the decree.[53]

Remarriage.

Remarriage is permitted.[54]

§ 909. **Rhode Island.**

Grounds for absolute divorce.

The court may grant a divorce in the following cases: Impotency; adultery; extreme cruelty; wilful desertion for five years of either of the parties, or such desertion for a shorter period of time in the discretion of the court; continued drunkenness; the habitual, excessive, and intemperate use of opium, morphine, or chloral; neglect and refusal for the period of at least one year next before the filing of the petition, on the part of the husband to provide necessaries for the subsistence of the wife, the husband being of sufficient ability; any other gross misbe-

[46]Rev. Stat. & Codes 1913, § 3233.

[47]Rev. Stat. & Codes 1913, § § 3233, 5701. Rev. Stat. & Codes 1913, § § 3205, 3206.

[48]Rev. Stat. & Codes 1913, § § 3208, 3212.

[49]Rev. Stat. & Codes 1913, § 3235.

[50]Rev. Stat. & Codes 1913, § 3235.

[51]Rev. Stat. & Codes 1913, § § 3234, 3247.

[52]Rev. Stat. & Codes 1913, § § 3234, 3247.

[53]Rev. Stat. & Codes 1913, § § 3236, 3245.

[54]Rev. Stat. & Codes 1913, § § 3243, 3247.

havior and wickedness, in either of the parties repugnant to, and in violation of, the marriage covenant.[55] Divorce may also be granted if marriage is void or voidable by law and where party is presumed dead at law.[56]

Grounds for partial divorce.

Divorces from bed, board, and further cohabitation until the parties be reconciled, may be granted for any of the causes for which by law a divorce from the bonds of marriage may be decreed, and for such other causes as may seem to require the same.[57]

Ground for annulment of marriage.

Consanguinity and affinity render a marriage void.[58]

But this provision shall not extend to or affect any marriage which shall be solemnized among the Jews within the degrees of affinity or consanguinity allowed by their religion.[59]

A marriage may be annulled where either party has been convicted of a crime.[60] Marriages are voidable when the party is for crime deemed to be civilly dead, as conviction of murder or arson.[61]

Residence.

No petition for divorce from the bonds of marriage shall be granted unless the petitioner shall have been a domiciled inhabitant of the state and have resided therein for the period of two years next before the preferring of such petition.[62]

Jurisdiction.

Superior courts have jurisdiction in all suits for divorce.[63]

Service.

Summons may be by personal service or by publication according to rule or order of court.[64]

Evidence.

No divorce from the bonds of marriage shall be granted solely upon default; nor solely upon admissions by pleadings; nor except upon trial before the court in open session; nor shall such divorce be granted where the court is satisfied that there has

[55]Gen. Laws 1909, ch. 247, § 2. See Walker v. Walker (R. I.), 82 Atl. 385.

[56]Gen. Laws 1909, ch. 247, § 1.

[57]Gen. Laws 1909, ch. 247, § 8.

[58]Gen. Laws 1909, ch. 247, § 1. See Beacon Hill Land Co. v. Bowen, 33 R. I. 404, 82 Atl. 81.

[59]Gen. Laws 1909, ch. 243, § 4.

[60]Gen. Laws 1909, ch. 247, § 1.

[61]Gen. Laws 1909, ch. 247, § 1.

[62]Gen Laws 1909, ch. 247, § 10. See Crow v. Crow, 41 R. I. 258, 103 Atl. 739; Walker v. Walker, 32 R. I. 28, 78 Atl. 339.

[63]Gen. Laws 1909, ch. 273, § 6.

[64]Gen. Laws 1909, ch. 247, § 13.

been any collusion or corrupt conduct by the parties or either of them, in regard to the proceedings to obtain the same.[65]

Alimony.

The court may allow alimony to wife during pendency of suit for prosecution of same and alimony upon decree of divorce for wife and minor children.[66]

Care and custody of children.

The court may regulate the custody and provide for the education, maintenance, and support of the children of all persons by it divorced, or petitioning for a divorce, and of all persons to whom a separate maintenance may be granted, or who may petition for the same.[67]

Remarriage.

After final decree for divorce from the bonds of marriage, either party may marry again; but no decree for divorce shall become final and operative until six months after the trial and decision.[68]

§ 910. **South Carolina.**

Divorces are not allowed.[69]

Grounds for annulment of marriage.

A marriage may be annulled on the following grounds: Idiocy lunacy, consanguinity,[70] want of consent; any cause showing that at the time that the marriage contract was made it was not really a contract;[71] and former husband or wife living.[72]

A marriage between whites and Indians or negroes is utterly null and void.[73]

Jurisdiction.

Courts of Common Pleas have authority to determine the issue of the validity of a marriage.[74]

[65]Gen. Laws 1909, ch. 247, § 18.

[66]Gen. Laws 1909, ch. 247, § 14.

[67]Gen. Laws 1909, ch. 247, § 14.

[68]Gen. Laws 1909, ch. 247, § 19. See Thrift v. Thrift, 30 R. I. 357, 75 Atl. 484.

[69]Const. art. 17, § 3. As to alimony, see Rembert v. Rembert, 84 S. Car. 9, 65 S. E. 831; Gordon v. Gordon, 91 S. Car. 245, 74 S. E. 360; Brunson v. Brunson, 94 S. Car. 11, 77 S. E. 704; Tillman v. Tillman (S. Car.), 81 S. E. 1101; State v. Duncan, 110 S. Car. 253, 96 S. E. 294. For an interesting case generally in this connection, see McCreery v. Davis, 44 S. Car. 195, 22 S. E. 178, 28 L. R. A. 655, 51 Am. St. 794.

[70]Laws 1912, § 3743; State v. Smith, 101 S. Car. 293, 85 S. E. 958.

[71]Laws 1912, § 3753.

[72]Laws 1912, § 3754; Davis v. Whitlock, 90 S. Car. 233, 73 S. E. 171.

[73]Laws 1912, § 3757.

[74]Laws 1912, § 3753; Davis v Whitlock, 90 S Car. 233, 73 S. E. 171.

§ 911. **South Dakota.**

Grounds for absolute divorce.

Divorce may be granted for: Adultery, conviction of felony, extreme cruelty, wilful desertion for one year, habitual intemperance for one year, and wilful neglect for one year.[75]

Grounds for partial divorce.

Though a divorce may be denied, the court may, in its discretion, compel the husband to support the wife.[76]

Grounds for annulment of marriage.

The marriage may be annulled on the ground that party seeking annulment was under age of consent; that a former marriage was in force; that one of parties is of unsound mind; that fraud or force compelled the marriage; that one of the parties is impotent.[77]

But marriages induced by fraud or force or in which either party was under age or of unsound mind may be ratified by cohabitation at any time after the incompetency has been removed.

Marriages entered into between near relatives or persons of close affinity, or between whites and blacks or persons of the yellow races, are void without legal process.[78]

Nonage.

The age of consent for males is eighteen years and for females fifteen years.[79]

Residence.

Generally a year's residence by plaintiff is required, but where cause of action arose in state, six months is sufficient and where parties were married in the state and plaintiff continued to reside there, the action may be brought at any time after cause.[80]

Jurisdiction.

The circuit court has jurisdiction to hear and determine cases of divorce and suits for alimony.[81]

[75]Rev. Code 1919, § 136.

[76]Rev. Code 1919, § 162.

[77]Rev. Code 1919, § 131.

[78]Rev. Code 1919, §§ 106-108, 128-130. See Garcia v. Garcia, 25 S. Dak. 645, 127 N. W. 586, 32 L. R. A. (N. S.) 424, Ann. Cas. 1912C, 621; Montague v. Montague, 25 S. Dak. 471, 127 N. W. 639, 30 L. R. A. (N. S.) 745, Ann. Cas. 1912C, 591.

[79]Rev. Code 1919, § 104.

[80]Rev. Code 1919, §§ 156-158. See Andrews v. Andrews, 40 S. Dak. 47, 166 N. W. 166; Pugh v. Pugh, 25 S. Dak. 7, 124 N. W. 959, 32 L. R. A. (N. S.) 954; Boyce v. Boyce, 31 S. Dak. 12, 139 N. W. 339; Connolly v. Connolly, 33 S. Dak. 346, 146 N. W. 581.

[81]Rev. Code 1919, § 136.

Service.

Summons may be by personal service or by publication of not less than once a week for six consecutive weeks.

When summons is served by publication, the defendant may be allowed to defend within one year after notice of judgment, and within seven years after it has been rendered.[82]

Evidence.

Both parties may testify, but their evidence must be corroborated.[83]

Alimony.

The court may allow alimony pendente lite and upon decree of divorce.[84]

Name of wife.

The court may change the name of the divorced wife when the minor children have not been assigned to her.[85]

Remarriage.

The plaintiff may remarry at any time.

The party guilty of adultery may remarry with plaintiff during his or her life, or upon the death of the other spouse marry another.[86]

§ 912. **Tennessee.**

Grounds for absolute divorce.

Divorce may be granted in the following cases: Cruel and inhuman treatment by wife of husband;[87] adultery; conviction of infamous crime or felony; attempting the life of either by poison or other means showing malice; wilful desertion or absence without reasonable cause for two years; where the wife refuses for two years to live in the state with the husband; habitual drunkenness contracted after marriage; former husband or wife living. A second marriage is valid if either party has been absent for five years and is not known by other party to be living, the first marriage being regarded as dissolved;[88] impotency; insanity; wilful neglect for two years; pregnancy by other than husband.[89]

[82]Rev. Code 1919, § 2338.

[83]Rev. Code 1919, § 161.

[84]Rev. Code 1919, § 163 and § 165, as amended by Laws 1923, ch. 219. See Tuttle v. Tuttle, 26 S. Dak. 306, 545, 128 N. W. 695; Cameron v. Cameron, 31 S. Dak. 335, 140 N. W. 700, Ann. Cas. 1915D, 1062.

[85]Laws 1923, ch. 220.

[86]Rev. Code 1919, § 153.

[87]Baldwin's Supp. 1920, § 4201. See Gamble v. Rucker, 124 Tenn. (16 Cates) 415, 137 S. W. 499.

[88]Shannon's Code 1917, § 4188.

[89]Shannon's Code 1917, § 4201.

Grounds for partial divorce.

A partial divorce may be granted on ground: That the husband is guilty of such cruel and inhuman treatment as renders it unsafe and improper for the wife to cohabit with him and be under his dominion and control; that he has offered such indignities to her person as to render her condition intolerable; that he has abandoned her, or turned her out of doors or neglected to provide for her.[90]

Grounds for annulment of marriage.

Consanguinity and affinity, force or fraud, pregnancy of woman at time of marriage, and miscegenation to the third generation of colored people inclusive, may be reasons for annulment of marriage.[91]

Nonage.

The age of consent for males is fourteen years and for females twelve years. Marriages under these ages may be ratified by cohabitation after arriving at lawful age, and such ratification is an absolute bar.[92]

Residence.

Two years' residence is required.[93]

Jurisdiction.

Circuit or chancery courts have jurisdiction in all suits for divorce.[94]

Service.

Summons may be by personal service or by publication for four consecutive weeks.[95]

If a male defendant evades service for three months, a decree may be granted.[96]

Evidence.

A divorce may be granted for causes arising out of the state, if the petitioner has lived in the state two years before commencing action.[97]

No decree by default will be granted.

Proof is required.[98]

[90]Shannon's Code 1917, § 4204.

[91]Shannon's Code 1917, §§ 4185-4249.

[92]Warwick v. Cooper, 5 Sneed (Tenn.) 659.

[93]Shannon's Code 1917, § 4203.

[94]Shannon's Code 1917, §§ 6070, 6111. See Wilson v. Wilson, 134 Tenn. (7 Thomp.) 697, 185 S. W. 718.

[95]Shannon's Code 1917, § 4207.

[96]Shannon's Code 1917, § 4209.

[97]Shannon's Code 1917, § 4203.

[98]Shannon's Code 1917, §§ 4214, 4215.

The complaint must be verified.[99]

If husband demands divorce for absence of wife he must prove that he attempted to induce her to live with him after the separation and also that he did not come into the state for purpose of securing a divorce.[1]

It is a good defense to suit by the wife for divorce from bed and board that her own misconduct justified the husband's acts.[2]

Alimony.

Alimony may be allowed wife in discretion of the court.[3]

If the husband secures the divorce the wife is entitled to neither dower, interest in his personal estate, nor alimony.[4]

Remarriage.

Remarriage is permitted, but the defendant guilty of adultery may not marry the co-respondent during the life of the plaintiff.[5]

§ 913. **Texas.**

Grounds for absolute divorce.

A divorce may be granted: Where the wife commits adultery or where the husband is living in adultery; conviction of felony, unless pardoned twelve months after conviction, and provided the conviction was not secured on the testimony of the other party; outrageous cruelty by either party such as to render life insupportable; intentional abandonment or desertion for three years; where husband and wife have lived apart for ten years without cohabitation.[6]

Grounds for annulment of marriage.

Impotency, consanguinity, fraud, former husband or wife liv-

[99]Shannon's Code 1917, § 4206.

[1]Shannon's Code 1917, § 4216.

[2]Shannon's Code 1917, § 4219.

[3]Shannon's Code 1917, §§ 4221-4225. See Toncray v. Toncray, 123 Tenn. (15 Cates) 476, 131 S. W. 977, 34 L. R. A. (N. S.) 1106, Ann. Cas. 1912C, 284.

[4]Shannon's Code 1917, § 4226.

[5]Shannon's Code 1917, § 4228.

[6]Comp. Stat. 1920, arts. 4631, 4632; Dickerson v. Dickerson (Tex. Civ. App.), 207 S. W. 941; Mahurin v. Mahurin (Tex. Civ. App.), 208 S. W. 558; McNabb v. McNabb (Tex. Civ. App.), 207 S. W. 129; Tanton v. Tanton (Tex. Civ. App.), 209 S. W. 429. See also Dickinson v. Dickinson (Tex. Civ. App.), 138 S. W. 205; Shook v. Shook (Tex. Civ. App.), 125 S. W. 638; Claunch v. Claunch (Tex. Civ. App.), 203 S. W. 930; Slaughter v. Slaughter (Tex. Civ. App.), 118 S. W. 193; Womble v. Womble (Tex. Civ. App.), 152 S. W. 473; O'Farrell v. O'Farrell, 56 Tex. Civ. App. 51, 119 S. W. 899; McConkey v. McConkey (Tex. Civ. App.), 187 S. W. 1100.

ing, and miscegenation may be grounds for annulment of the marriage.[7]

Nonage.

The age of consent for males is sixteen years and for females fourteen years. Under these ages persons are not permitted to marry.[8]

Residence.

Six months' residence in the county is required, and one year in the state.[9]

Jurisdiction.

District courts have jurisdiction in all cases of divorce.[10]

Service.

A citation must be served personally at least ten days before the return day.[11]

If service is made by publication, once a week for four consecutive weeks before the return day is acquired.[12]

Evidence.

No divorce shall be granted on the ground of adultery, where the husband has exposed the wife to lewd company.[13]

No judgment by default will be granted.

Confessions are insufficient.

Either party may testify.[14]

Alimony.

Courts may allow alimony during pendency of suit and order a division of the property upon final decree of divorce.[15]

Remarriage.

Remarriage is permitted, but not until expiration of one year

[7]Complete Stat. 1920, art. 4630. On mental incapacity, see Holland v. Riggs, 53 Tex. Civ. App. 367, 116 S. W. 167.

[8]Complete Stat. 1920, art. 4630.

[9]Complete Stat. 1920, art. 4632; Coss v. Coss (Tex. Civ. App.), 207 S. W. 127; Landers v. Landers (Tex. Civ. App.), 220 S. W. 359. See also Dickinson v. Dickinson (Tex. Civ. App.), 138 S. W. 205; Coward v. Sutfin (Tex. Civ. App.), 185 S. W. 378.

[10]Complete Stat. 1920, art. 1705; Kentz v. Kentz (Tex. Civ. App.), 209 S. W. 200.

[11]Complete Stat. 1920, § 1852; Sparkman v. Sparkman (Tex. Civ. App.), 209 S. W. 252.

[12]Complete Stat. 1920, § 1874; Griffin v. Griffin, 54 Tex. Civ. App. 619, 117 S. W. 910.

[13]Complete Stat. 1920, art. 4635.

[14]Complete Stat. 1920, art. 4633. As to authority of appellate court to set aside decree on evidence see De Fierros v. Fierros (Tex. Civ. App.), 154 S. W. 1067.

[15]Complete Stat. 1920, art. 4640; Burns v. Burns, 59 Tex. Civ. App. 549, 126 S. W. 333.

where divorce was granted for cruel treatment.[16]

A man can not be divorced from the woman whom he marries to escape punishment for seduction, for three years after such marriage.[17]

§ 914. **Utah.**

Grounds for absolute divorce.

A divorce may be granted in the following cases: Impotency of the defendant at the time of marriage; adultery committed by the defendant subsequent to marriage; wilful desertion of the plaintiff by defendant for more than one year; wilful neglect of defendant to provide for plaintiff the common necessaries of life; habitual drunkenness of defendant; conviction of defendant for felony; cruel treatment of plaintiff by defendant to the extent of causing great bodily harm or great mental distress to plaintiff; permanent insanity.[18]

Grounds for partial divorce.

No provision is made therefor by statute, but the court may decree separate maintenance.[19]

Grounds for annulment of marriage.

Consanguinity, force or fraud, former husband or wife living, idiocy, lunacy, and miscegenation (negro or Mongolian) may be grounds for annulment of marriage.[20]

Nonage.

The age of consent for males is sixteen years and for females fourteen years. But marriages under these ages may be ratified by cohabitation after arriving at lawful age, and such ratification is an absolute bar to annulment.[21]

Residence.

One year's residence is required.[22]

Jurisdiction.

District courts have jurisdiction.[23]

[16]Complete Stat. 1920, art. 4632. As to trial, see De Fierros v. Fierros (Tex. Civ. App.), 154 S. W. 1067.

[17]Complete Stat. 1920, art. 4632.

[18]Comp. Laws 1917, § 2995. See Doe v. Doe, 48 Utah 200, 158 Pac. 781; Holm v. Holm, 44 Utah 242, 139 Pac. 937.

[19]Comp. Laws 1917, § 3010. As to order of divorce not becoming absolute for six months under Laws 1913, ch. 49, pp. 76, 77, see Calvert v. Calvert, 52 Utah 598, 176 Pac. 731. See also Comp. Laws 1917, § § 3002, 6828, and Spencer v. Clark, 54 Utah 83, 179 Pac. 741.

[20]Comp. Laws 1917, § § 2967, 3006, 3007.

[21]Comp. Laws 1917, § 2967.

[22]Comp. Laws 1917, § 2995.

[23]Comp. Laws 1917, § 2995.

Service.

Summons may be by personal service or by publication. If by publication, once a week for five consecutive weeks.

Personal service outside of the state is equivalent to publication.

Service is complete thirty days after first publication or ten days after personal service out of the state.[24]

Evidence.

No decree is entered by default.

Evidence must be produced.[25]

Alimony.

Alimony during pendency of the suit and upon final decree of divorce may be allowed.[26]

Remarriage.

Remarriage is not forbidden by statute.[27]

§ 915. **Vermont.**

Grounds for absolute divorce.

Divorce may be granted in the following cases: Adultery in either party; when either party is sentenced to confinement at hard labor in the state prison for life, or for three years or more, and is actually confined at the time; intolerable severity in either of the parties; when either has been absent seven years and not heard of during that time; wilful desertion for three consecutive years; if the husband being of sufficient pecuniary ability to provide suitable maintenance for his wife, shall without cause wantonly, cruelly, and grossly refuse or neglect so to do.[28]

Grounds for partial divorce.

Separations may be decreed for the same causes as for which absolute divorces are decreed.[29]

Grounds for annulment of marriage.

Want of age, force or fraud, physical incapacity, idiocy, and lunacy may be causes for annulment of marriage.[30]

[24]Comp. Laws 1917, § 2995. See Atkinson v. Atkinson, 43 Utah 53, 134 Pac. 595, 47 L. R. A. (N. S.) 499.

[25]Comp. Laws 1917, § 2999.

[26]Comp. Laws 1917, §§ 2998-3000. See Blair v. Blair, 40 Utah 306, 121 Pac. 19, 38 L. R. A. (N. S.) 269, Ann. Cas. 1914D, 989.

[27]Comp. Laws 1917, § 3003.

[28]Gen. Laws 1917, § 3560. See Walker v. Walker, 92 Vt. 443, 104 Atl. 828; Whitehead v. Whitehead, 84 Vt. 321, 79 Atl. 516; Whitaker v. Whitaker, 92 Vt. 301, 102 Atl. 1036.

[29]Gen. Laws 1917, § 3564.

[30]Gen. Laws 1917, § 3547.

For force or fraud, the action must be brought during the lifetime of one or both of the parties. And the marriage will not be annulled if the parties have voluntarily cohabited together.[31]

For physical incapacity, the action must be commenced within two years of the time of marriage.[32]

For idiocy or lunacy, the action must be brought in the lifetime of the parties.[33]

Marriages between persons near of kin or of close affinity, or by persons already having a husband or wife living, if contracted in the state, are void without legal process.[34]

Nonage.

The age of consent for males is sixteen years and for females fourteen years. But marriage under these ages may be ratified if cohabitation has taken place after arriving at lawful age, and such cohabitation is an absolute bar to annulment.[35]

Residence.

No divorce will be granted for any cause which accrued in any other state or county before the parties lived together as husband and wife in the state and while neither party was a resident of the state, unless the libelant has resided in the state two full years and in the county six months next preceding the term of court.[36]

No divorce can be granted unless the plaintiff has been a resident for one year before complaint is filed.[37]

Jurisdiction.

County courts have jurisdiction in all suits for divorce.[38]

Service.

Summons may be by personal service or by publication. If by publication, for three consecutive weeks, the last publication six weeks before the commencement of the term.[39]

Evidence.

Trial must be by the court.[40]

Either party may testify.[41]

[31]Gen. Laws 1917, § 3555.
[32]Gen. Laws 1917, § 3557.
[33]Gen. Laws 1917, §§ 3549-3554.
[34]Gen. Laws 1917, § 3544.
[35]Gen. Laws 1917, § 3548.
[36]Gen. Laws 1917, § 3561. See Blondin v. Brooks, 83 Vt. 472, 76 Atl. 184; Turner v. Turner, 87 Vt. 65, 88 Atl. 3, 47 L. R. A. (N. S.) 505; Miller v. Miller, 88 Vt. 134, 92 Atl. 9, L. R. A. 1915D, 852.
[37]Gen. Laws 1917, § 3563.
[38]Gen. Laws 1917, § 3567.
[39]Gen. Laws 1917, §§ 3569-3571.
[40]Gen. Laws 1917, § 3567.
[41]Gen. Laws 1917, § 1894.

Testimony may be oral or by deposition and the court may exclude the public from a divorce hearing.[42]

Alimony.

Alimony may be allowed during pendency of suit and upon final decree.[43]

Remarriage.

It is not lawful for any libelee in any divorce proceeding in which a divorce is granted to marry any person other than the petitioner for the space of three years next after the granting of such divorce. But this provision does not apply after the death of the petitioner.

Any person entering into a marriage in less than three years after divorce may be punished as for a crime.[44]

§ 916. Virginia.

Grounds for absolute divorce.

Absolute divorce may be granted in the following cases: Adultery; natural or incurable impotency existing at the time of entering into the matrimonial contract; where either of the parties is sentenced to confinement in the penitentiary. (No pardon granted to the party so sentenced shall restore such party to his or her conjugal rights); where, prior to the marriage, either party, without the knowledge of the other, has been convicted of an infamous offense; where either party, charged with an offense punishable with death or confinement in the penitentiary, has been indicted, is a fugitive from justice, and has been absent for two years; where either party wilfully abandons or deserts the other for three years; where at the time of the marriage, the wife, without the knowledge of the husband, was with child by some person other than her husband or prior to such marriage had been a prostitute.[45]

Grounds for partial divorce.

Cruelty and abandonment or desertion may be grounds for partial divorce.[46] When three years have elapsed after a decree

[42]Gen. Laws 1917, §§ 1485, 3574.

[43]Gen. Laws 1917, §§ 3575-3595.

[44]Gen. Laws 1917, § 3602 and 3603, as amended by Laws 1921, No. 82.

[45]Code 1919, § 5103. See Gollehon v. Gollehon, 123 Va. 504, 96 S. E. 769; Good v. Good, 122 Va. 39, 94 S. E. 176; White v. White, 121 Va. 244, 92 S. E. 811; Tutwiler v. Tutwiler, 118 Va. 724, 88 S. E. 86; Washington v. Washington, 111 Va. 524, 69 S. E. 322.

[46]Code 1919, § 5104. See Devers v. Devers, 115 Va. 517, 79 S. E. 1048.

or three years after an abandonment or desertion the court may make the decree absolute.[47]

Grounds for annulment of marriage.

Physical incapacity, insanity, and consanguinity and affinity may be grounds for annulment of marriage.[48]

If the parties leave the state to have the marriage solemnized and to evade the law and then return to the state the marriage is void.[49]

Nonage.

The age of consent for males is fourteen years and for females twelve years.[50]

Residence.

No suit for divorce is maintainable unless one of the parties has been domiciled in the state for at least one year preceding the commencement of the suit.[51]

Jurisdiction.

Circuit courts and corporation courts on the chancery side have jurisdiction over all suits for divorce and alimony.[52]

Service.

Summons may be by personal service, or by publication for four consecutive weeks.[53]

Evidence.

Where the wife is pregnant before marriage or is notoriously immoral, which fact is known to the husband at the time of marriage, cohabitation after knowledge acts as a bar to a suit for divorce.[54]

Either party may testify.

Admissions of the parties must be corroborated.[55]

A copy of the marriage license must be filed with the complaint for divorce.[56]

Alimony.

Alimony may be allowed pendente lite and upon decree of divorce.[57]

[47]Code 1919, § 5115.

[48]Code 1919, § 5100.

[49]Code 1919, § 5089.

[50]Code 1919, § 5090.

[51]Code 1919, § 5105, as amended by Laws 1922, ch. 347, p. 589. See Towson v. Towson, 126 Va. 640, 102 S. E. 48.

[52]Code 1919, § 5105, as amended by Laws 1922, ch. 347, p. 589.

[53]Code 1919, §§ 5106, 5108.

[54]Code 1919, § 5103.

[55]Code 1919, § 5106, as amended by Laws 1920, ch. 334.

[56]Code 1919, § 5106, as amended by Laws 1920, ch. 334.

[57]Code 1919, §§ 5107, 5111.

Remarriage.

Remarriage is permitted after six months from decree.[58] But the court, in its discretion, may prohibit the party guilty of adultery from remarrying.[59]

§ 917. **Washington.**

Grounds for absolute divorce.

When the consent to the marriage of the party applying for the divorce was obtained by force or fraud, and there has been no subsequent voluntary cohabitation the innocent party may obtain a decree for divorce.[60]

Further causes for divorce are: Adultery on the part of the wife or the husband when unforgiven, and application is made within one year after it shall come to the knowledge of the party applying for divorce; impotency; abandonment for one year; cruel treatment of either party by the other, or personal indignities rendering life burdensome; habitual drunkenness of either party; neglect or refusal of the husband to make suitable provision for his family; imprisonment of either party in the penitentiary, if complaint is filed during the term of such imprisonment.

A divorce may be granted upon the application of either party for any cause deemed sufficient by the court, provided the court is satisfied that the parties can no longer live together.

If chronic mania or dementia has existed ten years, the court may in its discretion, enter a decree.

Where the parties are estranged and have lived apart for five years or more[61] the court may grant a divorce.

Grounds for annulment of marriage.

The marriage may be annulled for: Consanguinity and affinity, force, fraud, former husband or wife living, want of age or understanding, conviction for felony, insanity and affliction with pulmonary tuberculosis or contagious venereal disease.[62]

Nonage.

The age of consent for males is twenty-one years and for fe-

[58]Code 1919, § 5113.

[59]Code 1919, § 5114.

[60]Rem. Comp. Stat. 1922, § 982.

[61]Rem. Comp. Stat. 1922, § 982. Gould v. Gould, 63 Wash. 484, 115 Pac. 1041; Sabot v. Sabot, 97 Wash. 395, 166 Pac. 624; Stay v. Stay, 53 Wash. 534, 102 Pac. 420; Briggs v. Briggs, 56 Wash. 580, 106 Pac. 126; Sullivan v. Sullivan, 52 Wash. 160, 100 Pac. 321; Merriam v. Merriam, 75 Wash. 389, 134 Pac. 1058; Bickford v. Bickford, 57 Wash. 639, 107 Pac. 837.

[62]Rem. Comp. Stat. 1922, §§ 983, 8449; Johnson v. Johnson, 57 Wash. 89, 106 Pac. 500, 26 L. R. A. (N. S.) 179; State v. Nakashima, 62 Wash. 686, 114 Pac. 894.

males eighteen years.[63] But parent or guardian may consent to marriage at an earlier age.[64]

Residence.

One year's residence in state is required before bringing action for nullity or divorce.[65]

Jurisdiction.

Superior courts have jurisdiction to hear and determine all suits for divorce.[66]

Service.

Summons may be served personally, by telegraph, or by publication.[67]

Evidence.

Trial must be by the court,[68] and, when the suit is undefended, it is the duty of the prosecuting attorney to resist the petition.[69]

No decree by default will be entered.[70]

Admissions of parties must be corroborated.[71]

Alimony.

Alimony may be allowed. Pending the action the court may make such disposition of the persons, property, and children of the parties as may be deemed right and proper, and in granting the divorce may make such further decree as may appear just and equitable.[72]

Remarriage.

Those sections of the statute permitting remarriage after divorce have been recently repealed; but there is nothing in the laws prohibiting such remarriage.[73]

[63]Rem. Comp. Stat. 1922, § 8437.

[64]Rem. Comp. Stat. 1922, § 8451. See In re Hollopeter, 52 Wash. 41, 100 Pac. 159, 21 L. R. A. (N. S.) 847, 17 Ann. Cas. 91; Cushman v. Cushman, 80 Wash. 615, 142 Pac. 26.

[65]Rem. Comp. Stat. 1922, § 984.

[66]Rem. Comp. Stat. 1922, §§ 15, 984, and Larson v. Larson, 106 Wash. 305, 179 Pac. 841; Meisenheimer v. Meisenheimer, 55 Wash. 32, 104 Pac. 159.

[67]Rem. Comp. Stat. 1922, §§228, 984.

[68]Rem. Comp. Stat. 1922, §§ 996, 997.

[69]Rem. Comp. Stat. 1922, § 995.

[70]Rem. Comp. Stat. 1922, §§ 996, 997.

[71]Rem. Comp. Stat. 1922, §§ 996, 997.

[72]Rem. Comp. Stat. 1922, § 989. See State v. Superior Court, 55 Wash. 343, 104 Pac. 771, 25 L. R. A. (N. S.) 387. See also Quient v. Quient, 105 Wash. 315, 177 Pac. 779.

[73]See Laws 1921, ch. 109; Rem. Comp. Stat. 1922, § 990.

§ 918. **West Virginia.**

Grounds for absolute divorce.

Divorce may be granted in the following cases: Adultery; impotency at the time of marriage; sentence to the penitentiary; where prior to the marriage there has been, without the knowledge of the other party, a conviction of an infamous crime; wilful desertion for three years; if the wife without the husband's knowledge was pregnant at the time of marriage or was notoriously a prostitute, or if the husband without the wife's knowledge, was, prior to the marriage, notoriously a licentious person.[74]

Grounds for partial divorce.

A partial divorce may be granted in following cases: Cruel and inhuman treatment; abandonment; desertion; habitual drunkenness acquired after marriage;[75] and where the parties have been separated by a decree of court for two years without reconciliation, the court may, upon the production of suitable evidence, grant an absolute decree.[76]

Grounds for annulment of marriage.

Consanguinity and affinity, impotency, former husband or wife living, insanity and miscegenation may be causes for annulment of marriage.[77]

Nonage.

The age of consent for males is eighteen years and for females sixteen years.[78]

Residence.

One of the parties must have resided in the state for a year preceding the time of bringing the suit.[79]

Jurisdiction.

Chancery side of the circuit court has jurisdiction. Suit may be brought in the county where the parties last lived together, or, at plaintiff's option, in the county where defendant resides, if a resident.[80]

[74]Code 1914, § 3640. See Anderson v. Anderson, 78 W. Va. 118, 88 S. E. 653, 2 A. L. R. 1617; Reynolds v. Reynolds, 68 W. Va. 15, 69 S. E. 381, Ann. Cas. 1912A, 889.

[75]Code 1913, § 3641. See Huff v. Huff, 73 W. Va. 330, 80 S. E. 846, 51 L. R. A. (N. S.) 282; Maxwell v. Maxwell, 69 W. Va. 414, 71 S. E. 571.

[76]Code 1913, § 3648.

[77]Code 1913, § 3636. See Hastings v. Douglass, 249 Fed. 378.

[78]Code 1913, § 3637.

[79]Code 1913, § 3642, as amended by Laws 1915, ch. 73, § 7.

[80]Code 1913, § 3642, as amended by Laws 1915, ch. 73, § 7. See Jennings v. McDougle, 83 W. Va. 186, 98 S. E. 162.

Service.

Summons may be served personally or by publication for four successive weeks.[81]

Personal service outside of the state is equivalent to publication.[82]

Evidence.

Admissions must be corroborated.

No decree by default will be granted.[83]

Alimony.

Alimony will be allowed in the discretion of the court.[84]

Remarriage.

Remarriage is forbidden within six months of date of decree.[85]

§ 919. **Wisconsin.**

Grounds for absolute divorce.

Divorce may be granted in the following cases: Adultery; impotency: when either party subsequent to the marriage has been sentenced to imprisonment for three years or more (no pardon granted after a divorce shall restore the party sentenced to his or her conjugal rights); the wilful desertion of one party from the other for a term of one year; when the treatment of the wife by the husband has been cruel and inhuman, whether practiced by using personal violence, or by any other means, or when the wife shall be guilty of like cruelty to her husband, or shall be given to intoxication; habitual drunkenness for the space of one year immediately preceding the commencement of the action; whenever the husband and wife shall have voluntarily lived entirely separate for the space of five years next preceding the commencement of the action;[86] in the discretion of the court upon the grounds for which partial divorce may be granted an absolute divorce may be decreed.[87]

[81]Code 1913, § 3642, as amended by Laws 1915, ch. 73, § 7.

[82]Code 1913, § 3642, as amended by Laws 1915, ch. 73, § 7.

[83]Code 1913, § 3643, as amended by Laws 1915, ch. 73, § 8.

[84]Code 1913, §§ 3644, 3646. See Reynolds v. Reynolds, 68 W. Va. 15, 69 S. E. 381, Ann. Cas. 1912A, 889.

[85]Laws 1915, ch. 73, § 14. See Underwood v. Underwood, 83 W. Va. 272, 98 S. E. 207.

[86]Stat. 1921, § 2356. See Voss v. Voss, 157 Wis. 430, 147 N. W. 634; White v. White, 167 Wis. 615, 168 N. W. 704; Kohl v. Kohl, 143 Wis. 214, 125 N. W. 921; Karnes v. Karnes, 140 Wis. 280, 122 N. W. 717; Cevene v. Cevene, 143 Wis. 393, 127 N. W. 942.

[87]Stat. 1921, § 2358.

Grounds for partial divorce.

A divorce from bed and board forever, or for a limited period, may be adjudged for the fourth, fifth, and sixth grounds for an absolute divorce as enumerated above, or for the extreme cruelty of either party; also when the husband, being of sufficient ability, shall refuse or neglect to provide for his wife, or when his conduct toward her may render it unsafe and improper for her to live with him.[88]

Grounds for annulment of marriage.

Impotency or incapacity of copulation if plaintiff had no knowledge, consanguinity or affinity, husband or wife living, fraud, force, or coercion, insanity, if no subsequent confirmation, and nonage, unconfirmed after arriving at age of consent may be grounds of annulment of marriage.[89]

Nonage.

The age of consent for males is eighteen years and females fifteen years. But marriage under these ages may be ratified when cohabitation has taken place after arriving at lawful age, and such ratification is an absolute bar to annulment.[90]

Residence.

No divorce shall be granted unless the plaintiff shall have resided in the state two years immediately preceding the time of the commencement of the action, except in certain cases.[91]

In annulment proceeding residence at time of filing complaint is sufficient.[92]

Jurisdiction.

The circuit court has jurisdiction in all cases of divorce and suits for alimony.[93]

Service.

Summons may be by personal service or by publication, once a week for six weeks.

Personal service outside of the state is equivalent to publication.[94]

Evidence.

Affirmative proof aside from admissions is necessary.[95]

[88]Stat. 1921, § 2357.

[89]Stat. 1921, § 2351. See C—— v. C——, 158 Wis. 301, 148 N. W. 865, 5 A. L. R. 1013, holding concealment of venereal disease fraud. See note, 5 A. L. R. 1016, citing cases from other states.

[90]Stat. 1921, § 2351.

[91]Stat. 1921, § 2355.

[92]Stat. 1921, § 2354.

[93]Stat. 1921, § 2348.

[94]Stat. 1921, § 2355.

[95]Stat. 1921, § 2360i.

No decree will be granted on default of either party.[96]

Alimony.

Alimony will be allowed during pendency of suit and upon decree of divorce.[97]

Remarriage.

Remarriage is permitted after one year. If marriage is contracted before that time has elapsed it is illegal and void.[98]

§ 920. **Wyoming.**

Grounds for absolute divorce.

Divorce may be granted for the following causes: Adultery; impotency; when one of the parties has been convicted of a felony and sentenced to imprisonment therefor in any prison; when either party has wilfully deserted the other for the period of one year; when the husband or wife has become a habitual drunkard; when one of the parties has been guilty of extreme cruelty to the other; when the husband for the period of one year has neglected to provide the common necessaries of life, provided the neglect is not the result of poverty on the part of the husband which he could not avoid by ordinary industry; when either party shall offer such indignities to the other as shall render his or her condition intolerable; when the husband shall be guilty of such conduct as to constitute him a vagrant within the meaning of the law respecting vagrancy; when, prior to the contract of marriage or the solemnization thereof, either party shall have been convicted of a felony or infamous crime in any state or territory, without knowledge on the part of the other party of such fact at the time of marriage; when the intended wife, at the time of contracting the marriage or at the time of solemnization thereof, shall have been pregnant by any other man than her intended husband and without his knowledge at the time of such solemnization; where either party has become incurably insane.[99]

[96]Stat. 1921, § 2360h.

[97]Stat. 1921, § § 2361, 2364; Becker v. Becker, 153 Wis. 226, 140 N. W. 1082; Penn v. Penn, 168 Wis. 267, 169 N. W. 558. Under Wisconsin statute permitting a final division of the estate in lieu of alimony in a divorce proceeding, the court can not make such division and also an award of alimony. Steinkopf v. Steinkopf, 165 Wis. 224, 161 N. W. 757, 1 A. L. R. 1103 (and annot. p. 1106).

[98]Stat. 1921, § § 2330, 2374. Severa v. National Slavonic Society of the United States, 138 Wis. 144, 119 N. W. 814; Kitzman v. Kitzman, 167 Wis. 308, 166 N. W. 789; White v. White, 167 Wis. 615, 168 N. W. 704.

[99]Comp. Stat. 1920, § 4990; Laws 1921, ch. 16. See Bonham v. Bonham, 25 Wyo. 449, 172 Pac. 333.

Grounds for annulment of marriage.

Want of age and force or fraud may be causes for annulment of marriage.[1]

In case of consanguinity and affinity, or where former husband and wife is living, or where one of parties is insane or an idiot, the marriage is void without legal process.[2]

Nonage.

The legal age of consent for males is eighteen years and for females sixteen years.[3]

Residence.

A year's residence is required of the plaintiff unless the marriage was solemnized in the state and he has remained a citizen thereof to time of filing his complaint.[4]

A married woman may obtain a residence in the state, although her husband resides in another state.[5]

Jurisdiction.

District courts have jurisdiction in all suits for divorce.[6]

Service.

Summons may be by personal service or by publication for six successive weeks.[7]

Evidence.

The admissions or declarations of the parties must be corroborated.[8]

Alimony.

Alimony will be allowed pending suit and upon final decree.[9]

Remarriage.

Marriage is made illegal if entered into before one year from date granting decree.[10]

[1]Comp. Stat. 1920, § 4986.
[2]Comp. Stat. 1920, § 4983.
[3]Comp. Stat. 1920, § 4956.
[4]Comp. Stat. 1920, § 4991. See Duxstad v. Duxstad, 17 Wyo. 411, 100 Pac. 112, 129 Am. St. 1138.
[5]Comp. Stat. 1920, § 5015.
[6]Comp. Stat. 1920, § 4995.
[7]Comp. Stat. 1920, §§ 4994, 5636.
[8]Comp. Stat. 1920, § 5013.
[9]Comp. Stat. 1920, §§ 4994, 5000.
[10]Comp. Stat. 1920, § 5017.

CHAPTER 51

Forms

Section.

925. Instructions for drawing bill, complaint, libel or petition.
926. Complaint—Title of court—Title of cause.
927. Formal opening.
928. Formal opening—An infant wife by her guardian.
929. Complaint on ground of cruel treatment—Indiana.
930. Bill for divorce for cruelty, the complainant asking for the custody of the children, for alimony, and for alimony pendente lite.
931. Bill for divorce for adultery—Illinois.
932. Bill for divorce for desertion and conviction of husband for felony, and praying for resumption of maiden name —Illinois.
933. Complaint for divorce for desertion—Iowa.
934. Libel for divorce—Massachusetts.
935. Libel for divorce—Grounds for divorce that may be inserted in foregoing bills and complaints.
936. Petition for divorce and to set aside fraudulent conveyances.
937. General prayer.
938. General prayer—Massachusetts.
939. General prayer and for custody of children and for alimony—Indiana.
940. Prayer for summons.
941. Prayer for alimony.
942. Prayer for restoration of maiden name.
943. Prayer for restraining order to prevent violence.
944. Prayer for custody of children.
945. Pleas and answers—Venue, title of court, title of cause.
946. Plea or answer—Formal opening.
947. Plea to the jurisdiction.
948. Answer—General denial.
949. General denial and condonation.

Section
950. Answer—Condonation.
951. Answer—Collusion.
952. Answer—Connivance.
953. Answer—Consent and connivance.
954. Answer—Recrimination.
955. Answer—Existing marriage to another.
956. Answer to bill for cruelty.
957. Justification for alleged cruelty.
958. Motion for specifications.
959. Affidavit to be attached to answer under oath.
960. Answer of co-respondent.
961. Conclusion of answer and cross-bill.
962. Replication.
963. Cross-complaint.
964. Cross-bill—Denial of abandonment and prayer for divorce from bed and board for cruelty.
965. Separate maintenance—Complaint.
966. Separate maintenance—Petition.
967. Separate maintenance—Findings of fact and conclusions of law.
968. Decree for separate maintenance.
969. Decree of separation and alimony.
970. Decree of divorce a mensa et thoro (from bed and board).
971. Decree from bed and board—Custody of children—Alimony.
972. Bill for rescission of a voluntary conveyance made by a husband to his wife by means of the latter's fraudulent procurement.
973. Complaint to have marriage declared void.
974. Complaint for annulment of marriage for nonage.
975. Complaint for annulment of marriage for unsound mind.
976. Complaint for annulment of marriage for insanity.
977. Complaint for annulment for insanity—Restoration to reason.
978. Complaint for annulment of marriage for impotency.
979. Complaint for annulment of marriage for physical incapacity.
980. Complaint for annulment for former undissolved marriage.

Section
981. Petition for annulment for marriage outside of state to evade its laws.
982. Complaint for annulment for false representations as to chastity.
983. Complaint for annulment for false representations as to betrothal ceremony.
984. Complaint for annulment with prayer to legitimize children.
985. Answer to complaint for annulment for nonage.
986. Answer to complaint for annulment for fraud.
987. Answer to complaint for annulment for impotency.
988. Answer to complaint for annulment for intoxication.
989. Annulment—Decree of validity.
990. Decree of annulment.
991. Breach of promise—Complaint.
992. Breach of promise—Complaint—Special damages.
993. Breach of promise—Answer setting up fraud.
994. Breach of promise—Answer setting up duress.
995. Breach of promise—Answer setting up unchastity of plaintiff.
996. Breach of promise—Denial of breach.
997. Breach of promise—Answer setting up existing marriage of plaintiff.
998. Alienation of affections—Wife's complaint against husband's parents.
999. Alienation of affections—Husband's complaint against seducer of his wife.
1000. Necessaries furnished wife—Complaint.
1001. Complaint for wife's antenuptial debt.
1002. Order—Default of defendant—Personal service.
1003. Order—Default of defendant—Service by publication.
1004. Petition to open decree of divorce taken by default against nonresident.
1005. Petition to vacate decree.
1006. Summons.
1007. Order of notice by publication.
1008. Affidavit of notice.
1009. Affidavit for publication against nonresident.
1010. Notice with copy of bill to be served on nonresident defendant.

Section

1011. Affidavit of service of notice with copy of complaint.
1012. Affidavit of notice to co-respondent.
1013. Petition for writ of ne exeat.
1014. Ne exeat—Endorsement on petition.
1015. Masters' order for issuance of writ of ne exeat.
1016. Order of judge in vacation allowing an issuance of a writ of ne exeat.
1017. Ne exeat—Bond to be executed by complainant.
1018. Ne exeat—Bond to be given by defendant.
1019. Attachment clause.
1020. Prayer for attachment by trustee process.
1021. Affidavit for injunction.
1022. Order of notice by publication and attachment by trustee process.
1023. Order for attachment of real and personal property, and attachment by trustee process.
1024. Averment for injunction in complaint for divorce.
1025. Order restraining libelee from imposing any restraint upon the personal liberty of the libelant.
1026. Affidavit for injunction.
1027. Restraining order.
1028. Order of reference as to temporary alimony, suit money and counsel fees.
1029. Order confirming master's report as to alimony.
1030. Order granting alimony pendente lite.
1031. Notice of application for suit money.
1032. Motion for alimony pendente lite and counsel fees.
1033. Application for suit money.
1034. Order of reference to determine alimony.
1035. Report of master in chancery or other referee as to alimony.
1036. Order as to allowance.
1037. Order to pay temporary alimony, counsel fees and suit money on defendant's petition.
1038. Order to pay temporary alimony, counsel fees, and suit money on plaintiff's petition.
1039. Order granting alimony pendente lite.
1040. Order allowing maintenance pendente lite.
1041. Demand on party liable for temporary alimony.
1042. Notice of application for rule to show cause why attachment for contempt should not be issued.

Section

1043. Petition for contempt for non-payment of alimony.
1044. Petition to show cause why attachment as for contempt should not issue for failure to pay permanent alimony.
1045. Petition to show cause why attachment should not issue for failure to pay temporary alimony.
1046. Order to show cause.
1047. Order of notice on petition for contempt for non-payment of alimony.
1048. Answer in discharge of rule to show cause.
1049. Recognizance to appear and answer rule to show.
1050. Judgment for commitment as for contempt.
1051. Attachment as for contempt.
1052. Execution and order for commitment.
1053. Order convicting of contempt after order to show cause.
1054. Order purging of contempt.
1055. Custody of children—Averment in complaint.
1056. Petition for custody of minor children.
1057. Provision for maintenance of child after divorce.
1058. Order as to custody of child.
1059. Petition and order for third party to have care and custody of child.
1060. Order of notice on prayer for custody of children, suit money, and for restraining order.
1061. Order for custody of children.
1062. Order to produce child in court.
1063. Decree for custody of children.
1064. Decree awarding temporary custody of child.
1065. Decree, libel continued after hearing, with custody of children.
1066. Order that writ of habeas corpus issue to produce minor child.
1067. Habeas corpus.
1068. Decree awarding custody of children and use of homestead.
1069. Decree assigning homestead to wife.
1070. Decree assigning homestead to parties as tenants in common.
1071. Decree for sale of homestead with division of proceeds.
1072. Caption of decree or order with title of court and cause.
1073. Decree of divorce.

Section

1074. Decree for divorce, alimony and custody of children.
1075. Decree for divorce on verdict of jury.
1076. Decree for divorce, upon default, for conviction of crime, and granting right to resume maiden name.
1077. Decree for divorce on default—Personal service.
1078. Decree for divorce on default—Service by publication.
1079. Decree nisi or interlocutory.
1080. Objection to decree absolute.
1081. Decree nisi or interlocutory with findings of fact and conclusions of law.
1082. Decree nisi after appointment of guardian ad litem.
1083. Final decree of divorce after nisi or interlocutory decree.
1084. Order that decree nisi shall not become absolute.
1085. Decree for permanent alimony and other specific support.
1086. Decree on cross-complaint and amendment—Allowance of alimony and counsel fees.
1087. Decree to set aside decree when defendant not personally notified.
1088. Decree dismissing libel for adultery.
1089. Dismissal of appeal from the probate court.
1090. Decree dismissing bill after cause has been heard by jury and allowing an appeal—Illinois.
1091. Decree dismissing libel, the marriage being void.
1092. Decree dismissing libel without prejudice.
1093. Decree dismissing libel for want of jurisdiction.
1094. Decree dismissing cross-bill.
1095. Decree for costs.
1096. Petition for alimony after divorce decree.
1097. Petition for alimony after divorce—Massachusetts.
1098. Order of reference to master to take proof as to permanent alimony to be allowed complainant.
1099. Master's report—Testimony.
1100. Decree requiring security for payment of alimony.
1101. Decree for permanent alimony.
1102. Decree for permanent alimony with lien upon real estate.
1103. Agreement to sustain decree of probate court.
1104. Agreement to modify decree.
1105. Order to modify decree.

Section
1106. Petition to modify decree for alimony—Husband's petition to reduce.
1107. Motion to transfer suit to another county.
1108. Order directing issue to be tried by a jury.
1109. Certificate of decree of divorce—Absolute.
1110. Order of court for the examination of person alleged to be impotent.
1111. Affidavit of physician that witness is unable to attend court.
1112. Petition for writ of protection.
1113. Marriage settlement.
1114. Deed of wife confirming marriage settlement made during infancy.
1115. Antenuptial agreement.
1116. Separation agreements.
1117. Deed of separation—Another form.

§ 925. **Instructions for drawing bill, complaint, libel or petition.**

The attorney in drawing a bill, complaint, libel or petition for divorce should follow carefully the wording of the local statute and observe the common rules of pleading. For example, if the statute provides for a divorce where the defendant has contracted gross and confirmed habits of intoxication, caused by the voluntary and excessive use of intoxicating liquors, opium, or other drugs, it will not be sufficient to state in such pleading that the defendant has contracted gross habits of intoxication. So it will not be sufficient to simply say that the defendant has committed the crime of adultery, without stating where and with whom it was committed. If correspondent is unknown, or the place where the act was committed is unknown, it must be stated in the pleading. Neither is it sufficient to state that the defendant has neglected to provide suitable support and maintenance for the petitioner. It must be alleged that the defendant has cruelly and wantonly neglected or refused to provide a suitable support and maintenance for her, being of sufficient ability so to do.

By the following wording of the local statutes in drawing complaints or petitions for divorce, the attorney will not only save himself much time and trouble by motions to amend, further notice on the defendant, and continuance, but possibly expense in case of service by publication or republication.

After filling in the body of the libel and stating the cause or causes of divorce any number of causes for divorce may be inserted in the libel and sufficient proof of any one of them will justify the court in decreeing a divorce.

The technical designation of a party bringing an action in chancery proceedings, the party against whom it is brought, and the name of the initial pleading therein are variously termed: as to the first, the "plaintiff," "petitioner," "complainant," or "libelant;" as to the second, the "defendant," or "libelee," and as to the pleading, the "complaint," "bill of complaint," "petition," or "libel," according to the practice or the provisions of the Code of the several states.

In these forms for the designation of the party bringing the suit the word "plaintiff" has been generally used, and of the party against whom it is brought the "defendant" and to designate the plaintiffs original pleading the word "complaint."

§ 926. **Complaint—Title of court—Title of cause.**

State of.....
County of.....

In the ..... Circuit Court.
September Term.

JANE DOE
v.
JOHN DOE
Bill for Divorce.

§ 927. **Formal opening.**

(Venue) (Title of Court)
(Title of cause)

To the Honorable Judges of the Circuit Court of the county of ...., in the State of .....

In Chancery sitting:

Your oratrix, A. B., of the county of ..... and state of..... respectfully represents unto your Honor that, etc.,

Another form.

(Venue) (Title of Court)
(Title of Cause)

To the Honorable ....., Judge of the ..... court, of the county of ....., in the State of .....

In Chancery sitting:

Your orator, A. B., of, etc., respectfully represents unto your Honor that on, etc., your orator intermarried with one C. D., now C. B., at, etc., and that your orator is now and has been a resident of this state for over one whole year next before the filing of this bill.

The plaintiff in the above entitled cause complains of defendant in said entitled cause and says:

Another form.

To the Honorable the Judges of the ....., in and for the county of ..... and state of Illinois, in chancery sitting:

Your oratrix, ..., of the county of ..... and state of Illinois, respectfully represents that she is an actual resident of the said county of ..... and is now, and has been for .... years last past, a resident of the state of Illinois; that your oratrix's maiden name was ..... and that she is the daughter of ....., of the city of ..... and state of .....; that on the ..... day of ....., 19.., she was lawfully married to one ....., the defendant herein, and from the time of the said marriage until the .... day of ...., 19.., she lived and cohabited with the said .... as his wife, and always conducted herself toward her said husband as a true, kind and affectionate wife.

§ 928. **Formal opening—An infant-wife by her guardian.**

Your oratrix, A. D. of the county of ..... and state of ....., an infant under the age of twenty-one years, towit, of the age of ..... years, by R. S., of the same county, her guardian, respectfully represents unto your Honor that, etc.,

§ 929. **Complaint on ground of cruel treatment—Indiana.**

That this plaintiff and said defendant were duly married on the day of ....., 189.., and lived together as husband and wife until the .. day of ...., 19.., and on which said date they separated and have not lived and cohabited together since, and are not now living and cohabiting together as husband and wife; this plaintiff says that said defendant, before the said separation, was guilty of cruel and inhuman treatment of this plaintiff in this: (here state any and all acts of cruel treatment of any and every kind)'.

(If there are children and plaintiff is desirous of the custody, set out names and ages).

This plaintiff says that she has no property of her own; that said defendant is the owner of real and personal estate to the amount of.....dollars; that his annual income is at least..... dollars; that he owns real estate in the state of ..... of the value of ..... dollars.

Wherefore plaintiff sues and asks the court that the bond of matrimony heretofore existing between plaintiff and defendant be dissolved; that plaintiff be granted a divorce from said defendant (and that she be given the care and custody of said children), and she demands a judgment of ..... dollars alimony (and an allowance of ..... dollars per year for said children) and for all other proper relief.

(Signed.)

§ 930. **Bill for divorce for cruelty, the complainant asking for the custody of the children, for alimony, and for alimony pendente lite.**

To the Honorable the Judges of the ..... court, in and for the county of ..... and state of Illinois, in chancery sitting:

Your oratrix, ..., of ....., Illinois, respectfully represents that she is an actual resident of the county of ..... aforesaid and has been for more than ..... years last past a resident of the state of Illinois; that on the ..... day of ....., A. D....., at..... (name of city), in the state of Illinois, she was lawfully married to the defendant, ...; that, since her intermarriage with the said ..... she has always behaved herself toward him as a chaste, dutiful and affectionate wife.

Your oratrix further represents that there have been born to your oratrix, as the result of her marriage with the said ..... two children, one named ....., who was born on the ..... day of.....A. D....., and the other named....., who was born on the ..... day of ....., A. D. ....., and that both of said children are now living and residing with your oratrix.

Your oratrix further represents that the said defendant, ..., wholly disregarding his marriage vows and obligations toward your oratrix, has ever since said marriage been guilty of extreme and repeated cruelty toward your oratrix; that the said ..... (name of defendant), on divers dates and times since said marriage has beaten, struck and has neglected to furnish your oratrix with proper and necessary food and clothing; and

particularly that, on or about the ..... day of ....., A. D. ..... the said ..... (name of defendant) ..... (here set out some specific act of cruelty).

Your oratrix further represents that afterward, to wit, on the ..... day of ....., A. D. ....., the said ..... (name of defendant) struck your oratrix a blow in the face with his open hand (or indicate any other evidence of mistreatment), and afterward, towit, on the ..... day of ....., A. D. ....., the said ..... (name of defendant) violently knocked your oratrix off a chair upon which she was sitting (or indicate any other evidence of mistreatment), and afterward, to wit, on or about the ..... day of ....., A. D. ....., the said (name of defendant) ..... (set out any other specific act of cruelty).

Your orator further represents that she resided with the said ..... (name of defendant) until the ..... day of ....., A. D. ....., when, in consequence of the ill treatment hereinbefore mentioned, she was compelled to leave and cease living with him.

Your oratrix further represents that, although she continued to reside in the same house with the said ..... (name of defendant) after the said ..... day of ..... (the date of some act of cruelty), she has not, since the said last mentioned date, lived or cohabited with him as his wife, and is not now living or cohabiting with him as his wife; that on the ..... day of ....., A. D. ....., she was compelled to and did leave him and take up her residence separate and apart from him at .....; and that your oratrix has never forgiven or condoned any of the acts of the said ..... (name of defendant) hereinbefore mentioned.

Forasmuch therefore as your oratrix is without remedy in the premises except in a court of equity, and to the end that the said ..... (name of defendant), who is hereby made party defendant to this bill, may be required to make full and direct answer thereto; that your oratrix may be divorced and forever freed from the bonds of matrimony now existing between your oratrix and the said ..... (name of defendant); that your oratrix, by the decree of this court, be given the custody and control of her said children, ... and ....., and that the said ..... (name of defendant) may be decreed to pay such sums of money to your oratrix as your Honors may deem necessary and

proper for her maintenance and support and for the maintenance, support, and education of her said children; and that the said ..... (name of defendant) may be required to pay to your oratrix a sufficient sum of money to enable her to employ counsel and to carry on this suit, and for the support of herself and her children during the pendency thereof; and that your oratrix may have such other and further relief in the premises as to equity appertains and to your Honors shall seem meet.
(Add prayer for process).

.....
Complainant.
By.....
Her Solicitor.

§ 931. Bill for divorce for adultery—Illinois.

To the Honorable the Judges of the ..... court, in and for the county of ..... and state of Illinois, in chancery sitting:

Your oratrix, ..., of the county of ..... and state of Illinois, respectfully represents that she is an actual resident of the said county of ..... and is now, and has been for ..... years last past, a resident of the state of Illinois; that on the ..... day of ....., 19.., at the city of ..... in the county of ..... and state of ....., she was lawfully united in marriage with ....., the defendant hereinafter named, and from and after said marriage she lived and cohabited with the said ..... (defendant), as his wife until the ..... day of ....., 19..; and that during all the time aforesaid, she always conducted herself toward him as a kind, true, faithful and affectionate wife and was at all times true to her marriage covenants and vows.

Your oratrix further represents that, subsequent to the time of the said marriage of your oratrix and the said ..... (defendant), to wit, in the month of ....., in the year ....., the said.....(defendant) became and was guilty of lewd practices and became and was guilty of adultery; and that afterward, to wit, in the month of ....., in the said year ....., and afterward, in the month of ....., in the said year ....., the said ..... (defendant) became and was guilty of further lewd practices and became and was guilty of adultery.

Your oratrix further represents that on or about the ..... day of ....., 19.., the said ..... (defendant) committed

adultery at ..... with a certain woman, to wit, one .....; and that afterward, to wit, on or about the ..... day of ....., 19.., at ....., the said ..... (defendant) committed adultery with a certain other woman, to wit, one .....; and that afterward, to wit, on or about the ..... day of ....., 19.., at ....., the said ..... (defendant) again committed adultery with the said last named woman, to wit, ...; and that subsequent to the said last mentioned occasion, the said ..... (defendant) on divers times and occasions, has committed adultery with certain other women whose names are to your oratrix unknown.

Your oratrix further represents that, on account of the said lewd practices and the said commission of adultery by the said ..... (defendant) as aforesaid, she, your oratrix, was compelled to and did leave the said ..... (defendant) on the ..... day of ....., 19.., and has been obliged to remain away and live separate and apart from the said ..... (defendant) and has so remained away and lived separate and apart from the said ..... (defendant), continuously, since the said ..... day of ....., 19...

Forasmuch therefore as your oratrix is without remedy in the premises except in a court of equity, your oratrix prays that the said ..... (defendant), who is hereby made party defendant to this bill, may be required to make full, true and perfect answer thereto; that the said marriage between your oratrix and the said ..... (defendant) may be dissolved and declared null and of no effect by the decree of this honorable court; and that your oratrix may have such other and further relief in the premises as to equity appertains and to your honors shall seem meet.

(Add prayer for process).

....., Complainant.

By.....
Complainant's Solicitor.

§ 932. **Bill for divorce for desertion and conviction of husband for felony and praying for resumption of maiden name —Illinois.**

To the Honorable Judge of the ..... court, in and for the county of ....., and state of Illinois.

In Chancery sitting:

Your oratrix, ..., of the county of ....., and state of Illinois, respectfully represents unto your Honor that she is an actual resident of the said county of ....., and is now, and has been for ..... years last past, a resident of the state of Illinois; that your oratrix' maiden name was ...., and that she is the daughter of ...., of the city of ....., and state of .....; that on the ..... day of ....., in the year ....., she intermarried with one ....., and from the time of said marriage until the day of ....., 19.., she lived and cohabited with the said ..... as his wife, and that she always conducted herself toward her said husband as a true, kind and affectionate wife.

Your oratrix further represents that the said ....., wholly regardless of his marriage covenants and duties, afterward, to wit, on the ..... day of ....., 19.., wilfully deserted and absented himself from your oratrix, without any reasonable cause, for the space of two years and upward, and has persisted in such desertion and yet continues to absent himself from your oratrix.

Your oratrix further represents that on the ..... day of ....., 19.., at the city of ....., in the state of ....., at a term of the ..... court, held in and for the county of ....., in said state, begun and held in said county, on the ..... day of ....., 19.., before the honorable ....., judge thereof, presiding, the said ..... was duly convicted of the crime of manslaughter (or as the case may be) and was then and there, by the judgment of the said court, sentenced to confinement in the penitentiary of said state for the term of ..... years, at hard labor, which said judgment still remains in full force and effect, in no wise reversed, annulled, set aside or vacated, as by the records and proceedings in said court now remaining, reference thereto being had, will more fully appear.

For as much therefore as your oratrix is without remedy in the premises except in a court of equity, your oratrix prays that the said ....., who is made party defendant to this bill, may be required to make full and true answer thereto; that the said marriage between your oratrix and the said ..... may be dissolved and declared null and void by the decree of this court, pursuant to the statutes of the state of Illinois; that your oratrix may be allowed to resume her maiden name of ..... as before

marriage; and that your oratrix may have such other and further relief in the premises as to equity may appertain and to your honors shall seem meet.

(Add prayer for process).

....,
Complainant's Solicitor.

§ 933. **Complaint for divorce for desertion—Iowa.**

The plaintiff complains to the court that for more than a year last past she has been and is now a resident of the said state, residing at ....., in ..... county, where her residence has been continuously during all of said time (the entire time of the residence in the state should be stated after deducting all absences therefrom); that such residence of the plaintiff has been bona fide, and not only for the purpose of obtaining a divorce, and that the prayer of this complaint is also made in good faith.

The plaintiff further alleges that she and the defendant were married at ..... in ....., county of ....., and state of ....., on the ..... day of ..... 19.., and lived and cohabited together as husband and wife until the ..... day of ....., 19.., and that during all the time of said cohabitation the plaintiff conducted herself towards her said husband as a chaste and dutiful wife but that the defendant was on the contrary unfaithful to his marital duties and obligations, and on the ..... day of ....., 19.., he wilfully deserted plaintiff without any fault on her part, and without any reasonable or just cause therefor, and has ever since continuously abandoned her; that of the said marriage the following named children were born, who are now living, namely, (here insert names and ages of children).

The plaintiff further states that she is without property or means with which to support herself and said children and that the defendant is a man of good business capacity, does a prosperous business, and has property, both real and personal from which he is well able to support the plaintiff and said children; that such real property is known and described as (here described) of the value of ..... dollars, and that such personal property consists of (here described) of the value of ..... dollars.

Wherefore plaintiff prays the court that a decree of divorce may be granted her, and that the said bonds of matrimony here-

tofore existing between plaintiff and defendant be dissolved, and that the plaintiff be granted a divorce from said defendant, and that she be given the custody of said children, and that the court will decree to her a reasonable and proper sum as temporary alimony, and on the final hearing hereof, such sum as permanent alimony out of her said husband's said estate as may be necessary to support her and the said children, and for such other and proper relief as she may be entitled to in the premises.

.....

Signature.

(The complaint should be verified.)

§ 934. **Libel for divorce—Massachusetts.**

COMMONWEALTH OF MASSACHUSETTS

Superior Court, ..., ss.:

TO THE HONORABLE THE JUSTICES OF THE SUPERIOR COURT next to be holden at.....within and for the County of.....

RESPECTFULLY libels and represents..... of ..... in said county, that he was lawfully married to ..... now of ..... at ..... on the ..... day of....., A. D., 19..., and thereafterwards your libelant and the said ..... lived together as husband and wife in this commonwealth, to wit: at ....., that your libelant has always been faithful to h.. marriage vows and obligations, but the said ..... being wholly regardless of the same at ..... on ..... the ..... day of ....., A. D., 19..., ...

(Here insert grounds for divorce)

WHEREFORE, your libelant prays that a divorce from the bonds of matrimony may be decreed between your libelant and the said ..... and that the real and personal estate of the said ..... may be attached to the value of ..... dollars in order to secure a suitable support and maintenance to your libelant and to such children as may be committed to h.. care and custody.

.....

.....

.....

Dated the..... day of....., A. D., 19....

§ 935. **Libel for divorce—Grounds for divorce that may be inserted in foregoing bills and complaints.**

Adultery.

"At ..... on or about the ..... day of ....., A. D., 19.., committed the crime of adultery with one .....;" or, if the name of the correspondent is not known, say, "with a certain person whose name is to your libelant unknown."

Adultery with statement of time, place, and person.

"That, at divers time between the 1st day of May, 19.., and the filing of this libel, and at divers places in said city of Boston, but at what particular times and places the libelant is unable more particularly to state, the said libelee has committed adultery with ....., and ....., and with other ..... whose names are unknown to the libelant."

Adultery with specific and general allegations.

"On or about the ..... day of ....., A. D., 19.., at ..... aforesaid, committed the crime of adultery with a person to your libelant unknown, but by information of the name of ..... and on or about the ..... day of ....., A. D., 19..., at ..... in this commonwealth, committed the crime of adultery with some person to your libelant unknown; and, at the same time and place to your libelant unknown, committed the crime of adultery with one .....; and on divers other days between her said marriage with him and this date, committed the crime of adultery with divers lewd women to your libelant unknown."

False charge of adultery.

The plaintiff further alleges that the defendant at ..... on or about the ..... day of ..... 19.. (and also at ..... on or about the ..... day of ....., 19..), and at divers places and on divers other days and times was guilty of extreme cruel and inhuman treatment towards the plaintiff, in that in the presence and hearing of divers persons he openly and falsely charged her with adultery with one G. H. and with other persons.

Denial of sexual intercourse.

The plaintiff further alleges that almost immediately after said marriage the defendant began a course of extreme cruel and inhuman treatment towards the plaintiff, in that she has repeatedly and continuously ever since the said marriage denied him the right of sexual intercourse.

Imprisonment.

"That the libelee on ....., 19.., was sentenced by the Superior Court in ..... county and commonwealth of Massachusetts to confinement at hard labor for life (for ..... years)

in the state prison at ..... in the county of ..... for the crime of ....." (In Massachusetts for more than five years, to wit:)

Habits of intoxication.

"Has contracted gross and confirmed habits of intoxication, caused by the voluntary and excessive use of liquors, opium or other drugs."

Intemperate or excessive use of drugs.

That the defendant has been guilty of the habitual, excessive, and intemperate use of opium, morphine, and chloral.

Coarse and vulgar language as cruel and abusive treatment.

"That defendant continued almost incessantly and constantly to curse and abuse your petitioner, and call petitioner names too vulgar for repetition herein, and that said dates were so constant and numerous it would be impossible for petitioner to name any particular date, and that defendant continued to so abuse and curse petitioner and call her vile names for four years after said marriage in 189...

"That within thirty days after petitioner's marriage to her husband, Thomas J. Lynch, has begun to make overtures of love with other ladies, and even with young girls and negro women, in the drug store owned by her said husband at Tulane Ave. and Tonti street, whose names were unknown to petitioner, and her said husband would be guilty of these offenses in the presence of your petitioner, and solely for the purpose of humiliating and degrading petitioner before the public.

"That her said husband continued these practices for four years immediately succeeding his marriage with petitioner, and petitioner realizing that at the end of four years she could no longer endure such cruel and unusual punishment from an unnatural husband, was forced and compelled to leave and abandon her matrimonial domicil and return to live with her mother."[1]

Cruelty.

"At ....., on or about the ..... day of ....., 19.., and on divers other days and times, said defendant was guilty of cruel and abusive treatment towards your libelant," or "did inflict cruel and abusive treatment upon your libelant."

[1]This petition was held to state a cause of action in Lynch v. Lynch (La.), 71 So. 195, although Monroe, C. J. dissented.

Cruelty.

Cruelty should be alleged in the language of the statute followed by a statement of the facts upon which the charge is based. For instance:

Your oratrix further represents that the said defendant,..... wholly disregarding his marriage vows and obligations to your oratrix, has ever since said marriage been guilty of "extreme and repeated cruelty" towards your oratrix; that the said ....., defendant, on divers days and times since said marriage, etc., (as in Illinois); or "cruel and inhuman treatment," (as in Indiana); or "extreme cruelty by infliction of grievous bodily injury or grievous mental suffering," (as in California.)

Cruel treatment.

In Fitzgerald v. Fitzgerald (Tex.), 168 S. W. 452, an additional allegation that "defendant was guilty of many other excesses, outrages and cruel treatment towards her of such a nature as to render their further living together insupportable," was held too indefinite.

Cruelty involving mental suffering.

Plaintiff further alleges that on the evening of the eleventh day of March, 1891, the plaintiff and defendant left their home in South Pasadena, in this county, for the purpose of attending a lecture in the city of Los Angeles; that they left their infant child at their said home in the care of their domestic, one Annie Peterson; that after said lecture the plaintiff and her sister went to the house of a friend in the said city of Los Angeles for the purpose of spending the night there; that the defendant returned to their said home and found the said Annie Peterson in bed and asleep; that defendant then and there entered the bed of said Annie Peterson, and attempted to have sexual intercourse with her; that he tried to persuade her that it would not be wrong for him and her to have sexual intercourse together; that he remained in bed with the said Annie Peterson for upwards of two hours before retiring to his own room; that this conduct on the part of defendant has received great publicity by reason of a complaint having been made by the said Annie Peterson before a magistrate in the city and county of Los Angeles, charging the defendant with having at said time and place assaulted her with intent to commit a rape upon her; that afterwards the said defendant came to plaintiff and threatened to turn her out upon the world penniless unless she would help him to keep the said Annie

Peterson from prosecuting him on the said complaint; that this conduct on the part of defendant, and the publicity which has been given to it, has caused plaintiff grievous mental suffering, thereby greatly impairing her health.

Cruelty involving mental suffering.

And your oratrix charges that very soon after their said marriage as aforesaid, the said defendant commenced a course of extreme and repeated cruelty toward your oratrix; that he has often threatened and abused your oratrix in a most cruel and shameful manner; that on, to wit, the 9th day of May, 1886, at the city of Chicago, aforesaid, the defendant caught hold of your oratrix by her throat and threw her down upon the floor and choked, beat, bruised, and otherwise maltreated your oratrix in a most cruel, angry, rude, and revengeful manner. And again on the same day last aforesaid, at the place aforesaid, the said defendant again choked, beat, bruised, and otherwise maltreated your oratrix and threatened to take the life of your oratrix, and by means of force took from your oratrix a certain gold watch, of the personal goods and chattels of your oratrix. So your oratrix charges that the said defendant, Andrew Campbell, has been and is guilty of extreme and repeated cruelty toward your oratrix.

Attempting life of complainant.

Your oratrix (or orator) further represents that the said R. S., wholly regardless of her (or his) marriage covenants and duties, on, etc., at, etc., did wilfully and maliciously attempt the life of your orator (or oratrix) by means of a certain poison, to wit: (Here state poison administered) with the intent in so doing, wilfully and maliciously to take the life of your orator (or oratrix.)

Impotency.

Your oratrix (or orator) further represents that immediately after the said marriage took place your orator (or oratrix) discovered that the said ..... (here insert name of defendant) at the time of her (or his) intermarriage with your orator (or oratrix) as aforesaid, was, and has continued to be naturally impotent and physically incapable of entering into the marriage state.

That, etc.; (The facts constituting the impotency should be here stated), so that the said marriage could not be consummated by the sexual intercourse of the parties.

Your orator (or oratrix) further represents that he (or she) is informed and believes and so states the fact to be, that the said impotency or physical incapacity of the said ..... (here insert name of defendant) still exists and is incurable.

Impotency.

That said libelee is and ever since said marriage has been impotent, and that said impotency is incurable.

Desertion.

Your orator (or oratrix) further represents, that the said R. S. wholly regardless of her (or his) marriage covenants and duties, afterwards, on, etc., wilfully deserted and absented herself (or himself) from your orator (or oratrix) without any reasonable cause, for the space of ..... years and upwards; and has persisted in such desertion and yet continues to absent herself (or himself) from your orator (or oratrix).

Desertion.

"At ..... on the ..... day of ....., A. D., 19.., (or in the month of ....., A. D., 19...,) utterly deserted h.., and has continued such desertion from that day (time) to the date hereof, being more than three consecutive years next prior to the filing of this libel."

Desertion.

The plaintiff further charges that the defendant on or about the ..... day of ....., A. D., 19.., wilfully, and without any reasonable or just cause therefor, deserted and abandoned the plaintiff and wholly refused to live and cohabit with her any longer as husband and wife, and from thence hitherto up to the time of filing this Bill of Complaint, he has continually absented himself from her, and refused to return and live with her as husband and wife and still does and without any fault on the part of the plaintiff.

Desertion and failure to provide.

That the said defendant, without any just cause, deserted your oratrix at their domicil, leaving her without any money and without any means of support; that the said defendant has not since that date resided with your oratrix, and has not in any way contributed to her support; that the said desertion of your oratrix has continued since the said date, and has been wilful, obstinate and continued for more than one year prior to the filing of this bill; that the said defendant deserted your oratrix without any just cause, and that your oratrix has always demeaned her-

self in a proper manner, and had performed all of her duties towards the said defendant as his wife prior to said desertion; that there was no issue born of said marriage; that since that date your oratrix has been compelled, by her own efforts, to support herself without any aid or assistance from the said defendant.[2]

Desertion and failure to provide.

That during the times alleged in plaintiff's complaint and for two years prior thereto, the plaintiff did not, and had not for said time, lived with nor cohabited with this defendant; but that plaintiff has wholly deserted this defendant and for and during said time did in no way contribute to her support.

Neglect to provide.

That the defendant has for more than ..... years last past been guilty of gross neglect to duty to plaintiff, and that he is separated from plaintiff without the fault of the plaintiff and has, during said time, wilfully failed and neglected to provide plaintiff with the common necessaries of living, "or to contribute anything towards the support of the plaintiff."

Failure to provide.

That on the ..... day of ....., 19.., this plaintiff and said defendant were duly married and lived together as husband and wife until the ..... day of ....., 19.., on which date they separated and have not lived and cohabited together since, and are not now living and cohabiting together as husband and wife, but that this plaintiff returned to her father's home and there remains; this plaintiff says that said defendant, for two years and more before the said separation, failed wholly to make reasonable provision for the support of this plaintiff and for their children, although he was well able to do so, in this: (here state any and all facts of defendant's failure to provide.)

Refusal and neglect to provide.

"Being of sufficient ability, grossly, wantonly and cruelly refuses and neglects to provide a suitable maintenance for her."

§ 936. **Petition for divorce and to set aside fraudulent conveyances.**

The petition should allege all facts necessary to state a cause

[2]This bill was held sufficient in Fielding v. Fielding (Fla.), 64 So. 546.

for divorce, that is to say, the jurisdictional facts, the marriage, the living separate and apart, and the facts which constitute the cause for a divorce, which may then proceed as follows:

"That the defendants, fraudulently contriving and combining together to cheat and defraud this plaintiff, and to prevent her recovering of and from the defendant Calvin A. Damon support for herself and children, alimony, suit money, and the avails of the sale of her property received by him as aforesaid, caused the said Ellen H. Fitzgerald and William P. Fitzgerald to deed the said real estate so purchased and paid for by the defendant, Calvin A. Damon, as aforesaid, and hereinbefore described, to the defendant, Asenoth A. Damon, and the defendant Asenoth A. Damon, in pursuance of said fraudulent purpose and design, accepted said deed and caused the same to be recorded on the 25th day of May, 1868, in the office of the register of deeds for Dane county, Wisconsin, in volume 80 of Deeds, on page 338."

"The plaintiff further shows, upon information and belief, that the defendant Asenoth A. Damon knew the plaintiff and defendant, Calvin A. Damon, while they lived together as man and wife in the state of Massachusetts, and before their removal to the state of Wisconsin, and knew the relation that subsisted between them."

"The plaintiff further shows that the defendant, Asenoth A. Damon, prior to the purchase of the property of the said Ellen H. and William P. Fitzgerald by the defendant, Calvin A. Damon, as hereinbefore stated knew that the defendant, Calvin A. Damon, took the avails of the sale of the plaintiff's property in Massachusetts, as hereinbefore alleged, and that he brought the same to Wisconsin, and at the time of said purchase knew that the same was used in paying the purchase price of the real estate hereinbefore described."

"The plaintiff further shows that the defendant, Calvin A. Damon, has threatened that if this plaintiff in any way interfered with, or commenced proceedings against him, he would dispose of all his property, leave the country, and never return."

"The plaintiff further shows that she has now no property in her own right, but is entirely dependent for the support of herself and children, and their education, upon her own exertions and the kindness of her friends; that the present value of the property of the defendant, Calvin A. Damon, as she is informed and believes, is about thirty-five hundred dollars; that the real estate

hereinbefore described, has been much improved since the same was purchased by the defendant, Calvin A. Damon, as before stated, and the same is now worth about three thousand dollars."

There should be the usual prayer for divorce and alimony; and that the said conveyance be set aside, and for general relief.[3]

§ 937. **General prayer.**

Wherefore your libelant prays that a divorce from the bonds of matrimony may be decreed between your libelant and the said Henry Gibson, the defendant, herein, and for such other orders and decrees as to your honors shall seem meet and justice may require.

Another form.

For as much therefore as your oratrix is without remedy in the premises except in a court of equity, your oratrix prays that the said ....., who is hereby made party defendant to this bill, may be required to make full, true, and perfect answer thereto; and that the said marriage between your oratrix and the said ....., may be dissolved and declared null and of no effect, by the decree of this honorable court, and that your oratrix may have such other and further relief in the premises as to equity may appertain and to your honors shall seem meet.

§ 938. **General prayer—Massachusetts.**

Wherefore plaintiff sues and asks the court that the bonds of matrimony heretofore existing between plaintiff and defendant be dissolved; that plaintiff be granted a divorce from said defendant, and for all other proper relief.

§ 939. **General prayer and for custody of children and for alimony—Indiana.**

Wherefore plaintiff sues and asks the court that the bonds of matrimony heretofore existing between plaintiff and defendant be dissolved; that plaintiff be granted a divorce from said defendant (and that she be given the care and custody of said children), and she demands a judgment of ..... dollars alimony (and an allowance of ..... dollars per year for said children) and for all other proper relief.

§ 940. **Prayer for summons.**

May it please your honors to grant the writ of summons in chancery directed to the sheriff of the said county of .....,

[3]Damon v. Damon, 28 Wis. 510.

commanding him that he summon the said ....., defendant as aforesaid, to be and appear before this honorable court on the first day of the next ..... term thereof, to be held at the court house in the city of ....., in the county aforesaid then and there to answer this bill.

....,
Complainant.
By.....
Complainant's Solicitor.

§ 941. **Prayer for alimony.**

A clause may also, in a proper case, be inserted, praying for alimony, substantially thus: "And that such alimony out of his estate may be decreed to her as seems just and reasonable;" or "that he may be required to pay to your libelant such alimony as seems just and reasonable."

§ 942. **Prayer for restoration of maiden name.**

In a case of a libel by a wife, if she wishes to resume her maiden name, or the name of a former husband, insert in the prayer, "and that your libelant may be allowed to resume her maiden name of A..... C..... D.....;" or "the name of F....., being that of her former husband."

Another form.

Wherefore: the plaintiff prays that the bonds of matrimony, heretofore existing between plaintiff and defendant, may be dissolved, and that a decree may be entered herein giving a divorce to the plaintiff from the defendant, and that she may be allowed under such decree to resume her maiden name of .....

§ 943. **Prayer for restraining order to prevent violence.**

The plaintiff further alleges that the defendant is a man of violent and uncontrollable temper and has frequently threatened to kill the plaintiff (and to do her bodily violence) and that she stands in constant fear that he will put such threats into execution; and she therefore prays that a restraining order may issue out of this honorable court directed to the defendant, restraining him from interfering with or molesting the plaintiff during pendency of this action.

§ 944. **Prayer for custody of children.**

When the libelant desires the care and custody of the minor children of the marriage, insert in the prayer, "and that the

care and custody of their two (or as the number may be) minor children, namely H..... V....., and C..... L....., may be given (or decreed) to h..."

Or insert in the body of the libel, after the allegation of marriage, "and that there have been born of this marriage a daughter, H..... V....., and a son, C..... L....., now aged, respectively, nine and twelve years;" and then insert in the prayer, "and that the care and custody of said minor children be given to your libelant." (Ages of children should be stated).

§ 945. **Pleas and answers—Venue, title of court, title of cause.**

State of .....
County of .....

In the .....Circuit Court.
September Term.

John Doe
v.
Jane Doe

Answer to complaint for divorce.

§ 946. **Plea or answer—Formal opening.**

And now comes John Doe, the above defendant and for answer to the complaint of Mary Doe, the complainant says;

Another form.

The answer of A B, the defendant, to the bill of complaint of C V, the plaintiff.

This defendant now and at all times hereafter saving and reserving unto himself all benefits and advantages of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in said bill contained, for answer thereto or so much and such part thereof as this defendant is advised it is or are material or necessary for him to make answer unto, answering, says:

§ 947. **Plea to the jurisdiction.**

Now comes the libelee, and relying on the special appearance filed in his behalf, and without waiving the same, and without submitting himself in any way to the jurisdiction of this court, says that the court has no jurisdiction of him in the matter of the said libel for divorce.

WHEREFORE said libel should be dismissed.

§ 948. **Answer—General denial.**

The answer of ....., defendant, to the Bill of Complainant of .....

The defendant admits that he was lawfully joined in marriage with the complainant ....., on or about the ..... day of ....., A. D. ....., as alleged in h.. Bill of Complaint by ..... h.. and denies each and every other allegation of said complainant.

.....
Defendant's Attorney.

Another form.

The defendant denies that he (or she) has ever committed any of the offenses which are charged in the said complaint as causes for divorce against him (or her).

(Signed).....
Attorney for Defendant.

§ 949. **General denial and condonation.**

"The libelee denies each and every allegation of cause for divorce in the libel contained, and further answering says that if any such cause or causes occurred they have since been condoned by the libelant."

"And now comes the libelee in the above-entitled action and alleges that since the filing of said libel, the libelant has voluntarily cohabited as his wife (or her husband) and thereby condoned the offense alleged in the libel.

§ 950. **Answer—Condonation.**

For further answer the defendant alleges that after the commission of the offenses charged against him in the complaint of the plaintiff, and after the plaintiff had knowledge thereof, she (or he) condoned said alleged offenses, and forgave the defendant, and thereafter freely cohabited with the defendant, and that he (or she) has ever since conducted himself (or herself) towards the plaintiff as a faithful and kind husband (or wife).

Another form.

Further answering the defendant says that if she committed all or any of the acts of adultery alleged in said complaint, which she denies, that after the time mentioned in said complaint and before the commencement of this suit, the plaintiff being informed as to all or any of said alleged acts, freely condoned the same and forgave the defendant therefor, and freely cohabited with her,

and that ever since as well as before the dates of said alleged acts the defendant has been a faithful wife to the plaintiff.

Another form.

That after the commission of the said acts of adultery (or of cruel treatment), as alleged in plaintiff's complaint, and with full knowledge of all of said facts, the said plaintiff fully condoned said acts, and did thereafter with said knowledge, live and cohabit with defendant, and defendant and plaintiff did thereafter live together and cohabit as husband and wife.

§ 951. **Answer—Collusion.**

"The libelee says that if anything occurred between her and said ..... which might appear to lead to the inference that she had committed the crime of adultery with said ....., the same was committed with the knowledge and consent of the libelant, and that the libelant and libelee collusively agreed that the acts should be committed or appear to have been committed for the purpose of enabling the libelant to obtain a divorce."

§ 952. **Answer—Connivance.**

Further answering the defendant says that if she committed all or any of the acts of adultery alleged in said complaint, which she denies, or that if anything occurred between her and the said A..... B..... which might appear to lead to the inference that she had committed any act of adultery with him, the same was caused, procured, and connived at by plaintiff, and that the defendant and the said A..... B..... were brought together by the plaintiff for the purpose of getting them into such a situation as would lead to an inference that the said A..... B..... had committed adultery with her, and for the purpose of causing said A..... B..... and the defendant to commit adultery.

Another form.

And further answering the defendant denies that she committed the crime of adultery with A..... B..... on the date mentioned in said complaint or at any other time; and that if it shall appear that she and the said A..... B..... were together on said date under circumstances from which it might be inferred that she had committed adultery with the said A..... B....., that she was with said A..... B..... by reason of the connivance and procurement of the plaintiff.

And further answering the defendant says that the plaintiff

entered into a conspiracy with the said A..... B..... and others to so arrange matters that she and the said A..... B..... might be found together under such compromising circumstances as to entitle the plaintiff to obtain a divorce from her on the ground of adultery; that in pursuance of said conspiracy the said A..... B....., by procurement of the plaintiff, induced the defendant to come with him to a room in a certain hotel on or about said last mentioned date, where she was found by her husband and others who were parties to said conspiracy.

§ 953. **Answer—Consent and connivance.**

That as to all of said acts and grievances alleged in plaintiff's complaint, defendant says that the same were committed with the knowledge, consent and connivance and by the procurement of the plaintiff. Wherefore, etc.

Another form.

"The libelee says that if anything occurred between her and said ..... which might appear to lead to the inference that she had committed the crime of adultery with said ....., the same was caused, procured and connived at by the libelant, and that said ..... was brought by the libelant to the house in which the libelant and the libelee resided in said ....., ostensibly as a lodger, but really for the purpose of getting into such a situation with the libelee as would lead to the inference that said ..... had committed adultery with her."

§ 954. **Answer—Recrimination.**

The answer of A. B. the defendant, to the bill of complaint of C. B. the plaintiff: the defendant, now and at all times hereafter saving and reserving unto himself all benefits and advantages of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in said bill contained, for answer thereto, or so much and such part thereof as this defendant is advised it is or are material or necessary for him to make answer unto, answering, says:

This defendant admits that he was lawfully joined in marriage with the complainant,....., on or about the ..... day of ....., A. D. ....., as alleged in her bill of complaint; but for further answer the defendant alleges that the plaintiff at ..... on or about the ..... day of ..... 19.. and at divers other places and on divers other days and times was guilty of the same offense that he (or she) has charged against him

(or her) in said complaint; and that since said offenses were committed the defendant has not cohabited with the plaintiff as her husband (or as his wife) or forgiven the said offenses.

Another form.

That during the times alleged in plaintiff's complaint, and on the ..... day of ..... 19.., and at various other times thereafter, the plaintiff committed adultery with one R..... S..... at (here state place), and with other persons unknown to the defendant at times and places unknown to this defendant.[4]

Another form.

The defendant further alleges that at ..... on or about the .....day of ....., 19.., (and also at ..... on or about the ..... day of ....., 19..) and at divers others places and on divers other days and times the plaintiff was guilty of adultery with one G. H. and with divers other persons whose names are unknown to the defendant and since the knowledge of said offenses so committed by the plaintiff came to the defendant, he (or she) has not cohabited with the plaintiff as her husband (or as his wife) or forgiven said offense.

Another form.

"The libelee denies all the allegations contained in the libel and says that the libelant, at divers times before the filing of her said libel, committed the crime of adultery with one..... and with divers other persons, whose names are unknown to the libelee but by information of the name of .....; wherefore he says that the prayer of the libel should not be granted."

§ 955. **Answer—Existing marriage to another.**

The defendant for answer says that a ceremony of marriage was performed between him and the complainant at the place and time alleged in said complaint but he alleges that at the time the said ceremony of marriage was performed the complainant had a husband living whose name was ....., and who resided in ..... and from whom she had not been divorced on the day of the said ceremony performed between this defendant and her.

[4]An averment in an answer of recrimination should be as definite as to the time the recriminating act was committed as if the same act were charged in a complaint as a ground for divorce; and an averment in such an answer that the plaintiff had committed adultery at divers times between a certain day and the commencement of the suit, was too broad. Bancroft v. Bancroft, 4 Boyce (Del.) 9, 85 Atl. 561.

§ 956. **Answer to bill for cruelty.**

The answer of ....., defendant, to the bill of complaint of ....., complainant:

The defendant, now and at all times hereafter saving and reserving unto himself all benefits and advantages of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in said bill contained, for answer thereto or so much and such part thereof as this defendant is advised it is or are material or necessary for him to make answer unto, answering, says:

This defendant admits that he was lawfully joined in marriage with the complainant, ..., on or about the ..... day of ....., A. D. ....., as alleged in her bill of complaint.

This defendant further answering denies that since said marriage the complainant has conducted herself toward him as chaste, dutiful, and affectionate wife.

"That defendant further answering admits there have been born to them as the fruits of said marriage, two children, ... and ....., as set forth in complainant's bill of complaint.

This defendant further answering denies that ever since said marriage he has beaten, struck or abused the complainant or neglected to furnish her with proper and necessary food and clothing.

This defendant further answering denies that ..... (here insert denial of specific act or alleged cruelty). This defendant further answering denies that ..... (here insert denial of other specific acts of alleged cruelty). This defendant denies all and all manner of unlawful combination and confederacy wherewith he is by said bill charged without this, that there is any other matter, cause, or thing in the complainant's said bill of complaint containing material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of this court, all such matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and prays to be hence dismissed with his reasonable costs and charges in his behalf most wrongfully sustained.

§ 957. **Justification for alleged cruelty.**

The defendant further answering says that each and every act

charged against him in said complaint as cruelty towards the plaintiff consisted only of such acts as he believed at the time absolutely necessary to protect himself from the much more violent acts of the plaintiff towards him theretofore begun. And that any injuries the plaintiff may have received in resisting defendant's efforts to protect himself were not voluntarily inflicted with the intent to injure the plaintiff (here insert specifications.) The defendant denies that he struck or beat the plaintiff as alleged in said complaint or used any violence to disturb her except as herein set forth.

§ 958. **Motion for specifications.**

Now comes ....., named as libelee in the above libel and moves that the libelant be required to file specifications stating in some detail the dates, or approximate dates, of the several acts of cruelty relied upon, and to state the acts which ..... claims constituted cruel and abusive treatment, and also give in detail the places where these alleged acts of cruelty took place, giving street and number, or if at lodging or boarding houses, the name of the person or persons owning or conducting such lodging or boarding house.

§ 959. **Affidavit to be attached to answer under oath.**

(Venue)

———, being first duly sworn, on oath, says that he is the defendant in the above cause and is the person whose name is subscribed to the foregoing answer. Affiant further says he is acquainted with the contents of said answer; that the averments therein made as of his own knowledge are true in substance and in fact; and that the averments as to matters alleged to be on affiant's information and belief, are true, to the belief of the affiant's knowledge and belief.

.....

(Signature)

§ 960. **Answer of co-respondent.**

The answer of ....., defendant, to the bill of complaint of ....., complainant:

The defendant now and at all times hereafter saving and reserving unto himself all benefits and advantages of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in said bill contained, for answer

thereto or so much for such part thereof as this defendant is advised it is or are material or necessary for him to make answer unto, answering says:

The answer of A..... B....., named in the complaint filed herein, respectfully shows to this court, that he has been named in the complaint of the plaintiff in said action as co-respondent, and is charged with the commission of adultery with the defendant as follows, to wit: (here insert allegations of complaint) and that he denies the said allegations of the complainant.

Wherefore, he prays judgment against such plaintiff for his costs herein as provided by law.

§ 961. **Conclusion of answer and cross-bill.**

Wherefore, the defendant demands judgment in his favor dissolving the marriage between the plaintiff and the defendant and divorcing plaintiff and defendant, together with the costs of this action.

§ 962. **Replication.**

And the libelant, for replication, says that all the allegations contained in said libel are true, and that by reason of anything above in the answer of the said John contained, she ought not to be precluded from having the prayer of her said libel granted; because she says that all the several allegations in the said answer contained are false and groundless, and that she is in no wise guilty in manner and form as the said John in his said answer hath alleged; and this she prays may be inquired of by the court.

§ 963. **Cross-complaint.**

The defendant having fully answered the complaint filed herein by the complainant now comes by way of cross-complaint, and states that he and the plaintiff were separated as stated in said complaint, to wit: on the ..... day of ....., 19.., and that they have not so lived or cohabited since last named date.

The defendant further states that on or about the ..... day of ....., 19.., at ....., the said plaintiff committed adultery with one G H, whereupon, as soon as the knowledge thereof came to this defendant, he ceased to cohabit with her as her husband and has not done so since. Wherefore, he prays upon the hearing hereof, the bonds of matrimony existing between himself, and

the plaintiff be dissolved, and a divorce therefrom granted to him.

.....

(Signature)

Another form.

And now comes the defendant and files his cross-complaint against plaintiff wherein he admits that he and the plaintiff were duly married as charged in her said complaint and he avers that they lived together as husband and wife until the ..... day of ....., nineteen hundred and .....; that on or about the ..... day of ....., nineteen hundred and ..... at ....., the plaintiff committed adultery with one G. H. and that since the knowledge thereof came to this defendant he has ceased to cohabit with her, wherefore the defendant prays the court that a decree of divorce may be granted him and that the said bonds of matrimony heretofore existing between defendant and plaintiff be dissolved and that the defendant be granted a divorce from said plaintiff, and that he be given the custody of the children of said marriage and for all proper relief.

A. B., being duly sworn upon his oath, says that he is the defendant in the above entitled action and the plaintiff in the above cross-complaint; that he has been a resident of the State of Indiana for ..... years last past, and that for two years last past he has been a resident of ....., in said county and state, and has during said time resided in the following named places; (here give the street and number of all places of residence for two years); that he is by occupation, etc.

Another form.

The defendant, for cross-complaint against the plaintiff, alleges as follows:

She is now, and has been for ..... years last past, a bona fide resident of the state of Indiana, and for more than six months last past has been a bona fide resident of the county of .....

She and the plaintiff were duly married on the ..... day of ....., 19.., and lived together as husband and wife until the ..... day of ....., 19...

On the ..... day of ....., 19.., at ....., plaintiff wholly abandoned her, without cause, and has lived apart from her since that time against her wish and without her consent, and they

have not since cohabited together. (Or state any other cause for divorce.)

Wherefore, she asks that the bonds of matrimony existing between her and plaintiff be dissolved, and that she be granted a divorce.

§ 964. **Cross-bill—Denial of abandonment and prayer for divorce from bed and board for cruelty.**

To the Honorable ..... Judge of said court: and now comes the defendant in the above entitled cause and by way of cross-bill complains that G H, her husband has filed his bill of complaint against her in this court alleging that she had, without just cause deserted him and that such desertion had continued uninterruptedly for at least ..... years, and that any reconciliation between him and this cross-complainant was impossible, in which bill of complaint he prayed that the bonds of matrimony existing between them should be dissolved.

Your cross-complainant further alleges that she has filed her answer to said bill of complaint, in which she admitted the marriage between them as stated in said bill of complaint, and that she had separated from him as stated therein, but this cross-complainant alleges that prior to the time of such alleged desertion the complainant had treated her with extreme and repeated cruelty and inhumanity, and that in order to protect her life and person from danger and violence she was forced to, and did, on or about the ..... day of ..... 19.., leave the residence of the complainant and sought shelter and protection with relatives and friends and that said complainant has contributed nothing towards her support.

Wherefore the cross-complainant prays that a decree of divorce, a mensa et thoro, may be entered in her favor as against the said complainant, and for all proper relief therein.

(Prayer for the usual process.)

§ 965. **Separate maintenance—Complaint.**

(Venue) (Title of Court)

(Title of Cause) Bill for Separate Maintenance.

(Illinois.)

To the Honorable ..... Judge of said court,

In Chancery sitting:

Humbly complaining unto your honor, your oratrix..... shows that she is a resident of the county of.....and state of

.....; that on or about the ..... day ..... A. D., 19..., she was lawfully joined in marriage with.....who is made defendant hereto; that she lived with the said.....as his wife, from the time of such marriage until on or about the..... day of ..... A. D., 19..., when she was compelled to separate from the said defendant, for the causes hereinafter set forth. That during the time your oratrix and the said defendant lived together as husband and wife, there were born unto them..... child..... whose names and ages are as follows:.....

And your oratrix further shows unto your honor, that during the time she and said defendant lived together as husband and wife, she faithfully discharged all her duties as such wife, and at all times treated him with kindness and affection, and in all things acted and conducted herself in a manner well becoming a good, true, faithful and devoted wife; but your oratrix shows and charges that shortly after her said marriage the said defendant ....., not regarding the duty he owed to your oratrix, as his wife, began a course of unkind, cruel and inhuman conduct toward her, and continued the same until by reason thereof, she was compelled to and did, on or about the ..... day of ....., A. D., 19..., separate from and leave him, the said defendant. And your oratrix shows and charges that she remained with the said defendant as his wife, until his extreme and repeated acts of cruelty towards her became such as to render it unsafe and improper for her longer to remain with him.

And your oratrix further shows unto your honor, and charges that the said defendant is a man of violent passion and ungovernable temper; that he frequently addressed to your oratrix the most opprobrious and insulting epithets, and made frequent threats of personal violence, and has often threatened to take the life of your oratrix; and that in consequence of the cruel and inhuman treatment and threats aforesaid, your oratrix was compelled on the ..... day of ....., A. D., 19..., to leave the house of the said defendant, and seek refuge with her friends, since which time she has not dared to return to the defendant's house, or live with him.

(Here insert specifications with dates).

And that the said defendant ..... may be compelled to make a proper and suitable provision for the separate maintenance and support of your oratrix and the said child..... according to the statute in such case made and provided;

And, that your oratrix may have the care, custody and education of the child ..... of said marriage.

And that the said ..... defendant, his servants, agents, attorneys and solicitors, may each and all of them be enjoined and restrained from encumbering, charging, selling, or otherwise disposing of, or from attempting to incumber, charge, sell, or otherwise dispose of any of the real or personal estate of the said ....., until the further order of this court;

(Here insert prayer for any further specific and ancilliary relief necessary and desired such as writ of ne exeat or attachment.)

And that your oratrix may have such other and further relief in the premises as to your honor shall seem meet according to equity and good conscience;

May it please your honor to grant unto your oratrix the People's writ of injunction, issuing out of and under the seal of this honorable court, to be directed to the said defendant, ..., and to his servants, agents, attorneys, and solicitors, therein and thereby commanding and strictly enjoining them, and each of them, from incumbering, charging, selling, or otherwise disposing of or from attempting to incumber, charge, sell, or otherwise dispose of any of the real or personal estate of the said defendant, ..., until the further order of the court.

And may it please your honor to grant unto your oratrix the writ of summons issuing out of and under the seal of this honorable court, to be directed to the said defendant ..... therein and thereby commanding him, by a certain day and under a certain penalty to be therein inserted, that he personally be and appear before this honorable court, on the first day of the next ..... term thereof, to be holden at..... in the county of ..... on the ..... day of ....., A. D., 19..., then and there to stand to, abide and perform such order, direction and decree therein, as to your honor shall seem meet, according to equity and good conscience.

And your oratrix, as in duty bound, will ever pray, etc.

....

Solicitor for Complainant.

State of ..... }
.....County } ss.

..... being duly sworn, says that she is the complainant whose name is subscribed to the foregoing Bill of Complaint;

that she has heard the above Bill of Complaint read, and knows the contents thereof; that the said Bill of Complaint is true, of her own knowledge, except as to the matters and things therein stated to be upon information and belief, and as to those matters and things, she believes it to be true.

.....

Subscribed and sworn to before me, this.....day of ....., A. D., 19....

.....

§ 966. **Separate maintenance—Petition.**

To the Honorable....., Judge of said court.

Your petitioner respectfully shows unto your honor that on the ..... day of ....., 19.., your petitioner and C B were married at ....., but that she is now living separate and apart from the defendant without any fault on her part; that she has no money, means nor property whatever to provide for her maintenance and support; and that the defendant, although often requested so to do has failed and refused to provide means and provisions for her maintenance and support although he is the owner of property, real and personal, of the value of ..... dollars; that his real estate consists of (here describe) and his personal property (here describe); that he is engaged in a business and has a monthly income of ..... dollars;

Your petitioner shows that two children were born of said marriage, both of which are living, namely, Florence, of the age of ..... years, and Martin, of the age of ..... years; that it will require for the support of herself and the said children, who are now in her custody, an expenditure of not less than ..... dollars per month, and that the costs of employing attorneys and maintaining this suit must be paid by the defendant as the petitioner has no means with which to do so.

Your petitioner therefore prays for an order requiring the defendant to pay the said sum of ..... dollars per month for her and the said children's support and maintenance, and to pay such further sums as may be adjudged proper and reasonable to her attorneys for services herein; and further pay whatever costs are necessary for the maintenance of this suit, and for such other and further reliefs as the court may deem fair and equitable.

.....

A B Petitioner.

Verification.

State of ..... } ss
County of ..... }

A B being duly sworn deposes and says that she has heard the foregoing petition read and subscribed, knows the contents thereof and says the same is true in substance and in fact.

Subscribed and sworn to before me this ..... day of ....., 19...

.....
Notary Public.

§ 967. **Separate maintenance—Findings of fact and conclusions of law.**

And now this cause coming on for trial before his Honor, Mr. Justice ....., without a jury and it appearing that the issues were those made by the complaint of the plaintiff asking for a decree of separation from bed and board against the defendant, and his answer thereto and due proof of the facts and circumstances set forth in the said complaint having been made and due deliberation having been had, it is found and decided as follows:

FINDINGS OF FACT

1. That the plaintiff and defendant were, at the commencement of this action, both residents of the state of .....

2. That they were married and became husband and wife at ..... on or about ..... date.

3. That there is no issue of such marriage.

4. That the defendant has from the time of said marriage neglected and refused to provide for the plaintiff, and abandoned her.

5. That the circumstances of the parties are such that the plaintiff should have the sum of ..... dollars per week paid to her by the defendant as and for permanent alimony for her support and maintenance.

CONCLUSIONS OF LAW

1. That the plaintiff is entitled to a decree separating the parties hereto from bed and board with a provision therein that the defendant pay to the plaintiff the sum of ..... dollars per week as and for permanent alimony for her support.

2. That the defendant have taxible costs of this action.

(Signed) ..... (Judge).

§ 968. **Decree for separate maintenance.**

This cause having come on to be heard upon a bill of complaint herein the answer of the defendant thereto, the replication of the complainant to such answer, and the proofs taken in this cause as well as the testimony heard in open court (if the decree is upon the report of a master in chancery, this statement may be used, "and the report of the master in chancery filed herein, which said report is hereby approved and confirmed") and the court having heard the arguments of the counsel for the respective parties, and being fully advised in the premises, doth find that the allegations in the said bill of complaint contained, are true as therein stated; and that the equities of this cause are with the complainant.

It is therefore ordered, adjudged, and decreed by the court that the complainant is entitled to a separate maintenance from the defendant; and that she be allowed and the defendant do pay to her the sum of ..... dollars a year, commencing from the date of the filing of the complainant's bill of complaint herein, to wit, from ..... day of ....., 19.., less such sum as may have been paid her by him as alimony pendente lite, and that the said sum be paid in monthly (or quarterly) installments of ..... dollars each, payable in advance on the ..... day of each and every month (or quarter) until the further order of the court; and it is further ordered, adjudged, and decreed, that this decree be and remain a lien on the real estate of the defendant until he shall have given security for its faithful performance, to the satisfaction of the court or to the complainant, and that the defendant pay the costs of this suit, and in case of default in the payment of the said installments of money as the same become due or the costs herein, that execution issue therefor; and that nothing herein shall preclude the complainant from enforcing the payment of such sum (or sums) by proceedings as for contempt; and that either party be at liberty to apply to the court as circumstances may require. I would further report that in my judgment the complainant is entitled to a decree for separate maintenance against the defendant for the costs set forth in her bill of complaint.

Another form.

Now at this time this cause coming on to be heard upon a motion of A..... and B....., attorneys for the plaintiff, for a decree upon the findings of fact and conclusions of law hereto-

fore made herein on the ..... day of ....., 19.., and it appearing that no motion for a new trial or for further findings by the court has been filed herein.

It is therefore ordered and decreed that C.... D....., the defendant herein, pay to the clerk of this court (or to herself personally or to her attorneys) for the support of the plaintiff, the sum of ... dollars per week, beginning with the said ... day of ....., 19..; and that in case said sum is not paid before the expiration of each and every week beginning with said date, that the plaintiff may have an execution issued against the defendant herein for the collection of said amount.

And it is further ordered and decreed that plaintiff have and recover from and of the defendant, her costs and disbursements incurred herein, taxed at .....dollars, and that execution may issue against said defendant for said costs.

(Signed).....
Judge.

§ 969. **Decree of separation and alimony.**

"It is ordered, adjudged, and decreed that the plaintiff be, and she hereby is, forever separated from the defendant, and from the bed and board of said defendant, on the ground of nonsupport and cruel and inhuman treatment by the defendant. And it is further ordered, adjudged and decreed that from and after the entry of this decree the defendant, Horace Randall Sistare, pay to the plaintiff, Matilda Von Ellert Sistare, for her maintenance and support and the maintenance and education of Horace Von Ellert Sistare, the minor child of the plaintiff and defendant, the sum of twenty-two and 50-100 dollars ($22.50) per week, such sum to be paid into the hands of her attorneys of record in this action on each and every Monday. And it is further ordered, adjudged, and decreed that the sole care, custody, control, and education of said minor child, Horace Von Ellert Sistare, is hereby awarded to the plaintiff, and the defendant, upon complying fully with each and all of the directions of the decree herein, and not otherwise, and during his good behavior, shall, until the further order of this court, be permitted to see said child for the space of two hours, between the hours of 10 and 12 o'clock in the forenoon on Wednesdays and Saturdays, excepting Wednesdays and Saturdays during the months of July, August, and September of each year. And it is further

ordered, adjudged, and decreed that costs are hereby awarded to the plaintiff against the defendant, taxed at the sum of one hundred and seventeen and 67-100 dollars ($117.67), and that the plaintiff do recover said costs from the defendant and have execution therefor. And it is further ordered, adjudged, and decreed that the plaintiff have leave to apply from time to time for such orders at the foot of this judgment as may be necessary for its enforcement and for the protection and enforcement of her rights in the premises."

§ 970. **Decree of divorce a mensa et thoro (from bed and board.)**

(After usual headings.) "It is thereupon ordered, adjudged, and decreed that the plaintiff and defendant be separated from bed and board forever; provided, however, that the parties may at any time hereafter, by their joint and mutually free, voluntary act, apply to the court for leave to be discharged from this decretal order.

"And it is hereby declared to be the duty of each of them to live chastely during their separation, and that it will be criminal, and an act void in law, for either of them, during the life of the other, to contract matrimony with any other person. And it is further ordered, etc., that the plaintiff, according to the prayer of her bill, shall be entitled to, and charged with, the custody, care and education of the infant son of the parties in the pleadings mentioned, provided, always, that this order for custody, care and education of the said infant, may, at any time hereafter, be modified, varied, or annulled, upon sufficient cause shown. And it is further ordered, etc., that the defendant pay to the plaintiff $200 a year, to be computed from the date of this decree, in half yearly payments, to be applied towards the support and maintenance of the plaintiff and her son, and that this allowance is to continue until further order of the court and be subject to variation, as further circumstances may require, and it is further ordered, that the defendant pay to the plaintiff the costs of this suit, to be taxed, and that she have execution therefor, according to the course and practice of the court."

(This decree was entered in the case of Barrere v. Barrere, 4 Johns. Ch. (N. Y.) 187 at page 198. This was a divorce from bed and board on the grounds of cruelty.)

Another form.

This action having been heard and submitted and the court being sufficiently advised, it is considered and adjudged by the court that the plaintiff, ..., be, and she is hereby divorced a mensa et thoro (or from bed and board) from the defendant, ...

(If alimony is allowed, write order allowing same.

If order awarding care, etc., of children, write order on same.

Always enter judgment for costs and if attorney's fees is allowed, include same.)

§ 971. **Decree from bed and board—Custody of children—Alimony.**

It appearing from the pleadings and proofs that the defendant has been guilty of cruel and inhuman treatment of the plaintiff, by repeated acts of personal violence, so as to render it unsafe and improper under existing circumstances for her to cohabit with him, or to be under his dominion and control, it is thereupon ordered, etc., that the plaintiff and defendant be separated from bed and board forever; provided, however, that the parties may at any time hereafter, by their joint and mutually free voluntary act, apply to the court for leave to be discharged from this decretal order. And it is hereby declared to be the duty of each of them to live chastely during their separation, and that it will be criminal, and an act void in law, for either of them during the life of the other to contract matrimony with any other person. And it is further ordered, etc., that the plaintiff, according to the prayer of her bill, be entitled to and charged with the custody, care, and education of the infant son of the parties in the pleadings mentioned, provided always, that this order for the custody, care, and education of the said infant may at any time hereafter be modified, varied, or annulled upon sufficient cause shown. And it is further ordered, etc., that the defendant pay to the plaintiff two hundred dollars a year, to be computed from the date of this decree, in half-yearly payments, to be applied towards the support and maintenance of the plaintiff and her son, and that this allowance is to continue until further order, and be subject to variation as future circumstances may require. And it is further ordered, that the defendant pay to the plaintiff the

costs of this suit, to be taxed, and that she have execution therefor, according to the course and practice of the court.

§ 972. **Bill for rescission of a voluntary conveyance made by a husband to his wife by means of the latter's fraudulent procurement.**

State of Illinois, }
..... County. } ss

.....

v.

.....

In the ..... court,
To the ..... term, A. D., 19...

To the Honorable Judges of the ..... court, in and for the county of ..... and state of Illinois, in chancery sitting:

Your orator, ..., of ....., respectfully represents that on the ..... day of ....., A. D., 19..., at ....., he intermarried with one ....., whose name now is ....., hereinafter named as defendant to this bill of complaint, and that he lived and cohabited with the said ..... until the ..... day of ....., A. D., 19....

Your orator further represents that shortly after his said marriage with the said ....., to wit, on or about the ..... day of ....., A. D., 19..., the said....., then being the wife of your orator, requested that your orator convey to her, the said ....., the following described real estate, to wit: ..... (insert description); and that the said ..... still being the wife of your orator as aforesaid, afterward, to wit, on or about the ..... day of ....., A. D., 19.., again requested your orator to convey to her the said above described real estate; and that the said ....., still being the wife of your orator as aforesaid, afterward, to wit, on or about the ..... day of ....., A. D., 19.., again requested your orator to convey to her the said above described real estate.

Your orator further represents that the said ....., then being the wife of your orator as aforesaid, on each of said several occasions professed her love and affection for your orator, representing to your orator that she was actuated solely by motives of love and affection for him, your orator, and that she, the said ....., then being the wife of your orator as aforesaid, on each of said several occasions promised him that she would be and

always remain the affectionate, loving and dutiful wife of your orator.

Your orator, further represents that, relying upon the protestations by the said ....., then being the wife of your orator as aforesaid, that she entertained a love and affection for your orator and that she would always be and remain his affectionate, loving and dutiful wife, upon the day and year last aforesaid, he, your orator, executed to the said ....., then being the wife of your orator as aforesaid, a warranty deed, whereby he conveyed to the said ....., then being the wife of your orator as aforesaid, in fee simple, the said above described real estate; that no consideration other than natural love and affection entered into said conveyance, the said conveyance being voluntary and without valuable consideration.

Your orator further represents that the said deed of conveyance to the said above described real estate was, on the day of the date thereof, duly acknowledged according to law and filed for record in the office of the recorder of deeds of said ..... county, being entered in book ..... of ....., at page ....., which said deed of conveyance is hereunto annexed, and made a part hereof, marked exhibit A.

Your orator further represents that the said....., then being the wife of your orator as aforesaid, did not keep her said promise to be and remain the affectionate, loving and dutiful wife of your orator; that the said ....., on each of the said several occasions aforesaid, when she professed love and affection for your orator and promised to be and remain his affectionate, loving and dutiful wife, was feigning and shamming a love for him, your orator, for the purpose of fraudulently procuring from your orator, the conveyance as aforesaid to the said above described real estate.

Your orator further represents that, on the said several occasions aforesaid, when the said ....., then being the wife of your orator, professed her love and affection for him, your orator, and promised to be and remain his affectionate, loving and dutiful wife, she, the said ....., was then, and upon each of said occasions, planning to leave, desert and abandon your orator after she had accomplished her said purpose of procuring the said conveyance to the said above described real estate, and that shortly afterward, to wit, on the ..... day of ....., A. D.,

19.., she, the said.., then being the wife of your orator as aforesaid, did leave, desert and abandon him, your orator, and absented herself from him; that she, the said ....., ever since the day and year last aforesaid, has continued to absent herself from your orator; that she, the said ....., has not returned to live with him, your orator, and that ever since the day and year last aforesaid, she, the said ....., has continued to live and remain separate and apart from your orator and has not lived or cohabited with him, your orator, from the said day and year last herein mentioned.

Forasmuch therefore as your orator is without remedy in the premises except in a court of equity, your orator prays that the said ....., hereby made party defendant to this bill, may be required to make full, true and complete answer to the same, but not under oath, the answer under oath being hereby waived; that the said conveyance of the said above described real estate, made by your orator as aforesaid to the said ....., may be delivered up for rescission and cancelation and may be for naught esteemed; and that your honors may grant such other and further relief in the premises as to equity may appertain and to your honors shall seem meet.

(Add prayer for process.)

.....,
Complainant's Solicitor.

§ 973. **Complaint to have marriage declared void.**

The complaint of ..... against ....., defendant alleges (here insert any judicial clauses). The plaintiff further alleges that on the ..... day of ....., 19.., at ..... in the county of....., and state of ....., a marriage was duly solemnized between the plaintiff and defendant by ....., a justice of the peace within and for the said county and state, the said justice being duly authorized by the laws of said state to solemnize marriages, and the certificate of such marriage was duly recorded as required by law, but that the plaintiff is a white person and the defendant a negro, whereby the plaintiff prays that the said marriage may be declared and decreed by this court to be void, and for other proper relief.

(Signed).....
Plaintiff's Attorney.

§ 974. **Complaint for annulment of marriage for nonage.**

That on the ..... day of ....., 19.., this plaintiff and said defendant were married; this plaintiff says that at the time of said marriage she was ..... years of age and incapable on account of her said age of contracting said marriage.

Plaintiff further avers that on the ..... day of ....., 19.., plaintiff separated from said defendant, and that plaintiff and defendant have not since lived nor cohabited and are not now living nor cohabiting together as husband and wife; that at the time of said separation this plaintiff, by reason of her age, was incapable of ratifying, and she never has since ratified said contract of marriage.

Plaintiff further states that at and prior to the time of said marriage her name was A. E.

Wherefore this plaintiff sues and asks the court that said marriage may be declared void and that she be permitted to resume her former name and for all other proper relief.

§ 975. **Complaint for annulment of marriage for unsound mind.**

A. B. plaintiff in the above entitled cause, complains of said defendant and says that this plaintiff and said defendant were married on the ..... day of ....., 19...

That said plaintiff and defendant lived and cohabited together until the ..... day of ....., 19.., since which time they have not lived and cohabited and are not now living and cohabiting together as husband and wife.

This plaintiff says that prior to the time of said pretended marriage, to wit, on the ..... day of ....., 19.., this plaintiff was, by the judgment of the said ..... court, duly and legally declared to be a person of unsound mind and incapable of managing his estate, and that thereafter, on the ..... day of ....., 19..., one R. S. was duly appointed guardian of said plaintiff by said court.

Plaintiff says that at the time said marriage was contracted and at the time said marriage was entered into plaintiff was of unsound mind and incapable from want of understanding of contracting said marriage, and that plaintiff ever since has been and still is incapable from said want of understanding of contracting or ratifying any marriage.

That for the purpose of bringing said cause within the juris-

diction of said court, and for the purpose of obtaining a judgment and decree annulling the said above described marriage, this action is instituted and prosecuted by said R S, the duly appointed guardian of the said plaintiff, and that said R S is now acting as such guardian for said above named plaintiff. That said action is brought by this guardian in the name of his said ward and is prosecuted by him for the benefit of the said ward.

Wherefore said plaintiff asks, and this guardian, as aforesaid, asks for his said ward, the said plaintiff, that said marriage may be annulled and dissolved and declared void, and for all other proper relief.

§ 976. **Complaint for annulment of marriage for insanity.**

"That at the time of said pretended marriage, said ..... was incapable of contracting marriage, being insane, and has ever since continued to be incurably insane."

.....

Guardian ad litem.

§ 977. **Complaint for annulment for insanity—Restoration to reason.**

The complaint of ....., against ..... defendant, alleges (here insert any jurisdictional clauses). That the plaintiff was married to the defendant on the ..... day of ....., 19.., in the city of Chicago, Cook County, Illinois, that at the time of said marriage the plaintiff was of unsound mind to that extent that he was incapable of contracting the marriage tie, and remained in such condition for the space of ..... months after said marriage; that plaintiff was afterwards restored to his reason about the month of ..... of the year ....., and that he is now of sound mind but that since he was restored to sound mind he has not cohabited with the defendant.

Wherefore the plaintiff demands judgment, that the bonds of matrimony between him and the defendant be dissolved and annulled and that he be forever released and discharged from any and all obligations and duties arising from such marriage and other proper relief.

.....

Plaintiff's Attorney.

§ 978. **Complaint for annulment of marriage for impotency.**

That at the time of said marriage the defendant was and ever

since continued to be wholly incapable of consummating said marriage by reason of the (here state the nature of the incapacity, as: malformation of her parts of generation, or the frigidity and impotence of his parts of generation), and that such incapacity is incurable.

Another form—Impotency of husband.

"That immediately after said marriage took place your libelant discovered that the said ....., at the time of his intermarriage with your libelant as aforesaid, was, and has continued to be, naturally impotent and physically incapable of entering the marriage state; that the said ..... has a malformation of his parts of generation, so that the said marriage could not be consummated by the sexual intercourse of the parties, and that said physical incapacity of the libelee as aforesaid was well known to the libelee at the time of contracting said marriage, but was unknown to the libelant. And your libelant further represents that she is informed and believes and therefore alleges that the said impotency and physical incapacity of the said ..... still exists and is incurable."

§ 979. **Complaint for annulment of marriage for physical incapacity.**

The plaintiff further alleges that at the time of their marriage the defendant was and ever since has been, subject to a permanent and incorrectable corporal imbecility, which renders sexual intercourse impracticable, that at all times prior to their marriage he concealed said fact from the plaintiff.

Another form.

Your oratrix alleges that on the ..... day of ..... 19.., and within ..... years, before the commencement of this action at ....., she was married to the defendant, and that said defendant was then and ever since, has remained physically incapable of entering into the marriage state or consummating the said marriage, by reason of incurable physical defects, and that (here state the physical defects of).

Your oratrix further alleges that said incapacity was known to the defendant at the time of contracting said marriage, but was unknown to the plaintiff.

Another form—Impotency of wife.

"That soon after said marriage was celebrated, the libelant discovered that the libelee, at the time of her marriage with the

libelant as aforesaid, was impotent in this, that the mouth of the vagina of the said ..... was, and still is, closed, so as to prevent copulation; that said physical incapacity of the libelee as aforesaid was well known to the libelee at the time of contracting said marriage, but was unknown to the libelant, and that the libelant has been informed and believes and therefore alleges that said physical incapacity of the libelee still exists and is incurable."

§ 980. **Complaint for annulment for former undissolved marriage.**

PETITION FOR ANNULMENT

To the Honorable the Justices of the Superior Court, to be holden at Boston within and for the county of Suffolk:

Respectfully libels and represents A. B. of ..... in the county of ..... that (he or she) was married in form of law but not in legal effect to C. N. now of ..... on the ..... day of ....., A. D., 19....

That at the time of said pretended marriage said C. D. had a former (husband or wife) living, to wit, one H. K. to whom (he or she) was lawfully married at ..... on the ..... day of ....., A. D., 19..., and that said marriage was still in force.

That said H. K. is still living, and no divorce has ever been granted between said H. K. and the libelee.

WHEREFORE your libelant prays that said pretended marriage may by the decree of this Honorable Court be declared null and void.

Dated the ..... day of ....., A. D., 19....

A. B., Libelant.

Another form.

To the Honorable the Justices of the Superior Court, next to be holden at Boston within and for the county of Suffolk.

Respectfully represents A. B. of Boston in said county that on or about January 15th, A. D., 19.., your libelant went through a marriage ceremony with the libelee, in the city of Boston, in the county of Suffolk, and said commonwealth. The libelee at that time representing herself as an unmarried woman. That after said ceremony your libelant and the libelee lived together as husband and wife in this commonwealth, to wit, at Boston for about one month, when your libelant learned for the first time that the libelee was already married, and had a husband liv-

ing, named H. K., who resided in or near the city of Montreal, in the province of Quebec, in the Dominion of Canada, and such marriage was in force the day of her alleged marriage to your libelant. That your libelant upon learning of said prior marriage at once ceased to cohabit with the libelee and has lived separate and apart from her ever since.

Wherefore your petitioner prays that this Honorable Court will declare said marriage null and void.

Dated the ..... day of ....., A. D., 19....

(This form is taken from the original papers.)

Another form.

That the plaintiff and defendant were married at ..... in the State of Indiana on the ..... day of ....., 19..; that at the time of such marriage the defendant was husband (or wife) of one G. H. who at the time of said marriage was living and whose marriage with the defendant had never been dissolved. The plaintiff further alleges that on ..... day of ....., 19.. he ceased to live and cohabit with defendant nor have they lived together since said date as husband and wife.

§ 981. **Petition for annulment for marriage outside of state to evade its laws.**

"That at the time of said pretended marriage said C..... D..... had a former (husband or wife) living, to wit, H..... K..... in whose favor a decree of divorce nisi, was granted on the ..... day of ....., A. D., ..., and that two years had not elapsed from the day when said decree nisi, became absolute.

"That your libelant and said libelee were married outside the commonwealth in order to evade the laws of this commonwealth."

§ 982. **Complaint for annulment for false representations as to chastity.**

That on the ..... day of ....., 19.., this plaintiff entered into a certain marriage ceremony, and certain pretended marriage with said defendant, and that said pretended marriage was entered into in good faith on the part of this plaintiff, and that said pretended marriage was solemnized with due and legal formalities.

This plaintiff says that said pretended marriage and the said marriage ceremony were procured by fraud, in this: that said

defendant, at the time of said marriage ceremony and for ..... months prior thereto, falsely and fraudulently represented herself and did then and there falsely and fraudulently hold herself out to this plaintiff to be a virgin, and to be of good and chaste repute and uncorrupted morals.

That this plaintiff, relying upon said false and fraudulent representations and believing them to be true, and then and there believing said defendant was a virgin, and that she was then, and always had been chaste and virtuous and of good repute and uncorrupted morals, did promise to marry said defendant and did on said day enter into said marriage ceremony and said pretended marriage.

But this plaintiff says that said defendant was not, at the time of making said marriage contract, and at the time said marriage was so entered into, as aforesaid, a virgin and chaste and of uncorrupted morals, but was, on the contrary, at the time of said representations, and at the time of said pretended marriage, as aforesaid, unchaste; and she was then and there pregnant and with child by some other man, to this plaintiff unknown, and which said unchastity and pregnancy were wholly unknown to this plaintiff at said times, and were not known to this plaintiff until after said pretended marriage ceremony.

That thereafter, on the ..... day of ....., 19.., said defendant was delivered of said child.

This plaintiff says that as soon as he discovered said fraud, and as soon as he discovered the said defendant was so pregnant, as aforesaid, this plaintiff repudiated and disclaimed the said pretended marriage, and thereupon and immediately ceased to live and cohabit with said defendant, and has not, since the said discovery of said fraud, lived or cohabited and is not now living or cohabiting with said defendant.

Wherefore this plaintiff asks that said pretended and fraudulent marriage may be annulled and may be held to be null and void, and for all other proper relief.

Another form.

"That the libelant was induced to enter into said pretended marriage by the fraud and misrepresentation of the libelee, in that prior to said marriage the libelee represented herself to be, and induced the libelant to believe that she was a chaste and virtuous woman; but that in fact she was not so, but was at that time pregnant with a bastard child."

§ 983. **Complaint for annulment for false representations as to betrothal ceremony.**

"That your petitioner was induced to enter into said marriage by the fraud of the said E..... A..... S....., and that of her parents, A..... S....., and R..... S....., in representing that the said ceremony was to be a betrothal ceremony; and your petitioner, relying upon said representations, believed that he was becoming betrothed to the said E..... A..... S..... by said ceremony, and that he was not being married to her; that your petitioner and the said E..... A..... S..... have never lived together as man and wife."

§ 984. **Complaint for annulment with prayer to legitimize children.**

(Add after the prayer to have the marriage declared null and void, the following:)

"And your libelant says that said marriage between the libelant and libelee was contracted in good faith and in the belief on the part of both of them that said H..... K..... was dead, wherefore your libelant prays that E..... B..... and G..... B....., aged respectively ..... and ..... years, the minor children of the marriage, may be declared to be (his or her) legitimate children, and may be committed to (his or her) care and custody."

§ 985. **Answer to complaint for annulment for nonage.**

The answer of A..... B....., the defendant herein, to the complaint of C..... B....., the plaintiff.

For answer to the said complaint this defendant says that he admits the celebration of said marriage at the time and place stated in said complaint, but he avers that even if it be true as stated in said complaint, and this he neither admits nor denies but requires of the plaintiff due and full proof thereof, that the said plaintiff was at the time of said marriage under the age of ..... years, and therefore incapable of entering into the marriage contract, it is also true that afterwards when he (or she) became of the age of ..... years, and for a long period of time thereafter, to wit: for the space of....., the plaintiff and defendant lived and cohabited together as husband and wife and thereby acquired the repute among their neighbors and friends as being husband and wife; and this defendant avers that the said plaintiff then and there ratified and confirmed the afore-

said marriage ceremony and did thereby become the lawful wife (or husband) of the defendant.

Wherefore, he (or she) prays to be hence dismissed with his (or her) reasonable costs in this behalf most wrongfully sustained.

§ 986. **Answer to complaint for annulment for fraud.**

The answer of A..... B....., the defendant herein, to the complaint of C..... B....., the plaintiff.

For answer he (or she) admits the intermarriage of the plaintiff and defendant as the same is alleged in the said complaint. For further answer the defendant says that even if it be true that the plaintiff was induced to enter into the said marriage ceremony through the fraudulent representation of this defendant, as set up in said complaint, the plaintiff afterwards, when he (or she) well knew that the said representations were false, lived and cohabited with this defendant as her husband (or his wife) and thereby ratified and confirmed the said marriage.

§ 987. **Answer to complaint for annulment for impotency.**

For further answer to the said complaint, the defendant avers that even if it were true that this defendant was, at the time of the said marriage ceremony, physically impotent and incapable of sexual intercourse with the plaintiff; that afterwards for a long period of time, they lived and cohabited together apparently as husband and wife, and acquired a reputation as such and that she (or he) is thereby estopped by her (or his) laches and delay to claim that such marriage is either void or voidable.

§ 988. **Answer to complaint for annulment for intoxication.**

For further answer this defendant says that it is not true as stated in the said complaint that the plaintiff was so utterly under the influence of intoxicating liquors at the time of said marriage as to be incapable of entering into the same, and that even if such should have been the case, that afterwards when he became sober and wholly free from the influence of alcohol he recognized the validity of said marriage and ratified the same, and frequently and freely cohabited with this defendant, and had sexual intercourse with her as his wife, and she therefore prays in consideration of the premises that the said complaint be taken for naught and dismissed out of this honorable court.

§ 989. **Annulment—Decree of validity.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.: SUPERIOR COURT.
No.....Divorce.

.....

v.

.....

DECREE

This cause came on to be heard, and was argued by counsel, and thereupon upon consideration thereof, it is ordered and decreed that the marriage between the above named..... and ..... is valid and the same is hereby affirmed.

Dated at Boston the ..... day of ....., A. D., 19....

§ 990. **Decree of annulment.**

Come now the parties by counsel, and this cause being at issue, is submitted to the court for trial without the intervention of the jury.

And the court having heard the evidence, the argument of counsel, and being duly advised in the premises, finds for the plaintiff and that the allegation of plaintiff's complaint are true and that at the time of the said marriage the plaintiff was but ..... years of age, and was incapable, from want of age, to contract said marriage as alleged in plaintiff's complaint; that said marriage has been in no way ratified or confirmed by said plaintiff, and that the plaintiff is entitled to have the same declared null and void.

It is therefore considered and adjudged by the court that the said marriage of plaintiff and defendant be and the same is hereby declared null and void.

It is further ordered and considered by the court that the plaintiff have and recover from said defendant her costs paid, laid out and expended in and about said cause.

Another form.

Letitia M. A. Crump, acting by her committee William R. D. Lindsay, against Henry Morgan.

2 March, 1844. This cause coming on to be heard upon the bill, answer, exhibits and proofs, and being debated by counsel on each side, and the whole matter being considered by the Court: It is thereupon declared by the Court, that in October, in 1839, in the county of Montgomery, the ceremony of mar-

riage between the plaintiff Letitia M. A. Crump and the defendant Henry Morgan, was had and solemnized by and before a justice of the peace for the said county: and that the said plaintiff had been, in July, 1838, duly found to be a lunatic and incapable of managing her affairs, and so to have been continually from April, 1837, and had been duly committed as a lunatic, to the care and guardianship of her brother, the said William R. D. Lindsay, as her committee; and also, that at the time of the fact of the said marriage thus had and performed, the said plaintiff Letitia M. A. Crump was still under the care and custody of her said committee as a lunatic, and was, in fact, then and there a lunatic and person of unsound mind and incapable from mental imbecility of understanding and consenting to any contract, and especially a contract of so high a nature as that of the said marriage; and that the said Henry well knew of such unsoundness of mind of the plaintiff, and by fraud and imposition, without the knowledge of the said committee or any friend of the said plaintiff, clandestinely, and for the mere purpose of wicked gain, did procure the said marriage, in fact, to be had and celebrated; and the Court doth further declare that the said plaintiff hath, ever since the said marriage, in fact, continued to be, and is now, lunatic and of unsound mind, and incapable of consenting to the said marriage, and thereby confirming the same, even if such subsequent consent could, in law, confirm and make valid the said marriage. Therefore, the Court doth pronounce and declare the said pretended marriage de facto, contracted and celebrated between the said Letitia M. A. Crump and Henry Morgan, to have been and to be utterly null and of no effect; and that the said Letitia was and is, and of right ought to be, free and at liberty from any bond of said pretended marriage de facto; and doth pronounce that she ought to be divorced, and doth decree that she, the said Letitia M. A. Crump, be freed and divorced from the said Henry.

And the Court further decrees that the defendant pay all costs of this suit, to be taxed by the proper officers.[6]

§ 991. **Breach of promise—Complaint.**

The plaintiff ....., avers that heretofore to wit: on the

[6]This decree is taken from the case of Crump v. Morgan, 38 N. Car. 91, 102. The form of this decree was settled by the court itself.

..... day of ....., 19..., at ....., in consideration that the plaintiff being then an unmarried woman, at the request of ....., the defendant had then promised said plaintiff to marry her, on request, the said defendant promised to marry the plaintiff within a reasonable time.

That the plaintiff relying on said promise has ever since remained and continued, and still is, an unmarried woman, and has been for and during the time aforesaid, and is now ready and willing to marry the defendant.

That the defendant refuses to marry the plaintiff although a reasonable time has elapsed before this action, to her damages in the sum of ..... dollars.

Another form.

Plaintiff says that on the ..... day of ....., 19..., plaintiff being then unmarried, at the request of the defendant, then promised the defendant to marry him, and the defendant promised the plaintiff at the same time to marry her, and that plaintiff and defendant did then and there mutually promise and agree to marry each other.

That plaintiff, relying on said promise of the defendant, has remained unmarried since said date, and ever since has been and still is willing and ready to marry the defendant.

That on the ..... day of ....., 19..., the plaintiff requested the defendant to marry her, but the defendant then, and ever since, has refused and still refuses to marry this plaintiff; that a reasonable time has elapsed since said promise and since said defendant was so requested.

That plaintiff has sustained damages in the sum of..... dollars.

Wherefore, etc. (Signed.)

§ 992. **Breach of promise—Complaint—Special damages.**

This plaintiff says that on the ..... day of ....., 19.., this plaintiff, being then unmarried, at the request of the defendant, then promised the defendant to marry him; and that the defendant promised the plaintiff at the same time to marry her; and that the date set for said marriage was the ..... day of ....., 19.., which said date was mutually agreed upon between this plaintiff and said defendant.

That this plaintiff, relying on said promise of said defendant, has remained unmarried since the said..... day of .....,

19.., and ever since has been, and still is, ready and willing to marry said defendant, in pursuance of the terms of said contract so entered into as aforesaid.

That on the said ..... day of ....., 19.., said defendant failed, neglected and refused to marry this plaintiff, as was provided in said contract, and has ever since refused, and still refuses, to marry her; that a reasonable time has elapsed since said ..... day of ....., 19.., in which for said defendant to perform the terms of said contract.

Plaintiff further avers the fact to be that at the time defendant so promised to marry this plaintiff it was arranged and agreed that at the date so fixed for said marriage this plaintiff should give a wedding reception so to be given defendant would take plaintiff on a wedding trip, and that they would visit the eastern states and the cities of Washington, New York, Boston and many other places and cities in the East and throughout the country.

Plaintiff avers that pursuant to said arrangement and agreement, and relying upon defendant's said promise, she made great outlay, to wit, in all ..... dollars, for necessary, suitable and proper clothing, dresses, wraps, hats, gloves and other articles of dress and wearing apparel, which were rendered wholly useless, unnecessary and valueless by reason of the defendant's said failure and refusal to keep and perform his said contract.

That by reason of said agreement and promise of defendant to take plaintiff on said wedding trip, and relying on the same, this plaintiff made a great outlay of money, in all ..... dollars, preparing for said trip in the matter of the purchase of necessary and suitable traveling dresses, wraps, hats and bonnets and other articles of wearing apparel, and in the purchase of necessary and suitable trunks, boxes, traveling bags and other necessary articles for traveling, all of which have become useless, unnecessary and wholly worthless by reason of defendant's said failure to so keep and perform his said contract and agreement.

Plaintiff further says that a large number of invitations to said wedding were issued; that on the said ..... day of ....., 19.., a large number of guests assembled at the house of this plaintiff's father to witness said wedding; that by reason of said defendant's said failure and neglect to appear this plaintiff suffered great humiliation, embarrassment, mortification, distress of mind and nervous shock; that by reason of said nervous shock this plaintiff became sick and ill, and was compelled to and did

pay out large sums for medical attention and advice and for medicines, in all ..... dollars.

That by reason of the premises this plaintiff has been damaged in the sum of ..... dollars.

Wherefore, etc.

(Signed.)

§ 993. **Breach of promise—Answer setting up fraud.**

The answer of the defendant ..... to the complaint of ....., the plaintiff.

For answer to the said complaint, this defendant avers that at the time of the said supposed promise of marriage set forth in the said complaint and provisions thereto, the plaintiff stated to him, the defendant, such facts relative to her birth and lineage so as to make him believe, and which he did believe, that she was of pure white blood, whereas the fact was and is that she has negro blood in her veins and is descended from negro ancestors.

§ 994. **Breach of promise—Answer setting up duress.**

The answer of the defendant ....., to the complaint of ....., the plaintiff.

For answer to the said complaint this defendant avers that at the time of the said supposed promise of marriage set forth in the said complaint this defendant through the threats and conduct of the plaintiff and her relatives and friends was in such bodily fear of his life and health that he could not exercise his free will and judgment and was by such threats and conduct compelled to make such promise which he would not have made had he been free to exercise his will and judgment. (*here state in detail facts creating fear and duress*).

§ 995. **Breach of promise—Answer setting up unchastity of plaintiff.**

For answer to the complaint of the plaintiff, this defendant says that previous to the said supposed promise of marriage, the plaintiff had been and was the mother of a bastard child, of which this defendant was wholly unaware.

Another form.

The answer of the defendant ....., to the complaint of ....., the plaintiff.

For answer to the said complaint the defendant avers that at the time of the said supposed mutual promise, the plaintiff was

an unchaste woman of which fact this defendant was wholly ignorant.

§ 996. **Breach of promise—Denial of breach.**

The answer of ....., the defendant to the complaint of ..... the plaintiff.

For answer to the same complaint this defendant denies that he has refused to marry the plaintiff but avers that on the day when said marriage was to be solemnized and ever since he has been ready and willing to marry the plaintiff but at the date above mentioned, and at all times since, the plaintiff has refused to marry this defendant.

§ 997. **Breach of promise—Answer setting up existing marriage of plaintiff.**

The answer of ....., defendant against the complaint of ....., plaintiff.

For answer the defendant alleges that at the time of making said supposed mutual contract to marry, the plaintiff was the wife of ....., which fact was unknown to this defendant and which she concealed from said defendant.

§ 998. **Alienation of affections—Wife's complaint against husband's parents.**

The plaintiff complains of the defendant, and alleges that on or about the ..... day of ....., 19..., in the state of ....., the plaintiff was lawfully married to one ....., who is the son of defendant; that at all times since the said marriage the said ..... and the plaintiff have been, and now are husband and wife; that by reason of said marriage the plaintiff became and was entitled to the support, company, and society of her said husband; that from and after the time of said marriage, and until the interference on the part of the defendant hereinafter set forth, the said ..... was deeply attached to his said wife, the plaintiff; and the plaintiff and her said husband lived happily together as husband and wife, and but for the wrongful and malicious acts of the defendant, hereinafter set forth, would have continued so to live together; that shortly after the said marriage the said defendant, conceiving and harboring an intense dislike of the plaintiff, wrongfully and maliciously sought to prejudice the mind of said ....., against the plaintiff, and alienate his affections from her, and has ever

since sought and endeavored by subtile contrivances, by coaxing threats of disinheriting the said ....., to entice him to separate himself from the plaintiff, and to leave and desert her. Plaintiff further alleges that on or about the ..... day of ....., 19..., the plaintiff and her said husband were, by said defendant, persuaded and induced to leave their home, in the state of ....., where they had resided up to said date, and where plaintiff had friends and acquaintances, and come to the city of ....., in the state of ....., where the plaintiff was an entire stranger; that a few days prior to their said departure from ..... the defendant, in pursuance of her said design to alienate the affections of the said ..... from the plaintiff, and to entice him to leave the plaintiff, and with a view of having the plaintiff, as well as her said husband, more completely in the power of defendant, fraudulently induced and procured him to turn over and transfer to her, the said defendant, all, or nearly all, of his property, consisting of stocks, bonds, securities, etc., of the value of about ..... dollars; that shortly after their arrival in ..... the plaintiff and her said husband were joined by the defendant; that said defendant, upon her arrival in ....., continued, and has at all times since continued, her endeavors to alienate the affections of the said ....., from the plaintiff, and to induce and entice him to leave the plaintiff. Plaintiff avers and alleges that the said defendant has, by her arts and contrivances, by threats made to the said ....., and by misrepresenting the plaintiff to him, wrongfully and maliciously alienated the affections of her said husband from the plaintiff, and has wrongfully and maliciously enticed him to separate himself from her, whereby the plaintiff has been deprived of the society, comfort, and support of her said husband by reason of which the plaintiff has been damaged in the sum of ..... dollars wherefore plaintiff demands judgment, etc.

§ 999. **Alienation of affections—Husband's complaint against seducer of his wife.**

The plaintiff, John Doe, complains of Richard Roe, the defendant and alleges that on the ..... day of ....., 19..., at ....., in the state of ....., the plaintiff was lawfully married to one .....; that said plaintiff has at all times from the date of his said marriage lived in the city of .....

with his wife, and has provided her with a comfortable home, and at all times his said wife has lived with him at his said home happily and contentedly until the occurrence of the matters hereinafter set forth; that said defendant, about the year ....., became and was acquainted with the said wife of this plaintiff, and shortly afterwards the said defendant commenced to acquire, and did acquire, and since then has had and now has, an improper influence over the wife of said plaintiff, and the said defendant, by means of said undue influence, did maliciously, and with the intent to injure the plaintiff and to deprive him of the comfort, society, and assistance of his said wife, seduce the said wife, and seduce and alienate her affections away from the plaintiff and to the defendant; and the said defendant, further intending to injure this plaintiff and to deprive him of the comfort, society, and assistance of his wife, did, on or about the ..... day of ....., 19..., entice her away from the said plaintiff, against his consent, by means whereof, among other things, his home has been made desolate and ruined; that by reason of the premises the plaintiff has been, and still is, wrongfully deprived by the defendant of the comfort, society, and aid of his said wife, and has suffered great distress in body and mind in consequence thereof, and is damaged in the sum of ..... dollars; wherefore the said plaintiff prays judgment against the defendant in the sum of ..... dollars, and costs of suit.

§ 1000. **Necessaries furnished wife—Complaint.**

That on the ..... day of ....., 19.., and for ..... days thereafter, this plaintiff furnished to one E D, who was then and there the wife of said defendant, and at her instance and request, certain goods, wares and merchandise, of the value of ..... dollars, a bill of particulars of all of which is filed herewith and made a part of this complaint and marked exhibit A.

That said goods, wares and merchandise were necessary for her support and maintenance and suitable to her station in life, and that said defendant declined and refused to furnish his said wife with money with which to purchase said goods, and failed and refused to furnish her with proper means of support.

That on the ..... day of ....., 19.., this plaintiff notified said defendant that he had furnished his said wife with said goods and then and there demanded of him payment of said sum, the value thereof, which was refused.

That said sum is due and unpaid.

Wherefore, etc.

§ 1001. **Complaint for wife's antenuptial debt.**

That on the .....day of ....., 19..., the said defendant, E D, then unmarried, became indebted to this plaintiff in the sum of ..... dollars, for goods, wares and merchandise sold by this plaintiff and delivered to said defendant, E D, at her special instance and request, a bill of particulars of all of which is filed herewith and made a part of this complaint and marked exhibit A.

Plaintiff further avers that at said time and continuously thereafter until the ..... day of....., 19.., said defendant, E D, was the owner in her own right of a large amount of personal property, to wit: (here describe it), of the value of .....dollars; that on said last mentioned date, and after the said indebtedness had accrued, the said defendant, E D, and the said defendant, C D, were intermarried and that they ever since have been, and still are, husband and wife.

That at the time of said marriage, and on divers days thereafter, the said defendant, E D, turned over and surrendered and gave to the said defendant, C D, her said personal property as aforesaid and of the value of ..... dollars as aforesaid.

Plaintiff further avers that said defendant, E D, is now insolvent and has no property subject to execution and out of which the said debt can be made.

That by reason of the premises the said defendant, C D, has become liable for said indebtedness to this plaintiff, and that the same is due and unpaid.

Wherefore, etc. (Signed)

§ 1002. **Order—Default of defendant—Personal service.**

And now, on this day comes the said complainant, by ....., solicitor ....., and moves the court that said defendant be called to appear and make answer to the bill herein, and that in default thereof ..... default be entered herein, and said bill be taken as confessed by ..... And it appearing to the court that process of summons in chancery was duly issued in this cause against said defendant, returnable to the ..... term, A. D., 19..., of this court, and that said defendant was duly and personally served with such summons more than ten days prior to the first day of said ..... term, and has not appeared or

made answer herein, it is ordered by the court that said defendant come into court here, and plead, answer or demur to the said bill, instanter; and said defendant being now three times solemnly called so to come, and plead, answer or demur herein, comes not, but therein makes default; and thereupon, it is ordered, adjudged, and decreed by the court that, as to the said defendant, the said bill be taken as confessed.

§ 1003. **Order—Default of defendant—Service by publication.**

And now, on this day comes the said complainant, by ....., solicitor ..... and moves the court that said defendant be called to appear and make answer to the bill herein, and that in default thereof ..... default be entered herein, and said bill be taken as confessed by ..... And it appearing to the court that process of summons in chancery was duly issued in this cause against said defendant, returnable to the ..... term, A. D., 19..., of this court and that the said defendant ..... resides out of the state of Illinois, and that the clerk of this court has caused publication to be made in the ..... a weekly secular newspaper published in ....., and having a general circulation throughout the said county of ..... and the state of Illinois, containing a notice of the pendency of this suit, the names of the parties hereto, the title of the court, and the time and place of the return of the summons in this case; that said notice was duly published in said paper once in each week, for four successive weeks, the date of the first paper containing the same being the ..... day of ....., A. D., 19..., and the date of the last paper containing the same being the ..... day of ....., A. D., 19..., and that thirty days and upwards intervened between the first publication of the said notice and the first day of the term to which the summons in this cause was returnable, and that the said clerk likewise, within 10 days of the first publication of said notice, sent a copy thereof by mail addressed to ..... and that the said ..... defendant, has not appeared or made answer herein; it is ordered by the court that said defendant come into court here, and plead, answer or demur to the said bill, instanter; and said defendant being now three times solemnly called so to come, and plead, answer or demur herein, comes not, but therein makes default; and thereupon, it is ordered, adjudged and decreed by the court that, as to the said defendant, the said bill be taken as confessed.

§ 1004. **Petition to open decree of divorce taken by default against nonresident.**

The defendant in the above entitled cause of action would represent and show the court that on the ..... day of ....., 19.., the plaintiff in the above entitled cause obtained a judgment and decree of divorce from this defendant in said court; that this petitioner, as such defendant therein, at the time of the commencement of said cause of action and at the time of the trial thereof, and at the time of the entry of said decree, was not a resident of the state of Indiana, but was at said time a resident of the state of .....; that the only notice given of said proceedings and of said cause of action was by publication in a newspaper; that no summons or other notice was served upon this petitioner as such defendant, and that he did not appear to said cause of action, and that he never saw any newspaper containing the said notice and publication of said cause of action, and that he did not in truth and in fact have or receive any actual notice or knowledge of the pendency of said cause of action.

This petitioner would further show that in the said petition filed by said plaintiff in said cause of action the plaintiff therein falsely charged that this petitioner as such defendant had, on the ..... day of ....., ..., and at other times, committed the crime of adultery with one R S, and that upon said charge the said judgment and decree of divorce was entered and granted.

That the said charge therein made was false and was known by the plaintiff to be false at the time it was so made; this petitioner as defendant in said cause denies that he was ever guilty of said crime (or, set up condonation).

Wherefore this petitioner asks that said decree may be set aside and that said cause of action may be opened, and that this petitioner as such defendant may be permitted to appear to said cause and to make his defense therein and to defend against the charge therein made and file his answer, and he does now herewith tender his answer in said cause.

(Signed.)

STATE OF .....

COUNTY OF .....

C B, being duly sworn upon his oath, says that he is the defendant in the above entitled cause of action, and that during the pendency of said action he had no actual notice thereof in time to appear in said court at the time of the trial of such action or

at any time thereafter, and object to the entry of the judgment and decree therein; that the matters and things in the above and foregoing petition are true.

§ 1005. **Petition to vacate decree.**

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT

NO. . . . . DIVORCE

SUFFOLK, SS.:

. . . . . .

v.

. . . . . .

PETITION TO VACATE DECREE

And now comes . . . . . , your petitioner, and prays that the decree nisi entered in the above-entitled case upon the . . . . . day of . . . . . , A. D., 19. . . , be vacated and that the hearing upon the above-entitled case be reopened for the following reasons:

First. That the finding in said cause was based upon evidence that was untrue and false in every particular.

Second. That the above-entitled cause was contested by her and that in the courts of said contest she had employed . . . . . as her attorney. That she is informed and believes that . . . . . was acting as her attorney on the day of the trial of said cause. That his appearance had not been withdrawn and has not since been withdrawn. That on the day of the trial her attorney, either by himself or through some agent, was present during the day and that at the time this case was tried, in the vicinity of five o'clock in the afternoon of the day of the trial, the cause came on without the knowledge of . . . . . , her attorney, and without her knowledge and the first knowledge she had was the information that the case had been tried and decided against her upon the grounds of gross and confirmed habits of intoxication. That when said information had been conveyed to her she was ill and unable to intelligently decide what course she ought to pursue.

Third. Your petitioner says that until recently she had not been given any information as to the nature of the testimony against her, or as to the parties who gave such testimony. That she has been informed who the witnesses were and says that they were persons who were procured by the libelant to testify against her. That their statements were false, that in one case at least,

the case of one ....., who she is informed and believes testified, the witness had no knowledge or acquaintance with your petitioner upon which she could base testimony either for or against her. That one other witness ....., testified upon statements furnished to him by the libelant for him to testify to. That as to one other witness, who she is informed and believes testified at the said trial, she is entirely unacquainted with and unable to say other than that if any material testimony was given by the witness, it was testimony that was false and without foundation.

Fourth. That upon information and belief she has learned that statements were made to the justice presiding at the trial, that her case had been uncontested, and that by reason of that statement the trial proceeded. She has been informed and believes that said statement was made either by the libelant or by counsel of record representing the libelant. That said statement is untrue and that neither the counsel nor the libelant had any right or authority either through her, or counsel of record representing her, to make any such statement.

Fifth. That the charge upon which the finding was made as well as the evidence upon which the said charge was sustained, is false, and that she asks an opportunity to present to the court, evidence on such charge and asks that the decree nisi now pending upon the records of this court may be stricken off and that she may be allowed to present to court her evidence and have an opportunity to be heard by counsel upon the issue presented in said libel.

.....

Petitioner.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.: BOSTON, 19...

Subscribed and sworn to before me this ..... day of ....., A. D., 19....

.....

Justice of the Peace.

(This form is taken from the original papers.)

§ 1006. **Summons.**

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.:

To the Sheriffs of our several Counties, or their Deputies and

the Wardens, Superintendents, Masters or Keepers of our several Penal or Reformatory Institutions or their Deputies.

Greeting.

We command you to summon the said ..... if he may be found in your precinct, to appear before our Justices of our Superior Court, at Boston, within our County of Suffolk, on the first Monday of ..... next, by serving ..... with an attested copy of this writ, and of the libel hereto annexed, fourteen days, at least, before said first Monday of ..... that he may then and there, show cause why the prayer of said libel should not be granted.

Hereof fail not, and have you there this writ, with your doings therein.

Witness, John A. Aiken, Esquire, at Boston, this ..... day of ..... in the year of our Lord one thousand nine hundred and .....

§ 1007. **Order of notice by publication.**

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.: SUPERIOR COURT

Clerk's Office, Boston....., A. D., 19...

On the filing of the foregoing libel, it is ordered that the libelant give notice to the said libelee ..... of the pendency thereof, and to appear before said Court at Boston, within and for the County of Suffolk, on the first Monday of ..... next, by causing an attested copy of h.. said libel with this order thereon, to be published once a week, three weeks successively, in the ....., a newspaper printed in Boston, in the County of Suffolk, the last publication to be fourteen days at least before the said first Monday of ....., and by sending by mail to the last known address of the said libelee as soon as may be, a registered letter containing an attested copy of said libel and order thereon; or by causing the said libelee to be served with an attested copy of said libel and order fourteen days at least before said first Monday of ....., that the said libelee may then and there show cause why the prayer of said libel should not be granted. A true copy of libel and order thereon.

Attest: ....., **Clerk.**

§ 1008. **Affidavit of notice.**

....., Libelant,

v

....., Libelee.

I, ..., attorney for the above-named libelant, on oath do certify, that I have served the above-named libel, and the order of Court thereon, as therein directed, by giving notice thereof to the said libelee by causing to be published once a week, three weeks successively, in the ....., a newspaper printed in ....., in the County of ....., viz., ... on the ..... day of ....., A. D., ..., an attested copy of said libel with the order of Court thereon (the three newspapers, containing copies of said publication on said dates together with the copy of the libel, and order issued from the Clerk's office are filed herewith), and by sending by mail on the ..... day of ..... to the last known address of said libelee, a registered letter, containing an attested copy of said libel, and order, addressed as follows:

.....

The registry receipt signed by ..... was returned to me by the Post Office Officials and is hereto annexed and marked ..... a .....

Atty, for Libelant.

SUFFOLK, SS.: ....., A. D., ...

Then personally appeared ..... and made oath that the foregoing statement by him subscribed is true.

Before me .....

Justice of the Peace.

A B, being duly sworn upon her oath, says that she is the plaintiff in the above entitled cause of action for a divorce; that said defendant is not a resident of the state of Indiana, but as this affiant is informed, now resides in the state of Iowa; that on or about the ..... day of ....., 19..., said defendant lived at the city of Des Moines, in said state of Iowa, but affiant says that since said date she has not heard from said defendant directly or indirectly and that she does not now know his exact residence except as herein set out.

§ 1009. **Affidavit for publication against nonresident.**

A. B., the above named plaintiff, upon his oath says that C. D., the above named defendant, is not a resident of this state, but

as this affiant is informed, and believes, she (or he) now resides in ....., in the state of .....

(Signed.)

Subscribed and sworn to before me this ..... day of ....., A. D., 19....

(Signed). .....
Notary Public.

Another form.

A. B., the above named plaintiff, upon his oath, states that the above named defendant, C. D., is not a resident of this state, that the affiant has made diligent inquiry to learn his (or her) place of residence, and has been unable to ascertain the same.

(Signed.)

Subscribed, and sworn to before me this ..... day of ....., A. D., 19....

(Signed.) .....
Notary Public.

§ 1010. **Notice with copy of bill to be served on nonresident defendant.**

(Venue) (Title of Court)

(Title of Cause)

To ....., the above named defendant:

You are hereby notified that a complaint, a copy of which is hereto attached, will be filed against you in the ..... court of ..... county, in the state of ..... by the said plaintiff, to the ..... term, A. D., 19....

Now, unless you shall personally be and appear before said court, on the first day of the term thereof, to be held in ..... in said county on the ..... day of ....., 19.., and plead, answer, or demur to said complaint, the same and the matters and things therein charged and stated, will be taken as confessed, and a decree entered against you according to the prayer of said complainant.

.....
Solicitor for Plaintiff

§ 1011. **Affidavit of service of notice with copy of complaint.**

(Venue)

R. S., of ..... county of ..... and state of ....., upon his oath states that he served a copy of the foregoing complaint and notice of the commencement of suit upon .....

of ....., county of ....., and state of ....., the defendant named in said complaint, by delivering the same to him (or her) personally, on the ..... day of ....., 19...

(Signed.)

§ 1012. **Affidavit of notice to co-respondent.**

No. 24

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.: SUPERIOR COURT

....., Libelant,

v.

....., Libelee.

AFFIDAVIT OF NOTICE TO CO-RESPONDENT

I, ..., Attorney for the above-named libelant, on oath, do certify that I have given notice of said libel to ..... with whom said libelee is alleged, in said libel, to have committed adultery is alleged to have been committed ..... a registered letter containing an attested copy of said libel, and the order thereon, addressed as follows: .....

The Registry Receipt signed by ..... was returned to me by the Post Office Officials, and is hereto annexed and marked .....

The said Registered Letter was returned to me by the Post Office Officials unclaimed and unopened, and is hereto annexed and marked .....

..... Atty. for Libelant.

SUFFOLK, ss.: .....A. D.....

Then personally appeared ..... and made oath that the foregoing statement by him subscribed is true.

Before me .....

Justice of the Peace.

§ 1013. **Petition for writ of ne exeat.**

To the Honorable....., the Judges of said court.

In Chancery sitting.

Your petitioner, Mary Doe, the complainant in the above entitled cause respectfully represents that as appears by the files and records of the said court in this cause an order was entered therein on the ..... day of ..... 19.., requiring the said defendant, John Doe, to pay to her as alimony pending this suit, the sum of ..... dollars, weekly for the support and maintenance of herself and the children of the said marriage, and that the same,

nor any part thereof, has been paid; that the said John Doe, as your petitioner is informed and believes, and on such information and belief, states the fact to be true that he would not pay any portion of said alimony, but would depart from this county and state rather than make such payment. And your petitioner believes and so states the fact to be that the said John Doe will put such threat into execution, and that inasmuch as the said John Doe has no property in the said county and state, liable to levy and sale under process, your petitioner will be wholly deprived of the benefit of said order, inasmuch as said John Doe, as your petitioner is informed and believes, also threatened to take and remove from this state all his personal property and belongings which is subject to execution and that he has no real estate, but is abundantly able out of his personal property to pay the said alimony, if he so desires.

Your petitioner therefore, prays that inasmuch as she has no property of her own nor other means of supporting herself and her said children, that a writ of ne exeat may forthwith issue without notice to the said defendant to prevent him from leaving this state until he has paid the said alimony, or has given security to appear before this court from time to time as the court may require and abide by its orders in this behalf.

Mary Doe.

And now subscribed and sworn to at ..... in the state of ....., this ..... day of ....., 19.., before me.

Another clause.

The plaintiff further charges that the property and estate of the said John Doe consists wholly of personal property and is of a character to be readily and easily removed from this county and state, and placed beyond the reach of any order or decree or execution of this or any other court, and that she verily believes and so states the fact to be that the said defendant is about to leave the state of Indiana for the purpose of avoiding the payment of any alimony which he may be directed to pay for the support and maintenance of the plaintiff, and of taking with him property, moneys, credits and effects subject to execution with intent to defraud the plaintiff and their said children of their just rights in this behalf and of defying any order of this court herein.

Wherefore plaintiff sues and asks that an order of arrest may be issued for said defendant and that he be held to bail, or in

lieu thereof that he be committed until discharged in due course of law.

§ 1014. **Ne exeat—Endorsement on petition.**

Let the writ of ne exeat republica issue in this cause against the defendant, John Doe, and let the amount of bond be fixed at ..... dollars, and let an order to that effect be entered.

Signed.
Chancellor.

§ 1015. **Master's order for issuance of writ of ne exeat.**

The undersigned, being satisfied that no judge authorized to grant writs of ne exeat is present, at this time, in the county of ..... and state of Illinois (or being satisfied that, although there is a judge present, at this time, in the county of ..... and state of Illinois who is authorized to grant writs of ne exeat, to wit, the Honorable ....., the said judge is unable or incapacitated to act):

It is therefore ordered that the clerk of the ..... court in and for the said county of ..... issue a writ of ne exeat, returnable to the ..... term, A. D., 19..., of said court, in accordance with the prayer of the within bill (or petition). It is further ordered, etc.

....,
Master in Chancery.

§ 1016. **Order of judge in vacation allowing an issuance of a writ of ne exeat.**

It is hereby ordered that the clerk of the ..... court in and for the county of ..... and state of Illinois issue a writ of ne exeat, returnable to the ..... term, A. D., 19..., of said court, in accordance with the prayer of the within bill (or petition). It is further ordered that the said ....., complainant (or petitioner), file a bond, in the penal sum of ..... dollars, with ..... as surety, said bond to be conditioned pursuant to the statutes of the state of Illinois. And it is further ordered that the said ....., defendant, file a bond, in the penal sum of ..... dollars, with ..... as surety, conditioned pursuant to the statutes of the state of Illinois.

....., Judge.

§ 1017. **Ne exeat—Bond to be executed by complainant.**

Know all men by these presents that we, ... (name of

complainant), principal, and ....., surety, are held and firmly bound unto ..... (name of defendant), in the penal sum of ..... dollars, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents.

The condition of this obligation is such that whereas the above bounden ..... (name of complainant) has filed his bill in chancery (or has filed his petition) in the ..... court in and for the county of ..... and state of Illinois, to the next ..... term thereof, praying for a writ of ne exeat republica against the said ..... (name of defendant):

Now, therefore, if the said above bounden ....., complainant, shall prosecute her said bill (or petition) with effect and shall reimburse the said ..... (name of defendant) shall wrongfully sustain by occasion of the said writ, then this obligation to be void; otherwise to remain in full force and virtue.

In witness whereof, we have hereunto set our hands and seals this ..... day of ....., 19...

....., (Seal).

....., (Seal).

Approved:

....., Judge (or Master).

§ 1018. **Ne exeat—Bond to be given by defendant.**

Know all men by these presents that we, ... (name of defendant), principal, and ....., surety, are held and firmly bound unto ..... (name of complainant), in the penal sum of ..... dollars, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents.

The condition of this obligation is such that, whereas the said ..... (name of complainant) has filed his bill in chancery (or has filed his petition) in the ..... court in and for the county of ..... and state of Illinois, to the next ..... term thereof, praying for a writ of ne exeat republica against the above bounden ..... (name of defendant) shall not depart from the state of Illinois without leave of the said court and shall render himself in execution to answer any judgment or decree which the said court may render against him, then this obligation to be void; otherwise to remain in full force and virtue.

In witness whereof, we have hereunto set our hands and seals this ..... day of ....., 19..

....., (Seal)

....., (Seal)

Approved:

.....

§ 1019. **Attachment clause.**

If an attachment of the husband's property is required, on a libel filed by the wife, insert in the prayer, "and that the real and personal estate of the said ..... may be attached to the value of ..... dollars in order to secure a suitable support and maintenance to your libelant and to such children as may be committed to her care and custody."

If an attachment by trustee process is required, add after the above, "and whereas the said ..... has not in his own hands and possession goods and estate to the said value, but has entrusted to and deposited in the hands of ....., trustee of the said ....., goods effects, and credits to the said value, your libelant prays that the goods, effects, and credits of the said ..... in the hands of said trustee may be attached by trustee process to the said value."

§ 1020. **Prayer for attachment by trustee process.**

"And that the goods, effects and credits of the said ..... in the hands and possession of ..... may be attached by trustee process to the value of ..... dollars, said ..... not having in his own hands and possession goods and estate to the said value."

§ 1021. **Affidavit for injunction.**

A B, being duly sworn upon her oath, says she is plaintiff in the above entitled cause of action; that this plaintiff has ..... children, age ....., ... and ..... years, respectively, the fruits of the said marriage of plaintiff and defendant as alleged by this plaintiff herein; that this plaintiff and said children have no means of support whatever; that this plaintiff has no property, money nor income with and from which to support herself and the said children; that this plaintiff and said children are dependent on said defendant for support.

This affiant further says that she has a good and meritorious cause of action as set out and alleged in her complaint herein, and

that this affiant is entitled to a divorce from said defendant on the grounds alleged in her said complaint and to a judgment for alimony.

This affiant says that said defendant has wholly abandoned her and their said children and fails and refuses to support or to contribute to the support of this affiant or of their said children; and affiant says that he is amply able to support this affiant and their said children.

This affiant further says that said defendant is the owner of a large amount of personal property, to wit: (here describe property).

Affiant further says that said defendant is threatening to and is now preparing to sell, convey and dispose of the said above described personal property and is preparing to and will convert the same into money for the purpose of preventing her from collecting any judgment which may be rendered in her favor and for the support and maintenance of said children in said above entitled cause, and that said defendant will sell and dispose of his said property unless enjoined from so doing, to the great and irreparable injury of this plaintiff.

Wherefore this affiant asks that said defendant may be restrained and enjoined from selling and otherwise disposing of the said property, or any part thereof, until the final determination of the above entitled cause of action, and that said defendant be required to pay this affiant a sufficient sum and amount for the maintenance and support of herself and her said children during the pendency of said action.

(Signing and jurat.)

§ 1022. **Order of notice by publication and attachment by trustee process.**

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.:

SUPERIOR COURT ....., A. D., 19....

Upon the libel aforesaid, it is ordered by the court that the libelant notify the libelee to appear before our Justices of said court, at ..... in said county, on the first Monday of ..... next, ... by causing an attested copy of said libel and of the order of the court thereon, to be published in the ....., a newspaper published in ....., in the county of ....., once a week, three weeks successively, the last publication to be

..... days at least before the said last mentioned day, that he may then and there show cause, if any he have, why the prayer in said libel set forth should not be granted. And the officer serving this precept is ordered to attach the goods and estate of the said libelee to the value of ..... dollars. And whereas, the said libelant says that the said libelee has not in his own hands, and possession, goods and estate to the value of ..... dollars aforesaid, which can be come at to be attached, but has intrusted to, and deposited in the hands and possession of ..... Trustee of the said libelee's goods, effects and credits, to the said value:

WE COMMAND YOU, therefore, that you summon the said Trustee (if he may be found in your precinct), to appear before our Justices of our said court, to be holden as aforesaid, and show cause if any he has, why execution to be issued upon such judgment as the said libelant may recover against the said libelee in this libel (if any) should not issue against his goods, effects, or credits in the hands and possession of the said Trustee.

And have you there this writ, with your doings thereon.

Witness, John A. Aiken, Esquire, at Boston, the ..... day of ....., in the year of our Lord one thousand nine hundred .....

.....

Clerk.

§ 1023. **Order for attachment of real and personal property, and attachment by trustee process.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS.:

In Superior Court, Boston, ..., A. D., 19....

And in order to secure to the libelant (and to such children as may be committed to her care and custody) a suitable support and maintenance, the Sheriffs of our several counties, or their Deputies, or either of them, are hereby directed to attach on said libel the real or personal estate of said ..... to the amount of ..... dollars, conformable to the statutes in such case made and provided.

And whereas the said libelant says that the said ..... has not in his own hands and possession goods and estate to the value aforesaid which can be come at to be attached, but has intrusted to and deposited in the hands and possession of ....., trus-

tee of said ..... goods, effects and credits to the said value, it is ordered that the officer serving this order, summon the said supposed trustee, if he may be found in his precinct, by serving him with a true copy of said libel and this order thereon fourteen days before said ..... to appear before the Justices of said Court, to be holden as aforesaid, to show cause (if any have) why execution to be issued against the goods and effects of said ..... in the hands and possession of the said supposed trustee.

.....

Clerk.

§ 1024. **Averment for injunction in complaint for divorce.**

Your oratrix further represents that the said R. S. is the owner in fee of the following described real property, to wit: (here describe the real estate) of great value, to wit, of the value of about ..... dollars and is the owner of the following described personal property and effects, to wit: (here describe:) that your oratrix is without means of subsistence, except as she is able to earn the same by her own labor, that the said R. S. is able to support your oratrix and their said children if he was disposed to do so.

Your oratrix further represents that the said R. S. has declared his intention and threatens to sell and dispose of all his property as aforesaid, and to leave your oratrix and the said children without any means of support; and your oratrix has good reasons to fear, and does fear, that he will carry his said threats and intentions into execution unless he is restrained by the injunction of this honorable court.

§ 1025. **Order restraining libelee from imposing any restraint upon the personal liberty of the libelant.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.: SUPERIOR COURT.
No.....DIVORCE.

M. B. A.
v.
W. H. A.

In the above-entitled libel for divorce, upon the petition of said libelant, M. B. A., it is ordered that the said libelee, W. H. A.,

be and he hereby is prohibited from imposing any restraint upon the personal liberty of the libelant.

By the Court.

.....

Assistant Clerk.

Dated Boston the ..... day of ....., A. D., 19....

(The above form is taken from the original papers.)

§ 1026. **Affidavit for injunction.**

(Venue)

On this ..... day of ....., 19..., before me personally appeared the above named A. B., and made oath that he has heard read the above bill subscribed by him and knows the contents thereof and that the same is true of his own knowledge except as to the matters which are therein stated to be on his information or belief, and that as to those matters he believes it to be true.

(Signed).....

Clerk of the .....court.

§ 1027. **Restraining order.**

(Venue) (Title of Court)

(Names of parties.)

On motion of plaintiff, and on affidavit filed, it is ordered by the court that defendant herein, ..., be, and he is hereby restrained from selling or disposing of or encumbering in any way (here specify property), or any of his personal property, until further orders of this court.

§ 1028. **Order of reference as to temporary alimony, suit-money and counsel fees.**

This cause coming on to be heard on the petition of the complainant (or defendant) in this cause, duly verified, and the affidavits accompanying the same, by the defendant (or complainant) in opposition thereto, and upon hearing the arguments of the counsel for the respective parties, and the court not being sufficiently advised in the premises, to the order that said petition be referred to a master in chancery of this court (or the court commissioner or some qualified attorney as referee) to inquire and report what would be a reasonable sum to be allowed to the defendant for her support and maintenance during the pendency of this suit and also as to the amount to be allowed for suit money therein and on account of solicitors' fees; and that

the said master report as to the times and manner in which the said sums should be paid by the complainant.

§ 1029. **Order confirming master's report as to alimony.**

And now, on this day, comes the master in chancery (or master commissioner or attorney) and makes report of what would be a reasonable sum to be allowed for alimony pendente lite, suit money, and counsel fees, and the court having heard the arguments of the counsel for the plaintiff and defendant, in support of and against the confirmation of said report, and having considered the same, and being fully advised in the premises:

It is ordered and adjudged that the report of the master in chancery aforesaid be, and the same is in all things approved and confirmed, and that the plaintiff (or defendant) do pay to the defendant, etc. (as in the said report is recommended.)

§ 1030. **Order granting alimony pendente lite.**

And now on this day come the parties by their respective solicitors and this cause is heard by the court on an application for alimony pendente lite, and the court after being fully advised in the premises orders, adjudges, and decrees that the defendant herein, ..., pay to the clerk of this court for the use of the complainant herein ....., by the ..... day of ....., 19.., the sum of ..... dollars as alimony pendente lite, and a further sum of ..... dollars on the ..... day of ....., 19.., and a like sum of ..... dollars on the ..... day of each and every month thereafter during the pendency of this suit.

§ 1031. **Notice of application for suit-money.**

The defendant in the above entitled cause of action is hereby notified that on the ..... day of ....., 19..., at ... A. M. of said day, at the circuit court room in the court house of said county, in the city of ....., the plaintiff will apply to the ..... Circuit Court for an order requiring said defendant to pay into court for the use of this plaintiff a sufficient sum of money with which to prosecute her said suit, and to pay her attorneys, and for the support and maintenance of herself and children during the pendency of this action.

(Signed.)

Dated this ..... day of ....., 19....

§ 1032. **Motion for alimony pendente lite and counsel fees.**

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

SUFFOLK, ss: No.....

(Title of Cause)

And now comes the libelant and moves that the libelee pay into court a reasonable sum for the payment of expenses incurred and to be incurred by the libelant in preparing and prosecuting the above entitled suit, and for the fees of her counsel, and a further sum for the maintenance and support of the libelant during the pendency of the libel.

(Signed).....

§ 1033. **Application for suit-money.**

A B, being duly sworn upon her oath, says that she is the plaintiff in the above entitled cause of action pending in said court in which she has made application for a divorce from said defendant; this affiant would show the court that she has no money, means, property or income by and with which she can prosecute her said cause of action; that she has a good and meritorious cause of action for divorce; but she has no money, means, property or income with and out of which to support and keep and maintain the children of this plaintiff and defendant who are now in her custody and under her care; that said defendant has left and abandoned this plaintiff and his said family and has ceased to provide for and support this plaintiff and the said children.

That the said defendant has real and personal property of the value of ..... dollars; that he has an annual income of ..... dollars; that said defendant is worth over and above all of his indebtedness ..... dollars, as this affiant is informed and verily believes.

Wherefore this affiant asks an order that said defendant be required to pay her a reasonable sum with which to prosecute her said suit and cause of action, to pay attorneys' fees, and for her support and maintenance, and for the support and maintenance of her said children during the pendency of this action, and for such further order as the court may deem just and right.

(Signing and jurat.)

§ 1034. **Order of reference to determine alimony.**

This cause coming on again to be heard, on the motion of the plaintiff for temporary alimony, counsel fees, and suit money, and after duly considering the affidavits accompanying said motion and in support thereof and the affidavits in opposition thereto on motion of A..... B....., counsel for the plaintiff, and after hearing arguments both for and against said motion, it is hereby ordered that it be referred to C..... D....., one of the Masters in Chancery of this court (or such other officers of the court as are provided in that behalf, or to some attorney at law especially appointed therefor), to inquire what would be a reasonable sum to be allowed to the said plaintiff for her support and maintenance and for the support, maintenance, and education of the children of the marriage of the plaintiff and defendant. Also to make inquiry and report what would be a reasonable sum to be allowed to said plaintiff to enable her to prosecute this action and to defray the necessary costs and expenses thereof; and that such Master in Chancery (or other person, as aforesaid) report also the time and place and under what conditions the payment of such sum should be made.

(Signature)

§ 1035. **Report of master in chancery or other referee as to alimony.**

This honorable court, having by its order, made and entered in the above entitled cause on the ..... day of ....., 19.., by which it was referred to me to inquire (here recite the order or the material part thereof), I do, in pursuance of such order, respectfully report:

That the parties hereto and their respective counsel have appeared before me and submitted their proofs both for and against the allowance of alimony; and after considering the same, I find:

(1) that the plaintiff (or if she is the defendant, so state), is wholly without an income or any means of supporting or maintaining herself or of prosecuting (or defending) this suit.

(2) I further find that the defendant (or if he is plaintiff, so state) is seized of and possesses the following real property, to wit: (here describe such property as it is found he has) which is of the value of ..... dollars and that the net annual rents and profits thereof are ..... dollars.

(3) I further find that the said defendant (or plaintiff, as the case may be) is also possessed of the following described personal property (here describe it).

(4) I further find that said defendant (or plaintiff if such is the case) is engaged in ..... business in his own behalf at (here state the place), and that the profits of said business during the year just preceding the hearing of said matter, were ..... dollars (or if he is employed state where and salary or wages).

(5) I further find that there were born of the said marriage ..... children, of whom ..... are living, namely: (state names and dates of birth of surviving children), and that ..... of said children (here insert names) reside with the plaintiff (or defendant if she is the defendant), and are in her care, custody, and control.

And I also further report that in my judgment the defendant (or plaintiff) herein should be required to pay to the plaintiff (or defendant) for her support and maintenance and for the education of the children residing with her, the sum of ..... dollars per month during the pendency of this action; the first payment due in ....., the first month after the commencement of this action; that in my judgment the sum of ..... dollars should be allowed her as counsel fees and the sum of ..... dollars to enable her to prosecute this action and to defray the necessary costs and expenses thereof. All of which is respectfully submitted.

(Dated .....)

(Signed) .....
Master in Chancery or Referee.

§ 1036. **Order as to allowance.**

SUPERIOR COURT.
No. DIVORCE.

SUFFOLK, ss.:

A. B., Libelant.

v.

C. B., Libelee.

And now upon the libelee's motion for allowance in the above-entitled libel for divorce, it is ordered that the libelant pay to the Clerk of this Court for the use of the libelee, on or before the ..... day of ....., next current (if next month) (if that

current month) otherwise, A. D., 19..., the libelee upon said counsel showing to the Clerk subpoenas for witnesses intended by him to be served and indicating to the Clerk the absolute intention of the libelee to defend the said libel, otherwise said sum of ..... dollars is to be returned to the said libelant.

By the Court,

.....
Assistant Clerk.

§ 1037. **Order to pay temporary alimony, counsel fees and suit money on defendant's petition.**

This cause coming on to be heard upon the defendant's motion (or petition) for temporary alimony, suit money and counsel fees, and the court having considered the pleadings and other papers herein, and the evidence, doth find that there is a marriage existing between the parties; that the defense to the action is made in good faith, that the defendant has no property or income to support herself during the pendency of this suit or to pay counsel fees or suit money necessary in the preparation of the defense of this suit; that the plaintiff has ample means for all such purposes, has an income of ....., personal property amounting in value to ....., and real property of the value of ..... dollars. It is therefore ordered and adjudged that the plaintiff pay to the clerk of this court on the first day of ..... (month) 19..., and on the first day of every month thereafter and until the further order of the court, the sum of .....dollars for her support and maintenance, and the further sum of ..... dollars for her expenses necessary in the preparation and defense of this suit; and shall pay to her the further sum of ..... dollars as counsel fees herein. It is further ordered that, in case the plaintiff fails to make any one or more of said sums as ordered herein, execution may issue therefor without prejudice to the rights of plaintiff to proceed against defendant as for contempt.

.....
Judge.

§ 1038. **Order to pay temporary alimony, counsel fees, and suit money on plaintiff's petition.**

Now on this ..... day of ....., A. D....., this cause coming on again to be heard upon the plaintiff's motion (or petition) for temporary alimony, counsel fees, and suit money and

the court having considered the pleadings and other papers herein and the evidence, doth find therefrom the existing marriage of the parties, that the action is brought in good faith; that the complaint states a cause for divorce and that there is probable grounds for believing the plaintiff will succeed therein; that she is without property or income sufficient to enable her to support herself during the pendency of this suit or to pay her counsel fees and expenses necessary in the preparation and prosecution thereof; and that the defendant has ample means for that purpose, that he has an income of ..... dollars, personal property of the value of ..... dollars, and real property of the value of .....dollars. It is therefore ordered and adjudged that on the first day of ..... month and on the first day of every calendar month during the pendency of this suit and until the further order of the court, pay to the clerk of this court the sum of ..... dollars and the further sum of ..... dollars on the first day of ....., 19..., the further sum of ..... dollars for suit money and expenses herein and also the further sum of ..... dollars to be paid on the first day of ....., 19..., to the plaintiff for her counsel fees herein.

It is further ordered and adjudged that in case the defendant fails to pay any one or more of said sums as ordered herein, execution may issue to collect the same with costs of issuing said execution without prejudice to the rights of the plaintiff to proceed against the defendant as for contempt.

.....

Judge.

§ 1039. Order granting alimony pendente lite.

And now on this day come the parties by their respective solicitors, and this cause is heard by the court on an application for alimony pendente lite, and the court, after being fully advised in the premises, orders, adjudges, and decrees that the defendant herein, ... pay to the clerk of this court for the use of the complainant herein ....., by the ..... day of ....., 19..., the sum of ..... dollars as alimony pendente lite, and a further sum of ..... dollars on the ..... day of ....., 19.., and a like sum of ..... dollars on the ..... day of each and every month thereafter during the pendency of this suit.

Another form.

And now on this day, came the parties hereto by their respective solicitors, and this cause coming on to be heard upon the petition (or motion) of the complainant (or defendant) for an allowance of alimony pendente lite, and the court having heard the evidence and the arguments of counsel for the respective parties, and being duly advised in the premises, doth order, adjudge, and decree, that the defendant (or complainant) pay to the complainant (or defendant, her solicitor, or the clerk of this court), the sum of ..... dollars on, etc., and that he pay to the complainant (or defendant, her solicitor, or the clerk of this court) the further sum of ..... dollars on or before the first day of each and every month commencing on the first day of the next succeeding month for her support during the pendency of this suit; and that he pay her (or her solicitor or the clerk of this court) on or before the ..... day of ....., 19.., the sum of ..... dollars on account of her solicitor's fees herein, and on said last mentioned date the further sum of ..... dollars on account of her expenses in maintaining (or defending) this suit.

§ 1040. **Order allowing maintenance pendente lite.**

This case coming on to be heard on the response of defendant to rule of plaintiff to show cause why defendant should not pay temporary alimony to this plaintiff during the pendency of this suit, and defendant having filed his verified answer as response, and proof having been taken, and the court being sufficiently advised, it is ordered that defendant..., pay to plaintiff....., the sum of $..... per week, maintenance during the pendency of this suit.

§ 1041. **Demand on party liable for temporary alimony.**

"The Circuit Court for the County of Ingham, in Chancery.

"Frances Rossman, Complainant, v. Carl Rossman, Defendant.

Dated March ...., 19....

Sir: In this cause you will please to take notice that on the twenty-second day of February, A. D., 19..., there was due to Frances Rossman, the above-named complainant, from you, Carl Rossman, the above named defendant, the sum of sixty dollars, as and for temporary alimony, and also the further sum of twenty dollars with which to furnish clothing for said complain-

ant and the infant child of yourself and complainant, under and by the terms of an order of said court made in this cause on the twenty-first day of December, A. D., 19..., with a copy of which you have been served; and that the whole or no part of either sum has been paid by you, or for you, to said complainant, or to any one by virtue of said order; and that, for the reason that said several amounts are now due and unpaid, you are hereby requested to pay the same, and we hereby demand the payment of the same.

"Yours, etc.,

Hewett & Freeman,

"..... Solicitors.

"To Carl Rossman, Defendant."

§ 1042. **Notice of application for rule to show cause why attachment for contempt should not be issued.**

To A..... B....., the above named defendant.

You are hereby notified that on the ..... day of ....., 19.. at 10:00 A. M. of the said date, upon the coming in of the court or soon thereafter as counsel may be heard, we shall move the court for a rule upon you to show cause why you should not be attached as for contempt for failure to pay the alimony heretofore ordered by the court, basing said application upon the affidavits of said plaintiff and ....., copies of which are hereto annexed. When and where you may appear if you see fit.

Signed .....

Solicitors for Plaintiff.

Dated this ..... day of ....., 19...

§ 1043. **Petition for contempt for non-payment of alimony.**

SUPERIOR COURT

DIVORCE SESSION.

Now comes ....., the libelant in the above case, and says that on ....., 19.., a decree for alimony was entered requiring the libelee to pay to the libelant $..... forthwith, and the further sum of $..... on the first secular day of each and every month thereafter until the further order of the court; that the libelee has not made said payments as required by the decree.

Wherefore the libelant moves that the libelee, ... be summoned into court to show cause why he should not be adjudged in contempt.

.....

SUFFOLK, ss.: ....., 19...

Personally appeared the above-named ..... and made oath that the statements above subscribed by her are true so far as the same depend on her knowledge, and that so far as the same depend on information and belief she believes them to be true.

Before me, ...
Justice of the Peace.

§ 1044. **Petition to show cause why attachment as for contempt should not issue for failure to pay permanent alimony.**

The petition of Mary Doe, the plaintiff in the above entitled cause, represents unto this honorable court that on the ..... day of ....., 19..., a decree was entered in said cause requiring John Doe, the defendant, to pay unto your petitioner on the first day of each and every month thereafter, the sum of ..... dollars as for permanent alimony during the term of her natural life (or until the further order of this court in that behalf), as more fully and at large appears by the records of this court.

Your petitioner further represents that the said John Doe, the defendant, has not paid to your petitoner, nor to any one for her, any of the installments of alimony so payable to her under said decree, since the.....day of....., 19..., and that there is now due her in that behalf the aggregate sum of ..... dollars; that on the ..... day of ....., 19..., she made (or caused to be made) a demand upon the said John Doe, the defendant, to pay the said last mentioned sum (or some part thereof).

Your petitioner further represents that notwithstanding such decree, his default therein as aforesaid and the said demand, the said John Doe, has not paid the last mentioned sum or any part thereof, but has utterly and wilfully failed and refused so to do, and that he now stands in defiance of and in contempt of the said decree of this honorable court:

Wherefore your petitioner prays that a rule may be entered herein directing the said defendant, John Doe, to be and appear before this court on a short day and time named therein, and then and there to show cause why he should not be punished for contempt for so failing and refusing to obey the said decree of this court. Your petitioner further represents that on the ..... day of ....., 19... she served, (or caused to be served) upon

the said John Doe, a written notice of her intended application on this day for such rule which notice is in words and figures following, to wit: (here insert notice.)

(Signed) MARY DOE,
Plaintiff.

Subscribed and sworn to before me this .....day of ....., 19....

(Signed).....
Notary Public.

§ 1045. **Petition to show cause why attachment should not issue for failure to pay temporary alimony.**

And now again comes your petitioner, MARY DOE, the plaintiff (or defendant) in the above entitled cause, and represents unto this honorable court, that on the ..... day of....., 19... an order was entered therein requiring the said JOHN DOE, the defendant, (or plaintiff) to pay unto your petitioner the sum of ..... dollars on the first day of each and every month thereafter for her support and maintenance during the pendency of this suit, as more fully and at large appears by the records of this court.

Your petitioner further represents that the said John Doe, defendant, (or plaintiff) has not paid to your petitioner nor to any one for her any of the installments of alimony so payable to her under said order, which by the terms thereof were due on the first day of the month of ....., 19..., or which so fell due on the first day of every succeeding month; and that there is now due her under such order, the aggregate sum of ..... dollars. Your petitioner further represents that on the ..... day of ....., 19... she caused to be served upon the said John Doe, defendant, (or plaintiff) a written demand for payment of said last mentioned sum, to which demand was attached a certified copy of said order, and which demand was in the words and figures following, to wit: (here insert copy of demand). Your petitioner further represents that notwithstanding such demand so served upon the said defendant (or plaintiff) as aforesaid, he has not paid the said last mentioned sum nor any part thereof, but has utterly and wilfully failed and refused so to do, and that he stands in defiance of and in contempt of the order of this court. (If order for alimony authorizes or the statute permits, the issuance of an execution therefor, it should be further shown

that such execution did issue, was placed in the hands of the sheriff and returned by him nulla bona.)

Wherefore your petitioner prays that a rule may be entered herein directing the said John Doe, defendant (or plaintiff) to be and appear before this court on a short day and time to be named therein, and there and then to show cause why he should not be punished for contempt for so refusing to obey the order of this court.

Your petitioner further represents that on the ..... day of ....., 19..., she served, (or caused to be served) upon the said John Doe, a written notice of her intended application on this day for such rule, which notice is in words and figures following, to wit:

(here insert notice.)

(Signed.) MARY DOE,
Plaintiff.

Subscribed and sworn to before me this.....day of ....., 19....

(Signed) .....
Notary Public.

§ 1046. **Order to show cause.**

This cause coming on again to be heard upon the verified petition of the plaintiff (or defendant) for a rule upon John Doe, the defendant (or plaintiff) to show cause why he should not be punished for contempt for failure to obey the order of this court heretofore made and entered, requiring him, the said defendant (or plaintiff) to pay alimony (or counsel fees or suit money), on the reading and filing of which petition and duly considering the same, it is ordered that the said John Doe, defendant, (or plaintiff) be and appear before this court in open court at the courtroom thereof, on the ..... day of ....., 19..., at ..... o'clock, A. M., to show cause why such rule should not be issued and why he should not be punished for contempt as in said petition alleged. It is ordered that a copy of the said affidavit and of this order be served on the said defendant (or plaintiff) at least ..... days before the said ..... day of ....., 19....

Dated ....., 19....

(Signed.).....
Judge.

§ 1047. **Order of notice on petition for contempt for non-payment of alimony.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS.: SUPERIOR COURT,....., A. D., 19...

On the foregoing petition it is ordered, that the petitioner give notice to the respondent, ..., to appear at the ....., of said Court, at the Court House in ..... in said County of ....., on ..... A..D., 19..., at ..... o'clock, A. M., by serving him with a true and asserted copy of said petition with this order thereon, forthwith, that he may then and there show cause, if any, why said petition should not be granted.

By the Court,

.....

Clerk.

§ 1048. **Answer in discharge of rule to show cause.**

Comes now A..... B....., for his answer to said charge and in discharge of the said rule to show cause herein, says: (set out in explanation or denial or answer whatever matters the defendant may have).

(Signature and jurat.)

§ 1049. **Recognizance to appear and answer rule to show.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS.: SUPERIOR COURT.

On this ..... day of ....., A. D., 19..., personally appeared before said Court, in the Divorce Session thereof, at Boston, P. A. C., of Quincy, in the County of Norfolk, the respondent in a petition for contempt for failure to pay alimony brought by F. H. C., of said Boston, and filed in the libel for divorce numbered 1183 of the current records and files of said Court, wherein said F. H. C. is libelant, and said P. H. C. is libelee, and acknowledged himself indebted to the Commonwealth of Massachusetts in the sum of five hundred dollars, to be levied on his goods and estate, and in want thereof upon his body, if default be made in the performance of the condition here underwritten.

The condition of the above-written recognizance is such that WHEREAS, on the ..... day of ....., A. D., 19..., on said libelant's petition for contempt, it was by our said Court ordered that said P. A. C. be notified to appear before said

Court on the seventeenth day of February, A. D., 19... to show cause, if any he had, why he should not be proceeded against for the contempt of Court alleged in said petition, and said P. A. C. although duly notified, did not appear as directed, and on said ..... day of ....., A. D., 19..., by order of said Court, a capias issued directing the Sheriff of Suffolk County and his deputies to arrest said P. A. C., and bring him before said Court to answer for said alleged contempt, and on this ..... day of ....., A. D., 19..., said P. A. C. was brought before this Court in the custody of one of said deputies.

Now, therefore, if the said P. A. C. shall appear upon any day when ordered and from day to day thereafter, to answer said petition of said F. H. C., then this recognizance shall be void, otherwise it is to remain in full force and virtue.

By the Court.

(The above form is taken from the original paper.)

§ 1050. **Judgment for commitment as for contempt.**

This cause coming on again to be heard upon the petition of the plaintiff, Mary Doe, for a rule upon the defendant, John Doe, to show cause why he should not be attached as for contempt for the disobedience of an order of this court heretofore entered, that he, the defendant, should pay to the clerk of this court for the use and benefit of the plaintiff (or to her personally if such be the case) by or upon a certain date in such order fixed, and the defendant having filed his answer herein as follows: (here, insert substance of answer, and the court having read and considered the same, together with the affidavits both for and against said motion, and being duly advised in the premises doth find that the said defendant, John Doe, has not made such payments so ordered, although financially well able to do so, but has refused to make the same, and that he now is in disobedience of the orders of this court, and stands in contempt thereof, and that there is now due under said order, the sum of ..... dollars.

It is therefore considered and adjudged by the court that the said John Doe pay to the said clerk of this court instanter the sum of ..... dollars so due under the said order, and that he be committed by the sheriff of said county to the county jail of said county until said sum and the costs of this proceeding are paid or replevied.

(Signed).....

§ 1051. **Attachment as for contempt.**

The State of Indiana to the Sheriff of said ..... County.

You are hereby commanded to attach the body of A..... B..... so that you have him instanter before the judge of said ..... Circuit Court, now in session, to answer for contempt of said court in disobeying an order thereof that he should pay C..... D..... a certain sum for alimony (permanent or temporary, counsel fees, or suit money as the case may be); and have you then and there this writ:

By order of said court.

Witness the Clerk and Seal of said court.

(Signed).....
Clerk of the ..... Cir. Ct.

Dated this ..... day of ....., 19...

§ 1052. **Execution and order of commitment.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS.:

To the Sheriffs of our several counties, or their Deputies, or any Constable at our City of Boston.

Greeting:

Whereas: Mary M. Smith, of Boston, in our County of Suffolk, libelant by the consideration of our Justices of our SUPERIOR COURT, holden at Boston, for and within our county of Suffolk, aforesaid, to wit, on the twenty-sixth day of December, A. D., 19...., by a decree in a libel for divorce, recovered judgment against John L. Smith of said Boston, libelee, in the sum of eight dollars per week, the same to be payable weekly, the first payment to be made upon the first day of January, A. D., 19..., as alimony for the support of said libelant and the minor children of said libelant and said libelee, and whereas on the twenty-first day of April, A. D., 19..., upon motion of said libelant it was by our said Court ordered that execution issue forthwith for the sum of sixty-nine dollars which sum then appeared to be due and unpaid, as to us appears of record, whereof execution remains to be done.

We command you, therefore, that of the goods, chattels, or lands of the said judgment debtor, within your precinct, you cause to be paid and satisfied unto the said judgment creditor, at the value thereof in money, the aforesaid sum, being sixty-nine dollars in the whole, and thereof also to satisfy yourself for

your own fees; and for want of goods, chattels or lands of the said judgment debtor to be by him shown unto you, or found within your precinct to the acceptance of the said judgment creditor to satisfy the sums aforesaid with interest as aforesaid we command you to take the body of the said judgment debtor, and him commit unto our jail in Boston, in our County of Suffolk, or any jail in your precinct aforesaid, and detain in your custody within our said jail, until he pay the full sums above mentioned with your fees, or that he be discharged by the said judgment creditor, or otherwise by order of law. Hereof fail not and make return of this writ, with your doings thereon, into the Clerk's office of our said Superior Court at Boston, within our County of Suffolk aforesaid, in sixty days after the date hereof.

WITNESS, JOHN A. AIKEN, Esquire, at Boston, the twenty-second day of April, in the year of our Lord one thousand nine hundred and two.

.....

Clerk.

§ 1053. **Order convicting of contempt after order to show cause.**

This cause coming on again to be heard upon the rule heretofore issued requiring the said John Doe, defendant (or plaintiff) to show cause why he should not be punished as for contempt for disobeying the order of this court heretofore entered that he should pay certain installments of alimony pendente lite to the said Mary Doe, the plaintiff (or defendant) during the pendency of this suit, and the said John Doe, defendant (or plaintiff) having appeared in response to said rule and the court having heard the testimony adduced by the respective parties hereto and the arguments of their respective solicitors, and having duly considered the same, finds; that the said John Doe, the defendant (or plaintiff) has not paid to the said Mary Doe, the plaintiff, (or defendant), the sum of ..... dollars due under such order, but has wilfully and obstinately refused so to do although he is well able to make such payment.

It is therefore ordered that the said John Doe, defendant (or plaintiff) be and he now is adjudged guilty of contempt in disobeying the lawful order of this court as aforesaid, he having the power to obey said order, and it is adjudged that the said

John Doe, defendant (or plaintiff) be imprisoned in the county jail of said county until such order be obeyed or until the further order of this court.

Dated ....., 19....

(Signed.).....

Judge.

§ 1054. **Order purging of contempt.**

This said John Doe, the defendant (or plaintiff) herein having this day purged himself of the charge of contempt preferred against him by Mary Doe, the plaintiff (or defendant) herein, it is ordered that the said John Doe be and he now is acquitted of said charge and he is hereby discharged from arrest.

§ 1055. **Custody of children—Averment in complaint.**

Plaintiff further avers that of the fruits of their said marriage there were born to plaintiff and defendant ..... children, whose names and ages are as follows: (give names and ages); this plaintiff further avers that said defendant is not a fit and proper person to have the care and custody of said children; that prior to the time this plaintiff was informed and knew of said acts of adultery that said defendant would leave the home of this plaintiff and defendant, and in the absence of this plaintiff, and would leave said children without any one in charge of them or to care for them for an unreasonable and unnecessary length of time; that at such times, and at other times, said defendant would and did associate with vile and lewd persons and in such company visited wine rooms and drinking places, and with such persons drank intoxicating liquors; that at such times and other times said defendant visited houses of prostitution and other places of bad repute; that by reason thereof said defendant is not a proper and suitable person to have the care and custody of said children, wherefore he prays that he be given the custody of said children.

§ 1056. **Petition for custody of minor children.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS.: SUPERIOR COURT.

To the Honorable the Justices of the Superior Court to be holden at Boston, within and for the County of Suffolk:

Respectfully represents A. B. of ..... in the County of ....., that on the ..... day of ....., A. D., ..., a

decree of divorce nisi, was granted against him in favor of C. B., now of ..... in the County of ....., with custody of the minor children, E. B. and G. B. to said C. B. That said decree nisi has since become absolute.

That since the granting of said decree nisi the said C. B. has contracted gross and confirmed habits of intoxication, caused by the voluntary and excessive use of intoxicating liquor, and has become an unfit person to have the custody of said minor children.

That your petitioner is able to take said children, and provide a good home for them.

WHEREFORE, your petitioner prays that he be given the care and custody of said minor children.

Another form.

COMMONWEALTH OF MASSACHUSETTS.

(Same formal heading as above).

Respectfully represents A. D. of ..... in the county of ....., that on the ..... day of ....., A. D., ... she obtained a decree of divorce, nisi, for cause of cruel and abusive treatment, from C. D., of ..... in the state of ..... That at the time when said decree was granted, your petitioner did not ask for the custody of the minor children, H. D., and W. D., as they were already in her custody, and said C. D. was then of parts unknown. That your petitioner now has reason to believe that said C. D. is planning to seize said children and remove them from the commonwealth by force.

WHEREFORE she prays that the care and custody of said minor children may be decreed to her.

.....

Petitioner.

§ 1057. **Provision for maintenance of child after divorce.**

"The plaintiff, I..... P....., for her petition against the defendant, J..... P....., says that on or about the ..... day of ....., 19..., she was married to the defendant; that there was issue of said marriage a son, A..... P....., who still lives, and is now ..... years of age; that at the ..... term, of the court of common pleas in and for the county of ....., in the state of ....., such proceedings were had by said court, in a certain action for divorce therein pending, in which action said plaintiff herein was plaintiff and said defend-

ant herein was defendant; that said plaintiff was, on account of the misconduct and ill treatment and neglect of said defendant, by the judgment of said court of common pleas, divorced from said defendant, and awarded 'the custody, nurture, education and care of said minor child,' A..... P.....

"Plaintiff further says that ever since said decree of divorce was entered, said plaintiff and defendant have lived separate and apart, and said A..... P....., son of the said defendant, has been boarded and clothed and cared for by the plaintiff, and that such boarding, clothing, care and attention so furnished said son of the defendant by the plaintiff were necessary and appropriate to his comfort and condition in life, and were of the value of not less than ..... dollars per year.

"Said plaintiff further says that at the time said decree of divorce aforesaid was granted, said defendant herein was insolvent, but that he has become and now is solvent and well able to support his said son.

"Plaintiff says that there is due and owing her from the defendant for said boarding, clothing and care, a specific account of which is hereto attached, marked Exhibit 'A', the sum of ..... dollars, and interest; wherefore said plaintiff prays judgment against said defendant," etc.

§ 1058. **Order as to custody of child.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.: SUPERIOR COURT.

NO.....DIVORCE.

B. P. C., Libelant,

v.

F. S. C., Libelee.

In the libel aforesaid, upon the motion of the libelant, it is ordered that the custody of the minor child, F. C., be, and the same hereby is given to the libelant, B. P. C., until the further order of the court, and the said libelee, F. S. C., his agents and attorneys, are hereby enjoined and commanded to desist and refrain from interfering with the libelant's possession and custody of said minor child and from exercising any control over said child.

By the Court.

Dated at Boston this ..... day

....., A. D. .....

(The above form is taken from the original papers.)

Another form.

The following order is copied from the case of McNamara v. McNamara, 93 Nebr. 190, (1913), 139 N. W. at p. 1045: "That the custody of the children be and it is awarded plaintiff until further order of the court, they not to be removed from its jurisdiction; and defendant is enjoined from interfering with plaintiff in the control of the children, but shall be entitled to visit them at reasonable hours not oftener than once in two months, visits not to last more than two hours each, and to be in the presence of the sheriff in said county, or his deputy."

Another form.

It is further ordered, adjudged, and decreed that until the further order of this court, plaintiff shall have the full care, custody, and control of the minor children of the said parties, namely: (here insert the names and ages of such children) which shall in no way be interfered with or disturbed by the defendant, who, however, may visit them at reasonable times and places provided he in no way harasses or annoys the plaintiff.

§ 1059. **Petition and order for third party to have care and custody of child.**

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR DIVORCE COURT.

SUFFOLK, ss.: No.....

.....

v.

.....

PETITION

Your petitioners, ..., libelant and ....., libelee, in the above-entitled action, respectfully petition this Honorable Court to decree the care and custody of our child, ..., born ....., A. D., 19..., to ....., and ..... of ..... in the County of ..... and Commonwealth of Massachusetts.

.....

Libelant.

.....

Libelee.

DECREE

This petition came on to be heard on motion of the Libelant and Libelee, who were represented by counsel. And thereupon, after consideration it is ordered and decreed that the care and

custody of the said ..... be and hereby is decreed to ..... of ..... in the county of ..... and Commonwealth of Massachusetts. It is ordered and decreed that ..... the mother and ..... the father of said ..... shall be permitted to see said child at all reasonable time or times until further order of the Court.

.....
Justice of the Superior Court.

§ 1060. **Order of notice on prayer for custody of children, suit money, and for restraining order.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS.: SUPERIOR COURT.

A. B.

v.

C. B.

On the foregoing libel for divorce ordered, that the libelant give notice to said libelee, C. B., to appear at Equity Session, First Division of said Court, at the Court House in Boston, in said County of Suffolk, on ..... day of ....., A. D., 19.., at .. o'clock A. M., by serving him with a true and attested copy of said libel with this order thereon, forthwith, that he may then and there show cause, if any, why the prayers of said libel for the custody of their minor children during the pendency of the libel, and for an allowance to enable said libelant to prosecute said libel and for an order prohibiting libelee from imposing any restraint upon the personal liberty of the libelant should not be granted.

By the Court.

.....
Clerk.

§ 1061. **Order for custody of children.**

Come now the parties by counsel, and on motion of the plaintiff herein it is ordered by the court that the said plaintiff have the care, custody and control of the children of said plaintiff and defendant herein, to wit: (here name them), until the further order of this court.

It is further ordered by the court that said children, and neither of them, shall be taken or removed from said ..... county without the permission of this court, and that the defendant shall be permitted to visit said children at least once each week on

..... of each week, and that at all other times said defendant is hereby enjoined from in any manner visiting or interfering with said children.

This order to be and remain in full force until changed or modified by the court.

§ 1062. **Order to produce child in court.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.: SUPERIOR COURT.

NO.....DIVORCE.

E. E. D., Petitioner,

v.

G. W. D., Respondent.

ORDER TO PRODUCE CHILD IN COURT

In the above-entitled petition, the said respondent, G. W. D., be and he hereby is directed to produce the body of R. E. D., the minor child of said E. E. D. and G. W. D., forthwith, before a justice of this court, to await the decree of this court.

By the Court.

....., Assistant Clerk.

Dated at Boston this ..... day of ....., A. D., 19....

(The above form is taken from the original papers.)

§ 1063. **Decree for custody of children.**

And it is also further ordered, adjudged, and decreed that the complainant shall have the care, custody, and maintenance of the said minor children, namely: ..... and ....., and the said children shall remain with the said plaintiff until they each retain the age of fourteen years, or until the further order of the court.

.....

Court Judge.

§ 1064. **Decree awarding temporary custody of child.**

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

SUFFOLK, ss.: NO.....DIVORCE.

.....,

v.

.....,

DECREE.

"This case came on to be heard on the motion of the libelant for the temporary custody of the child, ..., and was argued by counsel. And thereupon, after consideration thereof, it is ORDERED, ADJUDGED and DECREED:

"That the libelee (or libelant) ....., be and hereby is ordered to surrender the possession of said child to libelee (or libelant) ....., to be taken by h.. to h.. home in the city (or town) of ..... and there to remain until ..... further orders of the court. The libelee (or libelant) shall have the privilege of seeing said child at all reasonable and proper times."

By the Court.

.....

Clerk.

§ 1065. **Decree, libel continued after hearing, with custody of children.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.: SUPERIOR DIVORCE COURT.

J. K.

v.

P. K.

ORDERED.

In the above-entitled libel for divorce, after hearing the same together with the libel of said J. K. against said P. K. it is ordered as follows:

The libel stands continued. The libelee J. K. is to have the custody of the children, I. N. K. and G. H. K., who are not to be removed from the Commonwealth. The libelant is to have a reasonable opportunity to have the children visit him at his home at reasonable times. The libelant is to pay to the libelee five dollars each week for the support of the children.

By the Court.

....., Assistant Clerk.

Dated at Boston the ..... day of ....., A. D. .....

(The above form is taken from the original papers.)

§ 1066. **Order that writ of habeas corpus issue to produce minor child.**

This cause coming on to be heard upon the petition of A. B., the complainant, and the court having read and considered the

affidavits filed and the testimony adduced, as well on the part of the complainant as on the part of the defendant, and the court being fully advised in the premises, it is hereby ordered on motion of the solicitor, of said complainant, that a writ of habeas corpus issue out of and under the seal of this court in the prescribed form, directed to the said defendant, commanding him to have the body (or bodies) of A B (and C B) before this court on the ..... day of .....19.., (or immediately upon the service of the said writ), and then and there to do and abide by whatever order may be entered herein concerning the custody of said A B (and C B).

§ 1067. **Habeas corpus.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS.:

To the Sheriffs of our several Counties and their respective Deputies. GREETING:

WHEREAS: E. E. D. of Boston in our County of Suffolk has brought a petition before the Justices of our Superior Court within and for said County of Suffolk against her former husband, G. W. D., in which petition it is alleged that R. E. D., the minor child of said E. E. D. and G. W. D. is now in the custody and control of said G. W. D., the custody of which child the petitioner asks that the Court may decree to her.

Now, therefore, we command you that the body of the said R. E. D., you take and have before a justice of our said Superior Court, now holden at Boston, within and for the County of Suffolk, immediately after the receipt of this writ, to do and receive what our said Justices shall then and there consider concerning said minor child, R. E. D., in this behalf.

And have you here this writ, with your doings therein.

Witness, Albert Mason, Esquire, at Boston the twenty-sixth day of May in the year of our Lord one thousand nine hundred and three.

George P. Drury,
Assistant Clerk.

(The above form is taken from the original papers.)

§ 1068. **Decree awarding custody of children and use of homestead.**

"It is now ordered, adjudged, and decreed by the court that the defendant, Marion A. Luthe, shall, until further order of the court, retain the custody and control of the said children of the parties hereto, during their minority, to support, care for, and educate them to the best advantage the condition and circumstances as the plaintiff and defendant will allow.

That for this purpose defendant shall have the possession of lot 25 and south half of lot 26, block 150, Adea's addition to the city of Denver, Arapahoe county and state of Colorado, and the improvements thereon, to hold, occupy, and enjoy the same, together with the issues, rents, and profits thereof, without let, hindrance, or interference in any manner on the part of plaintiff. That plaintiff shall keep the dwelling-house situate on said premises well insured at his own expense, in some fire insurance company of good repute for financial responsibility. He shall pay the taxes thereon, and shall keep the interest paid upon the incumbrance of $3,800 on said premises.

And, further, plaintiff shall pay or cause to be paid to defendant within sixty days from the entry of this modified decree the sum of two hundred and sixty dollars on account of the furniture taken by him from said defendant; and plaintiff shall also pay or cause to be paid to the defendant, on or before the 15th day of December of each and every year, the sum of fifty dollars for herself, and the sum of twenty-five dollars on account of each of said minor children then remaining in her custody and control as aforesaid. In case the plaintiff shall fail at any time to pay to defendant any of the sums of money hereinbefore specified, or any part thereof, when the same shall become due and payable, the amount so remaining unpaid shall constitute a lien in favor of defendant against plaintiff's undivided half interest in said lot 25, and south half of lot 26, aforesaid, and the same may be foreclosed by proper civil action. Defendant may also at any time have execution, garnishment, or other proper proceedings against plaintiff for any such sum or sums of money, or any part thereof, remaining due and unpaid according to the terms of this decree.

In case the plaintiff shall fail to keep said dwelling-house insured as aforesaid, and any loss shall hereby befall said estate, such loss shall be a lien against his interest in said premises, and

in favor of the defendant, and the amount of said lien may be established by a proper civil action, and foreclosed accordingly.

If plaintiff shall suffer said premises, or any part thereof, to be sold for taxes or for default in payment of said incumbrance of $3,800, or any part thereof, or any interest theron, the loss or sacrifice on account of such sale or sales shall, as between the parties hereto, be borne wholly by the said plaintiff; and the defendant may become the purchaser at such sale or sales, or may redeem or repurchase said premises, or any part thereof, from such sale or sales, for the benefit of her individual or separate estate, the same as though she were not a tenant in common with plaintiff.

The plaintiff may renew said incumbrance from time to time, as may be necessary, but not for a greater sum than $3,800, nor at a rate of interest greater than ten per cent. per annum; and defendant shall join in the execution of any necessary securities therefor; and plaintiff shall not in any manner interfere with defendant's enjoyment of said premises, or any part thereof, for the purposes aforesaid, until the further order of the court.

If plaintiff shall faithfully perform the matters required of him by this decree while said defendant shall have the custody of said children as aforesaid, his undivided half interest in said premises shall not be deemed to be otherwise affected hereby, and the same shall be preserved for his ultimate use and enjoyment; provided, nevertheless that, if plaintiff shall elect so to do, he may convey to defendant by good and sufficient warranty deed, subject only to the incumbrance and liens hereinbefore mentioned, all his right, title, and interest in and to the premises above described, so that defendant shall become the absolute owner of the whole thereof, subject only to said liens and incumbrance, with full authority to use, sell, convey, lease, or incumber the same, as she shall deem for the best interests of herself and said minor children; and upon the execution and delivery of the conveyance aforesaid within twenty days from the entering of this decree, plaintiff shall be and stand relieved from each and every of the commands, directions, and requirements hereinbefore expressed touching the payment of interest, insurance, taxes, and other allowances on account of alimony and maintenance for said defendant, remaining subject only to such

obligations as may thereafter be devolved upon him in respect to his surviving children during their minority, in case of necessity or of a substantial change in the condition or circumstances of the parties hereto.

This decree shall stand in lieu of all former decrees as to the custody of the children, use of realty, recovery of personalty, and alimony and maintenance for defendant and said children. The former decrees of this court in reference to visits to and by the children, and the conduct of the parents in their intercourse with the children shall be and remain in full force and effect, and shall be enforced by the court when either party shall upon proper notice to the other show that there has been a violation thereof. This decree may be further modified by the court upon due notice to the parties and opportunity to be heard, as the condition or circumstances of the parties may change, or as the best interests of the children may require."[7]

§ 1069. **Decree assigning homestead to wife.**

It is further ordered, adjudged, and decreed that the homestead of the said parties be and the same is hereby assigned to the plaintiff for her use and benefit during the remainder of her life, but inasmuch as it appears from the evidence that such homestead came from separate property of the defendant, it is, after the death of the wife, decreed to be in the defendant the former owner.

(Signature.)

§ 1070. **Decree assigning homestead to parties as tenants in common.**

It is further ordered, adjudged, and decreed that the real estate heretofore occupied by said parties as a homestead be and the same is hereby assigned to them in equal portion as tenants in common and in like manner as if they had acquired the same by purchase as single persons.

§ 1071. **Decree for sale of homestead with division of proceeds.**

It is further ordered, adjudged, and decreed that the real estate heretofore occupied by said parties as a homestead, be sold and

[7]This decree was formulated and directed to be entered by the Supreme Court of Colorado, in Luthe v. Luthe, 12 Colo. 421, 21 Pac. 467.

the proceeds divided equally between the said parties, after deducting the cost and expenses of the sale. Such sale may be made in the manner and upon the terms as the parties may hereafter agree. Failure of such agreement, however, and the fact thereof being reported to the court, such further order will be made respecting said sale as may seem necessary.

§ 1072. **Caption of decree or order with title of court and cause.**

At a term of the ..... Court, held in and for the county of ....., in the state of....., at the courthouse in ....., on the ..... day of ....., in the year 19....

Present: The Honorable ....., Judge, etc.

A. B.

v.

C. D.

In Chancery

This cause, coming on to be heard, etc.,

§ 1073. **Decree of divorce.**

This cause coming on to be heard on the bill, answer and replication, and upon the testimony of the witnesses produced, sworn and examined in open court, ..., ... and ..... appear as solicitors for the complainant, and ..... and ..... as solicitors for the defendant, and the court having heard the testimony of said witnesses so produced sworn and examined as aforesaid, and the arguments of counsel, and being fully advised in the premises and on consideration thereof, doth find that all the material facts alleged in said bill are true, and that the complainant is now an actual resident of said ..... county, Illinois, and has been such resident for more than one year prior to the commencement of this suit: that on the ..... day of ....., A. D., 19..., at ..... (name of city), in the state of ....., the complainant and defendant were lawfully married and lived together as husband and wife until the ..... day of ....., A. D., 19...; that there were born to the complainant and defendants as the fruits of such marriage, three children, two of whom are now living, namely: ..... now over ..... years old, and ..... now about ..... years old; and that the defendant has been guilty of extreme and repeated cruelty to the complainant since said marriage, as alleged in said com-

plaint. And the court further finds that the complainant is a proper person to have the care and custody of the said .....

It is further ordered, adjudged, and decreed by the court that the marriage between the complainant and the defendant be dissolved, and the same is hereby dissolved accordingly, and the said parties are and each of them is, freed from the obligations thereof, and that the complainant have the care and custody of the said .....; that the defendant pay the costs of this suit and that execution issue therefor.

.....

Judge.

Another form.

Form of written decree used in Arizona, California, Idaho, Montana, Nevada, Utah, and a few of the other western states.

In the ..... Court of the County of .....State of .....

Present: Hon. ....., Judge.

MARY BROWN

v. Decree of Divorce.

JOHN BROWN

This cause coming on to be heard this ..... day of ..... 19..., upon the complaint herein taken, as confessed by the defendant (whose default for not answering has been duly entered) upon the proofs taken herein, and upon report of John Smith, referee in this cause, to whom it was referred by order of this court duly made the ..... day of ....., 19.., to take the proofs of the facts set forth in the complaint and to report the same to the court, and the said referee having taken the testimony by written questions and answers and reported the same to this court, on the ..... day of ....., 19.., from which it appears that all the material allegations of the complainant are sustained by testimony free from all legal exceptions as to its competency, admissibility and sufficiency, and it also appearing to said court that said defendant was duly served with the summons and all and singular the law and the premises being by the court here understood and fully considered.

Wherefore it is here ordered, adjudged, and decreed, and this does order, adjudge, and decree, that the marriage between the said plaintiff Mary Brown and the said defendant John Brown be dissolved, and the same is hereby dissolved and the said parties are, and each of them is, freed and absolutely released from the bonds of matrimony, and all the obligations thereof.

And it is further ordered and decreed that the custody of the children of said marriage, to wit, Delia Brown, aged sixteen years, and Peter Brown, aged seven years, be and the same is hereby awarded to the plaintiff.

Done in open court this ..... day of ....., 19....

.....
Judge.

This is a true copy of the decree of divorce.

.....
Clerk.

§ 1074. **Decree for divorce, alimony and custody of children.**

Come now the parties by counsel, and it appearing to the court that the defendant has been duly served with process more than ten days before the first day of the present term of said court (or, more than ten days before the day of which the summons herein was made returnable) (or if by publication show the notice).

And this cause being at issue, is submitted to the court without the intervention of the jury; and the court having heard the evidence and being duly advised in the premises, finds for the plaintiff and that the allegations of plaintiff's complaint are true and that she is entitled to a decree of divorce from said defendant on the grounds therein alleged. The court further finds the said plaintiff is a suitable and proper person to have the care, custody and control of the children named in her said complaint, and that the plaintiff is entitled to alimony and to an allowance for the maintenance and support of said children.

It is therefore considered and adjudged by the court that the bonds of matrimony existing between plaintiff and defendant herein be, and they are hereby, dissolved and that said plaintiff is hereby granted a divorce from said defendant.

It is further considered and adjudged by the court that the plaintiff have and recover of and from said defendant the sum of ..... dollars alimony; that said judgment for alimony be payable as follows: (here state time and terms of payment).

It is further considered and ordered by the court that the plaintiff have the care, custody and control of the following named children: (here state names and ages), until the further order of this court; it is further ordered that said defendant pay into this court on the first day of each month for the support and main-

tenance of said children the following sums, to wit: (here state amount to be paid for each child).

It is further considered and adjudged by the court that the plaintiff recover of said defendant her costs and charges paid, laid out and expended.

§ 1075. **Decree for divorce on verdict of jury.**

This cause having come on to be heard upon the Bill of Complaint herein, the answer of the defendant thereto, and the replication of said complaint to the said answer, and the jury having been called, selected, and sworn, to wit: (giving the names of the jurors) to try the issue herein and, to wit: (here state the issue as raised by the pleading which is to be determined by the jury) and the said trial having proceeded, and the said jury having heard the evidence offered by the respective parties, and having been found such issue in the affirmative.

It is therefore ordered, adjudged, and decreed by the court that the marriage between the said plaintiff and the said defendant be dissolved and the same is hereby dissolved accordingly, and a divorce from the bonds of matrimony between the said parties is also adjudged and decreed.

§ 1076. **Decree for divorce, upon default, for conviction of crime, and granting right to resume maiden name.**

This cause having come on to be heard upon the bill of complaint herein; and the defendant having been duly served with a copy of bill in this cause (or indicate manner of service) more than ..... days prior to the first day of the present term of this court, and having been three times called in open court to appear, except, demur, plead or answer the complainant's bill, came not, but herein made default; and the court having ordered that the said bill of complaint and the matters therein contained to be taken as confessed; and the court having heard the oral testimony of the witnesses sworn and examined in open court; and having heard the arguments of counsel, and being fully advised in the premises on consideration thereof, doth find that the defendant has been convicted of felony as charged in said bill.

It is further ordered, adjudged, and decreed by the court that the marriage heretofore existing between the complainant and defendant be dissolved, the same is hereby dissolved accordingly, and the parties are and each of them is freed from the obligations thereof.

It is further ordered, adjudged, and decreed that the complainant herein, ..., be allowed to resume her maiden name of .....

It is further ordered that the defendant pay the costs of this suit and that execution issue therefor.

.....
Judge.

§ 1077. **Decree for divorce on default—Personal service.**

And now, on this day comes the said complainant, by ...., solicitor.., and moves the court that said defendant be called to appear and make answer to the bill herein, and that in default thereof ..... default be entered herein, and said bill be taken as confessed by ..... And it appearing to the court that process of summons in chancery was duly issued in this cause against said defendant, returnable to the ..... Term, A. D., 19..., of this court, and that said defendant was duly and personally served with such summons more than ten days prior to the first day of said ..... term, and has not appeared or made answer herein, it is ordered by the court that said defendant come into court here, and plead, answer or demur to the said bill, instanter; and said defendant being now three times solemnly called so to come, and plead, answer or demur herein, comes not, but therein makes default; and thereupon, it is ordered, adjudged, and decreed by the court that, as to the said defendant, the said bill be taken as confessed; and this cause coming on to be heard upon the Bill of Complaint, taken as confessed against said defendant, and upon the evidence adduced by the said complainant, and the court having heard the testimony in open court, and the same having been reduced to writing, and a certificate thereof filed herein, and having heard the arguments of counsel, and being now fully advised in the premises, the court finds that the allegations in the said Bill of Complaint have been substantially proven; that the complainant is now, and was at the time of the filing of the Bill of Complaint herein a resident of said county and was an actual resident of the state of ..... for more than a year immediately preceding the filing of said bill, and that the defendant ..... (here insert grounds for divorce as stated in statute).

On motion of the solicitor.. for the complainant, it is ordered, adjudged and decreed by the court, that the said complainant be

and . .he is hereby divorced from the said defendant, and that the bonds of matrimony heretofore existing between the said complainant, ..., and the said defendant .... be and the same are hereby dissolved, and that the said complainant be restored to all and singular the rights and privileges of an unmarried person.

§ 1078. **Decree for divorce on default—Service by publication.**

And now, on this day comes the said complainant, by ...., solicitor.. and moves the court that said defendant be called to appear and make answer to the bill herein, and that in default thereof ..... default be entered herein, and said bill be taken as confessed by ..... and it appearing to the court that process of summons in chancery was duly issued in this cause against said defendant, returnable to the ..... term, A. D., 19..., of this court, and that the said defendant ..... resides out of the state of Illinois, and that the clerk of this court has caused publication to be made in the ..... a weekly secular newspaper published in ....., and having a general circulation throughout the said county of ..... and the state of Illinois, containing a notice of the pendency of this suit, the names of the parties hereto, the title of the court, and the time and place of the return of the summons in this case; that said notice was duly published in said paper once in each week, for four successive weeks, the date of the first paper containing the same being the ..... day of ....., A. D., 19.., and the date of the last paper containing the same being the ..... day of ....., A. D., 19.., and that thirty days and upwards intervened between the first publication of the said notice and the first day of the term to which the summons in this cause was returnable, and that the said clerk likewise, within 10 days of the first publication of said notice, sent a copy thereof by mail addressed to ..... and that the said ..... defendant, has not appeared or made answer herein; it is ordered by the court that said defendant come into court here, and plead, answer or demur to the said bill, instanter; and said defendant being now three times solemnly called so to come, and plead, answer or demur herein, comes not, but therein makes default; and thereupon, it is ordered, adjudged and decreed by the court that, as to the said defendant, the said bill be taken as confessed; and

this cause coming on to be heard upon the Bill of Complaint, taken as confessed against said defendant, and upon the evidence adduced by the said complainant, and the court having heard the testimony in open court, and the same having been reduced to writing, and a certificate thereof filed herein, and having heard the arguments of counsel, and being now fully advised in the premises, the court finds that the allegations in the said Bill of Complaint have been substantially proven; that the complainant is now, and was at the time of the filing of the Bill of Complaint herein, a resident of said county, and was an actual resident of the State of ..... for more than a year immediately preceding the filing of said bill, and that the defendant (here insert grounds for divorce).

On motion of the solicitor.. for the complainant, it is ordered, adjudged and decreed by the court, that the said complainant be and ..he is hereby divorced from the said defendant and that the bonds of matrimony heretofore existing between the said complainant ....., and the said defendant ....., be and the same are hereby dissolved, and that the said complainant be restored to all and singular the rights and privileges of an unmarried person.

§ 1079. **Decree nisi or interlocutory.**

"In the Superior court of the State of California in and for the county of Los Angeles.

"Harry B. Kinney, Plaintiff, v. Nellie Kinney, Defendant. Interlocutory Judgment by Default in Action for Divorce.

"This cause came on regularly to be heard on the 19th day of August, 1914, before the said superior court, in department 5 thereof; Geo. S. Richardson appearing as attorney for plaintiff herein, and no one appearing for said defendant. And it appearing that the defendant was duly served with process herein, and said defendant not having answered plaintiff's complaint herein, within the time provided by law or otherwise; and the default of the defendant for not answering the said complaint having been duly entered herein in the manner provided by law; and evidence having been introduced on behalf of said plaintiff at said hearing of this cause; and said cause having been submitted to the court for its consideration and decision:

"Now therefore said court, having duly considered the same, makes its findings of fact and decision as follows: The court

finds that all the allegations contained in the complaint are true, and that a divorce ought to be granted as prayed for in said complaint. Wherefore it is hereby ordered, adjudged, and decreed that the said plaintiff is entitled to a divorce from the defendant; that when one year shall have expired after the entry of this interlocutory judgment a final judgment and decree shall be entered granting a divorce herein, wherein and whereby the bonds of matrimony heretofore existing between said plaintiff and said defendant shall be dissolved, and at that time the court shall grant such other and further relief as may be necessary to complete disposition of this action.

"Done in open court this 19th day of August, A. D. 1914.

CHARLES WELLBORN, Judge."

§ 1080. **Objection to decree absolute.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.: SUPERIOR COURT.

No. ..... Divorce.

....., Libelant,

v.

....., Libelee.

OBJECTION TO DECREE ABSOLUTE.

And now comes the libelee, and deposes, and says that on or about the time notice of the said libel was served upon him, he consulted with and engaged one ....., and attorney, of this court, to appear and answer in his behalf and to conduct his defence, yet the said ..... utterly failed and neglected so to appear and answer, and your affiant had no notice or knowledge of the time of the hearing of said libel, but was later informed that a decree nisi had been granted to the libelant; and your deponent further says that he believes he has a good defence to the said libel, and has at all times intended in good faith, and still intends to defend the said libel.

Wherefore, he prays that the decree nisi which was granted to the said libelant be vacated so that the said cause may be heard upon its merits.

.....

Petitioner.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.: Boston, Dec....., A. D., 19...

Then personally appeared the above-named ..... and deposed and said that the above statement subscribed by him is true, before me.

.....
Notary Public.

(This form is taken from the original papers.)

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.: SUPERIOR COURT.
No. ..... Divorce.

A. B., Libelant,
v.
C. D., Libelee.

OBJECTIONS TO DECREE ABSOLUTE.

Now comes the libelee and objects to the decree nisi heretofore entered in said libel becoming absolute, and for causes of objection says:

1. That he never was served with any process or had any notice of the pendency of said libel until after the hearing upon the same, and that he only learned of the same by reading in a newspaper that a decree of divorce, nisi, had been granted in favor of his wife, the said libelant.

2. That he believes he has a good defence to said libel and in good faith intends to defend the same.

.....
Libelee.

....., ss.: ....., 19...

Then personally appeared the said ..... and made oath that the foregoing statement by him subscribed was true.

.....
Justice of the Peace.

Note. Where the libelant has committed adultery after the decree nisi the objections should be in the form above given, but the allegation would be simply:

"That at divers times and places since the granting of said ....., 19..., in ..... Street in ....., the libelant has committed adultery with one ....."

§ 1081. **Decree nisi or interlocutory with findings of fact and conclusions of law.**

This cause having been regularly called and coming on for trial upon the complaint herein taken as confessed, the order of

default against the defendant having been heretofore entered as appears by the records of this court, the plaintiff appearing in person and by ....., her solicitor, the court doth find that the allegations in the said Bill of Complaint have been substantially proven by competent and admissible testimony, free from all legal exceptions, from which testimony the court has determined as a matter of law that the plaintiff is entitled to a divorce from said defendant on the ground of ..... and is at this time entitled to an interlocutory decree herein, to the effect that she is entitled to a divorce on said grounds.

Wherefore all and singular the law and the premises being considered it is hereby ordered, adjudged, and decreed, as and for an interlocutory decree herein that the plaintiff has established grounds for the dissolution of the bond of matrimony heretofore and now existing between said plaintiff and said defendant; that he is entitled to and ought to be granted a decree of divorce upon the ground of .....; and that upon the expiration of ..... from the entry of this decree, a final judgment of divorce be entered herein, according to the statute in such case made and provided.

The court further finds from the said testimony and so concludes as a matter of law that the plaintiff is a suitable person to have the care, custody, control, and maintenance of ..... and ....., the minor children mentioned in said complaint, and it is therefore ordered and decreed that the custody of the children of said marriage, to-wit: ....., age ..... years, and ....., age ..... years, be and the same is hereby awarded to the plaintiff until the further order of this court.

Done in open court this ..... day of ....., 19....

....., Judge of said ..... court.

Entered this ..... day of ....., 19....

By ....., Deputy Clerk.

Another form.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.: SUPERIOR COURT.

....., Libelant,

v.

....., Libelee. No.....

DECREE NISI.

In the above-entitled libel for divorce, it is now ordered and decreed, nisi, that the bond of matrimony heretofore entered into

between the said ..... and ..... be, for the cause of the ..... of the said libelee, as alleged in said libel dissolved:

.....

this decree to become absolute, after the expiration of six months from the entry of this decree, unless the court shall have for sufficient cause, on application of any party interested, otherwise ordered.

By the Court.

....., Clerk.

§ 1082. **Decree nisi after appointment of guardian ad litem.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS.: SUPERIOR DIVORCE COURT.

C. M. G., Libelant,

v.

H. J. G., Libelee.

DECREE NISI.

This cause came on to be heard upon the suggestion of said libelant that this court appoint a guardian ad litem of said libelee, and it appearing that said libelee was an inmate of the Massachusetts Hospital for dipsomaniacs and inebriates, and that there might be some doubt as to the sanity of said ..... this court appointed ..... of ..... guardian ad litem of said ..... for the purpose of investigating and reporting as to the sanity of said ..... and as to the truth of the matters alleged in said libel.

And thereafterwards the said ..... after having made investigation, especially as to the sanity of the said ..... filed his report in writing, stating that said ..... was sane and desired to contest said libel, and thereupon said ..... was notified to appear before this court and did so appear and upon examination as to his sanity, this court adjudged said ..... to be sane.

And now, said cause having been heard and tried upon the merits it is ordered and decreed nisi, that the bond of matrimony heretofore entered into between the said C. M. G. and H. J. G. be, for the cause of the gross and confirmed habits of intoxication on the part of the said libelee as alleged in said libel dissolved, this decree to become absolute after the expiration of six months unless the court shall have for sufficient cause, upon application of any party interested, otherwise ordered.

(This form is taken from the original papers.)

§ 1083. **Final decree of divorce after nisi or interlocutory decree.**

It appearing that on the ..... day of ....., 19..., an interlocutory decree of divorce was entered herein upon the finding of this court that the plaintiff herein is entitled to and ought to be granted a divorce from the defendant; that more than ..... has expired since such entry and no appeal has been taken therefrom and no reason appearing why such interlocutory decree should not become final; and all and singular the law and the facts considered. Now on motion of the solicitor for the plaintiff it is hereby ordered, adjudged and decreed that the said plaintiff be and ..he is hereby divorced from said defendant, and that the bonds of matrimony heretofore existing between the said plaintiff ....., and the said defendant ....., be and the same are hereby dissolved; and that the plaintiff and the defendant, and each of them be restored to all and singular the rights and privileges of unmarried persons; and that either is at liberty to marry after the entry of this decree.

Done in open court this ..... day of ....., 19....

....., Judge of said ..... court.

State of ..... } ss.:
County of ..... }

I hereby certify that the decree, of which the above is a true copy, was entered in ..... book of divorces at page ...., on the ..... day of ....., 19....

§ 1084. **Order that decree nisi shall not become absolute.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.: SUPERIOR COURT.

M. B. R., Libelant,

v.

M. R., Libelee.

ORDER.

In the above-entitled libel for divorce, it is ordered that the decree nisi granted in said libel on the twenty-ninth day of January, A. D., 19..., shall not become absolute until further order of the Court, and that said libelant, M. B. R., be notified by an officer of said court to appear before our Justices of our said Superior Court, in the Equity Session, the First Division thereof,

on Saturday, the twenty-third day of April, A. D., 19..., at ten o'clock, A. M., by serving her with a copy of this order forthwith that she may then and there show cause, if any she have, why said decree nisi should not be vacated, and said libel dismissed.

By the Court.

....., Assistant Clerk.

Dated at Boston the sixteenth day of April, A. D., 19....

(The above form is taken from the original papers.)

§ 1085. **Decree for permanent alimony and other specific support.**

It is therefore ordered, adjudged, and decreed that on the first day of ....., 19..., and the first day of every month thereafter during the pendency of this suit, and so until the further order of the court, the defendant pay to the clerk of this court on account of the plaintiff's maintenance, the sum of ..... dollars; that he also, from this time forth, in addition to the monthly allowance aforesaid, furnish for the plaintiff and her children, all reasonable food, fuel and clothing, or provide for her obtaining the same on his credit and allow to her for said children the use of the house and residence mentioned in the pleading herein, and now occupied by same; and the furniture and furnishings therein as the abiding place and home, without let or hindrance; and in case of the failure of the said defendant to furnish food, fuel and clothing as aforesaid or to furnish credit whereon and whereby plaintiff may procure the same, plaintiff has leave, without additional showing, to apply for an increase of the aforesaid monthly allowance; this without prejudice to the rights of either party hereafter to apply for a modification of this order as far as the aforesaid monthly allowance is concerned.

.....

Judge.

§ 1086. **Decree on cross complaint and amendment—Allowance of alimony and counsel fees.**

"The court finds against the plaintiff on his complaint, and it finds against the cross-complainant on her cross-complaint, and that neither of said parties is entitled to a divorce. That the plaintiff pay the costs made by him in this cause, and said cross-complainant pay the costs made by her in this cause."

The amendment, allowed later, was as follows:

"Come now again the parties by their attorneys as aforesaid,

and the court having had the cause under advisement finds for the defendant on the cross-complaint herein sued on, and that the plaintiff is not entitled to a decree of divorce as alleged in his complaint, and that the plaintiff, John J. Livingston, pay all costs taxed in this cause on account of his complaint herein. And the court also finds for the defendant on her cross-complaint herein that said defendant, Barbara Livingston, is entitled to a decree of divorce as alleged in her cross-complaint, and that said defendant pay all costs taxed in this cause on account of her cross-complaint herein, also that she recover $250 alimony. It is therefore ordered and adjudged by the court that the plaintiff take nothing by this action on his complaint, and that he pay all costs taxed on account of the prosecution of his cause. It is further ordered and adjudged by the court that the defendant be and she is hereby granted a divorce from the plaintiff, and that she recover of the plaintiff the sum of two hundred fifty ($250) dollars as alimony and all her costs laid out and expended in the prosecution of her cross-complaint."

§ 1087. **Decree to set aside decree where defendant not personally notified.**

And now on this ..... day of ....., ..., this cause coming on again to be heard upon a petition of the defendant to set aside the decree heretofore rendered in said cause, on the ground that he had not been summoned or served with a copy of said bill of complaint or received any notice of the pendency of said suit, as required by statute in such case made and provided; and the court having read the answer offered and proposed to be filed in said cause, and the affidavit filed in the premises, doth order, adjudge, and decree that the defendant be allowed to appear in open court and to file his proposed answer to said bill of complaint, touching the matters of such decree upon the payment of all such costs as have heretofore accrued in said cause; and that in the meantime the said decree shall stand affirmed until the further order of the court, subject to be set aside, altered, amended or affirmed as it shall appear just.

§ 1088. **Decree dismissing libel for adultery.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS.: SUPERIOR COURT.

NO.....DIVORCE.

DECREE.

In the above-entitled libel for divorce, upon hearing, it is ordered and decreed that the libel be, and the same hereby is dismissed, for the reason that each party has been guilty of adultery as charged by the other.

By the Court.
George P. Drury,
Assistant Clerk.

(This form is taken from the original papers.)

§ 1089. **Dismissal of appeal from the probate court.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.: SUPERIOR COURT.

A. L. L., Petitioner.
v.
T. J. L., Respondent.

In the above-entitled petition wherein said T. J. L. of Boston in said County of Suffolk appealed from a decree of the Probate Court and for said County of Suffolk dated the ..... day of ....., 19.., in favor of his wife, A. L. L. Petitioner, whereby the Respondent T. J. L. was ordered to pay the Petitioner for the support of herself, ten dollars forthwith, and the further sum of five dollars each Thursday thereafter.

It is now ordered on the ..... day of ....., 19..., that said appeal be and the same hereby is dismissed and the decree of the Probate Court be and the same hereby is affirmed.

(This form was taken from the original papers.)

§ 1090. **Decree dismissing bill after cause has been heard by jury and allowing an appeal—Illinois.**

This cause having come on to be heard on the bill of complaint and the answer of the defendant thereto and the replication of the complaint to said answer, and the complainant having demanded that the said cause be tried by a jury, and a jury of twelve lawful men having been called, selected and sworn, and the said jury having heard the evidence of the respective parties and the argument of counsel in open court, and having been instructed by the court in writing as to the law of the case and having found by their verdict that the defendant was not guilty of deserting the complainant for the space of two years, as charged

in complainant's bill, and the complainant having interposed a motion in writing in this case to set aside the verdict and have a new trial, and the court having heard the arguments in that behalf and being fully advised in the premises, overruled said motion, and, the verdict of the jury being the judgment of the court:

It is therefore ordered, adjudged and decreed by the court that the complainant's bill be and the same is hereby dismissed and that the complainant shall pay all the costs of this suit.

And the complainant having prayed an appeal to the appellate court of the ..... district, of the state of Illinois, the said appeal is allowed upon said complainant's filing a bond with the clerk of this court, with security to be approved by the clerk of this court, in the penal sum of ..... dollars, conditioned for the prosecution of the said appeal with effect and without delay and the payment of the costs of said appeal in case they should be adjudged against her, and also upon the filing of a certificate of evidence, the said bond to be filed within forty days and the said certificate of evidence to be filed within sixty days after the entering of this decree.

....,
Judge.

§ 1091. **Decree dismissing libel, the marriage being void.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS.: SUPERIOR COURT.

NO..... DIVORCE.

A. R. G., Libelant,

v.

M. F. G., Libelee.

DECREE.

This cause came on to be heard, and was argued by counsel, and thereupon upon consideration thereof, it is ordered and decreed that the said libel be and the same hereby is dismissed for the reason that the marriage between the said A. R. G. and M. F. G. was void, being made by both parties, in evasion of the laws of this Commonwealth.

By the Court.

....., Assistant Clerk.

Dated at Boston the ..... day of ....., A. D., ...

(The above form is taken from the original papers.)

§ 1092. **Decree dismissing libel without prejudice.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.: SUPERIOR COURT.

NO. . . . . DIVORCE.

A. B.

v.

C. D.

Upon hearing the above-entitled libel for divorce, it is ordered and decreed that said libel be, and the same hereby is, dismissed without prejudice.

Dated the . . . . . day of . . . . . , A. D., 19. . . .

By the Court.

. . . . . , Clerk.

§ 1093. **Decree dismissing libel for want of jurisdiction.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.: SUPERIOR COURT.

NO. . . . . DIVORCE.

A. B.

v.

C. D.

DECREE.

This cause came on to be heard upon the plea to the jurisdiction and was argued by counsel, and thereupon upon consideration thereof, it is ordered, adjudged, and decreed that the plea to the jurisdiction be sustained, and that for that reason alone said libel be, and the same hereby, is dismissed.

Dated at Boston the . . . . . day of . . . . . , A. D. . . . .

By the Court.

. . . . . , Clerk.

§ 1094. **Decree dismissing cross-bill.**

This cause coming on to be heard and being submitted, the evidence of both parties hereto heard and considered, and the court being advised in the premises doth order adjudge and decree that the cross-bill of the defendant be, and the same is hereby dismissed.

It is further ordered that the said defendant in said cross-bill pay to the complainant in this cause so made by her to be taxed by the clerk.

§ 1095. **Decree for costs.**

"It is ordered that the libelee pay to the libelant, the costs of this suit, to be taxed, and that she have execution therefor, according to the course and practice of the court."

§ 1096. **Petition for alimony after divorce decree.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.: SUPERIOR COURT.

No. .....

....., Libelant,

v.

....., Libelee.

APPLICATION FOR ALLOWANCE.

Respectfully represents the libelee ..... that she believes that she has a defense to this libel and intends in good faith to contest it and to use for such defense any allowance made.

Wherefore she asks an allowance to enable her to defend the libel.

.....

Libelee.

I believe the above statement to be true.

.....

Libelee's Attorney.

§ 1097. **Petition for alimony after divorce—Massachusetts.**

(Omitting formal parts.)

Respectfully represents C. D. of Boston in the County of Suffolk, that on the ..... day of ....., A. D., ..., she was granted a decree of divorce, nisi, against A. B., of said Boston, with custody of the two minor children, E. D. and F. D. That at the time of the hearing on said libel, no payment of money was asked for by your libelant, either as alimony or for the support of children. At that time said A. B. was out of the commonwealth, and had little or no property of any value, so far as your petitioner knew, and your petitioner was then in fairly comfortable circumstances, she and her children being supported by her father and brothers. At the present time your petitioner is dependent upon her own exertions for her support, and said children are now of the ages of 14 and 12 years, and the expense of their maintenance and education has increased. The respondent has now secured employment, and is residing in

Boston, Massachusetts, and your petitioner is informed and believes that he is in receipt of an income of not less than three thousand dollars per year.

WHEREFORE she prays that the respondent be ordered to pay her a suitable allowance as alimony and for the support of said children.

.....

Petitioner.

§ 1098. **Order of reference to master to take proof as to permanent alimony to be allowed complainant.**

This cause having come on to be heard upon the bill of complaint herein the answer thereto, and the replication of the complainant to such answer on the motion of the solicitors for the complainant (or defendant to take the proofs of the respective parties as to the amount of permanent alimony which should be allowed the complainant, and the court having heard the arguments of the solicitors for the respective solicitors upon such motion, it is ordered that this cause be referred to ....., one of the Masters in Chancery in this court, to take such proofs after having given notice to the said parties respectively, of the time and place when and where such proofs will be taken; and cause to come before him such witnesses as the respective parties may desire, and as he may deem necessary, and to examine them separately on oath and reduce their testimony to writing (or typewritten through the aid of a stenographer) and report the same together with his conclusion thereon to the court.

It is further ordered, that the said master, in taking such testimony, inquire into and report to this court as to the value of the defendant's estate, both real and personal, and as to the amount of his monthly or annual income at the time of the commencement of this suit, and also the pecuniary necessities of the complainant and the situation and circumstances of both the complainant and defendant; and report what, in his judgment, would, under the circumstances as he so finds to exist, be a reasonable sum to be allowed to complainant for her support and maintenance, and the support and maintenance of such of the children of the marriage as may be decreed to be under her care and control; and that said master also inquire and report as to the time and manner in which said sums should be paid to the complainant.

§ 1099. **Master's report—Testimony.**

Now in pursuance of an order of this court in the above entitled cause entered on the ..... day of ....., ..., whereby it was referred to me, the undersigned master in chancery of the said court, to take the proof of the respective parties, and report the same to the court, after having given notice to the said parties respectively of the time and place when and where such proof will be taken, and cause to come before me such witnesses as the respective parties may desire, and as I may deem necessary, and to examine them separately on oath and reduce their testimony to writing (or typewriting through the aid of a stenographer) and report the same together with my conclusion to the court.

It is further ordered, that the said master, in taking such testimony, inquire into and report to this court as to the value of the defendant's estate, both real and personal, and as to the amount of his monthly or annual income at the time of the commencement of this suit, and also the pecuniary necessities of the complainant and the situation and circumstances of both the complainant and defendant; and report what, in my judgment, would, under the circumstances as I so find to exist, to be a reasonable sum to be allowed to complainant for her support and maintenance, and the support and maintenance of such of the children of the marriage as may be decreed to be under her care and control; and that said I also inquire and report as to the time and manner in which said sums should be paid to the complainant.

I, the said master, therefore make report of my acts and doings under said order as follows:

That I gave notice to the parties respectively of the time and place, when and where the proofs would be submitted and the testimony taken, at which time and place the solicitors for the said parties respectively appeared as also did all such witnesses as they or either of them desiring or made known to me thereupon. I did on the ..... day of ....., 19.., at my office in, etc., proceed to take the proofs of the respective parties; and the several witnesses so appearing after having been severally sworn and examined by me, touching the matters aforesaid whereupon I reduced their testimony to writing (or caused it to be typewritten through the aid of a stenographer), and I have attached the same hereto, and make the same a part of this report.

I would further report that the defendant has real estate of the

value of ..... dollars, the yearly income of which is about ..... dollars, that the personal property of the defendant is of the value of about .....; that he had at the time of the commencement of this suit and he has now a monthly (or annual) income of ..... dollars. I further report that ..... number of children of the complainant and defendant live with, and are entirely supported by the complainant (here give names, sex and age of children.)

I further report, that in my judgment the sum of ..... dollars a year, payable monthly, to be a suitable allowance for the present separate maintenance of the complainant; that it ought to be made payable from the commencement of this suit less such sums as she may have received as temporary alimony; and that such allowance ought to be made subject to be increased or decreased in the future, as circumstances may be shown to require.

That my fees herein amount to ..... dollars.

All of which I respectfully submit to this honorable court.

.....

Master of Chancery.

Dated, etc.

§ 1100. **Decree requiring security for payment of alimony.**

It is further ordered, adjudged, and decreed that to secure the payment of permanent alimony herein allowed, ... bank is hereby instructed and appointed a trustee to make and hold the following securities, to wit: The plaintiff shall forthwith issue to said bank a mortgage or trust on (here describe real estate), and shall forthwith deposit with said bank ..... dollars face value of good notes secured by good real estate mortgages.[8]

§ 1101. **Decree for permanent alimony.**

This cause again coming on to be heard, as to the allowance of alimony to be paid by the defendant to the complainant upon the bill of complaint herein, in answer thereto, the replication of the complainant to such answer, and the proofs taken in said cause and the testimony introduced and heard in open court; and the court having heretofore rendered a decree in said cause, dissolving a marriage between the complainant and defendant, and

[8]This decree is approved in Maxwell v. Sawyer, 90 Wis. 352, 63 N. W. 283.

having reserved the consideration of the question of alimony; and the counsel for the respective parties having been heard, and the court being fully advised in the premises, and on consideration thereof:

It is ordered, adjudged, and decreed by the court that the defendant pay to the complainant the sum of ..... dollars, during each and every year, commencing on, etc., and payable quarterly in advance, until further order by this court; and that the defendant pay the costs of this suit to be taxed by the clerk of this court, within ..... days from the rendition of this decree; and that in default of the payment of any of said sums, in the manner, and at the times herein provided, that execution issue therefor.

It is further ordered, adjudged, and decreed by the court that this decree shall be and remain a lien upon all the land and tenements of the defendant until the defendant shall execute a good and sufficient mortgage upon his real estate, or so much thereof as may be necessary to secure the prompt payment of the sums herein ordered to be paid, and such mortgage be approved by the court, or under its direction.

Another form.

It is further ordered, adjudged and decreed that the defendant pay to the plaintiff (or to the clerk of the court), the sum of ..... dollars on the first day of ....., 19.., and on the first day of each and every month thereafter for her support and maintenance during her natural life or until she shall again marry; such sums not to be in lieu of her right of dower in the defendant's real estate or in lieu of her interests in the personal estate of said defendant in case of his death intestate. It is further ordered that the defendant give security to the clerk of this court to be approved by said clerk (or by this court), for the payment of said alimony, and the said allowance for the support of said children.

It is further ordered and adjudged that in case the defendant fails to make the said payments as provided herein, the clerk of said court shall issue upon the request of the plaintiff, execution for the collection of payments then due.

It is further ordered that this decree may hereafter be modified upon the application of either of the parties to this action, in case of a change in the circumstances of either.

§ 1102. **Decree for permanent alimony with lien upon real estate.**

And it is further ordered, adjudged, and decreed that the aggregate sum ordered to be paid by the defendant herein, to wit: sum of ..... dollars, consisting of ..... dollars to be paid to the plaintiff as her counsel fees in this action, the sum of ..... as her costs herein, and the sum of ..... dollars in full for all future alimony for the support of herself and ..... and ....., her minor children and that said aggregate sum be and the same is hereby declared a lien on the following described real property which is hereby declared to belong to the defendant (description of property). That all of the said sums may be paid to the parties entitled thereto, or to the clerk of this court for their use, and if the same be not paid, and the receipt therefor filed with the said clerk within ..... days from the date of this decree, execution or order of sale of the said property may issue thereon, on demand of the plaintiff, under which execution of order of sale the said real estate, or, so much thereof as will satisfy plaintiff's demand, to wit:..... dollars, may be sold in the manner prescribed by law for the sale of real property under execution.

§ 1103. **Agreement to sustain decree of probate court.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.: SUPERIOR COURT.
DIVORCE NO.....

L. B. C., Petitioner,
v.
F. T. C., Respondent.

DECREE.

Braley, J.

This cause came on to be heard and upon the agreement of the parties it is not ordered, adjudged and decreed that the appeal of the respondent F. T. C. be, and the same hereby is sustained. that the petition of the said L. B. C. be and the same hereby is dismissed and remanded to the probate court.

By the Court.
....., Assistant Clerk.

(This form is taken from the original papers.)

§ 1104. **Agreement to modify decree.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.: SUPERIOR COURT.
No. ..... LIBEL FOR DIVORCE.
A. B.
v.
C. D.

In the above-named case it is agreed that the decree heretofore entered therein may be modified substantially as follows:

Whereas, ..., the libelee in said action, has this day paid to ....., the libelant, the sum of $....., it is ordered and decreed that said sum of $..... shall be and is in full of all costs and expenses of said suit, also of all arrears of alimony that are now due and unpaid, and of any sum or sums ordered and decreed to be paid for the support and maintenance of the minor child of said parties, that are now due and unpaid, according to the former order of the court, and for all future alimony and also for all past and future expenses of maintaining said minor child and in all other respects said decree is affirmed.

.....
Atty. for Libelant.

.....
Atty. for Libelee.

§ 1105. **Order to modify decree.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.: SUPERIOR COURT.
Divorce No. .....

M. A. A., Petitioner,
v.
W. H. A., Respondent.

In the above entitled petition it is ordered, adjudged and decreed that the decree heretofore entered on the ..... day of ....., 19..., in the libel for divorce numbered ..... of ....., between the said petitioner as libelant and the said respondent as libelee, be, and the same hereby is modified as set forth in the agreement of the parties, which is hereto annexed and made a part of this decree, and in all other respects said decree of ....., 19..., is affirmed.

By the Court.
....., Assistant Clerk.

Dated at Boston the ..... day of ....., A. D.....
(This form is taken from the original papers.)

§ 1106. **Petition to modify decree for alimony—Husband's petition to reduce.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.: SUPERIOR COURT.

To the Honorable the Justices of the Superior Court to be holden at Boston, within and for the County of Suffolk:

Respectfully represents A. B. of Boston in the County of Suffolk that upon granting a decree of divorce, nisi, granted in favor of C. B. of said Boston, against your petitioner on the ..... day of ....., A. D. ....., which decree nisi has since become absolute, this court ordered your petitioner to pay to said C. B. the sum of ten dollars per week, as alimony.

That at the time said decree was made your petitioner was receiving an income of twenty-five dollars per week, and said C. B. was without visible means of support; but at the present time your petitioner is out of employment, and has no property and no income except a pension of twenty dollars per month, and is wholly unable to pay said alimony, and said C. B. has recently come into an income of about three hundred dollars per year by inheritance.

WHEREFORE your petitioner prays that said decree as to alimony may be modified by reducing said alimony materially, or to a nominal sum, or by discontinuing the same altogether.

.....
Petitioner.

§ 1107. **Motion to transfer suit to another county.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.: SUPERIOR DIVORCE COURT.

A. B.

v. Divorce No. ....

C. B.

MOTION.

And now comes the libelant (or libelee) and moves the Honorable Court that ..... may be allowed to transfer the above-entitled action to the County of ....., inasmuch as the libel was brought in the wrong county.

.....
Clerk.

§ 1108. **Order directing issue to be tried by a jury.**

It is hereby ordered and adjudged that upon the pleadings filed in this cause, the following issues of fact be submitted to and tried by the jury, to wit:

(1) Has the defendant committed adultery subsequently to his marriage with the complainant in manner and form as charged in the complaint?

(2) Has the defendant been guilty of extreme and repeated cruelty (or such other cruelty as the statute in each particular state provides) to the complainant in manner and form as charged in the complaint?

§ 1109. **Certificate of decree of divorce—Absolute.**

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS.:

I hereby certify that at the Supreme Court holden at Boston, within and for the County of Suffolk, on the ..... day of ..... A. D., ..., a divorce from the bond of matrimony—nisi—was decreed by the court between .... of ....., libelant, and ..... of ....., libelee, in favor of said libelant, for the cause which is fully set forth in the libel on file in said court to wit:

....

to become absolute after the expiration of six months, unless the court shall have for sufficient cause an application of any party interested, otherwise ordered.

And on the ..... day of ....., A. D. ....., the said six months having expired, and the court not having otherwise ordered, said decree becomes absolute.

In testimony whereof I have hereunto set my hand, and affixed the seal of said court, at Boston, this ..... day of ....., A. D. .....

.....

Clerk.

§ 1110. **Order of court for the examination of person alleged to be impotent.**

STATE OF VERMONT.

COUNTY OF ESSEX. COUNTY COURT.

Le Barron

v. Divorce.

Le Barron

ORDER OF THE COURT.

It is ordered, this ..... day of ....., 19.., by the court that a commissioner be appointed to take the proofs in relation to the alleged impotency of the defendant at the time of the said marriage between the said ..... and the petitioner.

And it is further ordered that the defendant submit .....self to a personal examination by such physicians and surgeons, and at such time and under such regulations as shall be selected and prescribed by the said commissioner, for the purpose of determining the truth of the said allegation in said petition.

The commissioner will select such number of competent and disinterested physicians and surgeons, and prescribe such rules and regulations for such examination so as to secure the utmost fairness, and will report all his proceedings in relation thereto with the evidence of all such medical examiners as to the facts and results of said examination, and return the same, together with other proofs taken by him, to the court.

(This form is taken from LeBarron v. LeBarron, 35 Vt. 365, at page 372.

§ 1111. **Affidavit of physician that witness is unable to attend court.**

KNOW ALL MEN BY THESE PRESENTS.

That I, ..., of ..... in the County of ..... and Commonwealth of Massachusetts, depose and say that I am a duly registered physician and surgeon, practicing in ....., in the County of ....., and with an office at ..... street, that I have been and at present am the regular attending physician of ....., that I have attended ..... frequently during the past ..... weeks, that on ..... 19.., at the ..... Hospital in ....., in the County of ....., a surgical operation of a delicate and serious nature was performed upon ..... that at the time said operation was performed, I was present and assisted in performing it, that at the present time the said ..... was a patient at the ..... Hospital and is under medical treatment and care, and I still attend h.... and attended h.... on ....., that .... is still confined in .... bed and is not able and does not sit up in bed.

I further depose and say that in my opinion it will not be safe or proper for h.... to leave the hospital for at least ..... from the present time, that ..... is still in an extremely nervous

state and for ..... recovery should be kept quiet, free from noise and excitement, and subject to no mental or physical strain.

Boston, ... 19...

Then personally appeared the above-named ..... and made oath that the foregoing affidavit subscribed by him is true.

Before me .....

Notary Public.

§ 1112. **Petition for writ of protection.**

"Your petitioner says that he is not a resident of the Commonwealth of Massachusetts; that he is here temporarily for the purpose of attending the trial of the divorce case of ..... v. ....., No. ....., in which he is the libelant, now on the short list in said court, and undisposed of; that said suit has not been commenced collusively, but was commenced and is conducted in good faith in every respect; that he apprehends his arrest for debt, and prays that this court may issue a writ of protection in his behalf."

Subscribed and sworn to before me the ..... day of ....., A. D. .....

.....

Justice of the Peace.

§ 1113. **Marriage settlement.**

Indenture made this ..... day of ....., 19.., by and between ....., of ..... (intended wife), of the first part; ....., of ..... (trustee), of the second part; and ....., of said ..... (intended husband), of the third part, witnesseth:

Whereas, a marriage is intended between the said parties of the first and third parts; and whereas, said party of the first part is the owner of certain property, chattels, and choses in action, being of the value of about ..... dollars, a schedule of which is to be hereunto annexed, or to be annexed to one or more parts of these presents, and may be referred to as a part of this instrument, she, the said party of the first part, with the consent and approbation of said party of the third part expressed by his executing these presents, is desirous of transferring said property to said party of the second part, in trust for the uses and purposes hereinafter declared of and concerning the same: Now, therefore, in consideration of the premises, and of one dollar to her

paid by said party of the second part, the receipt of which is hereby acknowledged, the said party of the first part doth hereby sell, assign, and transfer to the party of the second part the property hereinbefore named and in said schedule contained: To have and to hold the same to him, the said party of the second part, his executors, administrators, and assigns to his and their own use and behoof, forever. In trust, however, for the following uses and purposes, namely:

1. To hold, manage, and improve said property, with authority to change the investment of the same or any part thereof, and reinvest the proceeds from time to time, and the net amount of all dividends, income, and interest of said fund, as well of the original fund as of any proceeds thereof, after deducting all incidental charges and expenses, with a reasonable compensation to said trustee for his services, to pay over to her the said party of the first part until the solemnization of said intended marriage.

2. From and after the solemnization of said intended marriage, and during the joint lives of said parties of the first and third parts, the said party of the second part shall collect and receive all the dividends, income, and interest of said trust fund, and of any funds which may be substituted therefor, and shall pay the net amount which may remain, after deducting all incidental expenses and charges and his compensation for services, to the said party of the first part, upon her sole and separate receipt therefor, for her sole and separate use and benefit, free from the control and interference of the said party of the third part, or any one claiming through or under him.

3. In case said party of the first part shall survive said party of the third part, the whole of said fund and property which shall then remain, with any accumulation thereof then not already appropriated as herein directed, shall be reconveyed by said party of the second part, or any person who may then be legally acting as trustee, to said party of the first part, to hold in the same manner as absolutely as if these presents had not been made.

4. In case of the death of said party of the first part during coverture, said party of the second part, or his successor in said trust, shall assign and transfer all of said fund that may then remain, together with the proceeds thereof, principal as well as interest, and any income therefrom then remaining, to such per-

son or persons, and for such uses and purposes, as she, the said party of the first part, may, by her last will and testament, direct or appoint; and for want of such last will and testament the party of the second part, or his successor in said trust, shall assign and transfer all of said fund then remaining, together with its proceeds and income, to the lawful issue of the party of the first part, share and share alike, the lawful issue of any deceased child to take by right of representation; and for want of such lawful issue to said party of the third part, to have and to hold the same to him and his representatives, and to his and their use, forever.

5. The party of the second part hereby accepts the said trust, and covenants that he will execute the same with all due fidelity, it being, however, understood that he is not to be held accountable or liable for any mere errors of judgment in the execution of said trust. It is also understood that said party of the second part may at any time resign said trust, and further, that he shall so resign whenever requested thereto in writing by the party of the first part; and in case of his decease or disability before the full execution of said trust, said party of the first part, if living, is to nominate and appoint a successor in the trust; or in case of her decease, then the successor in said trust may be appointed by the judge of probate for said county of ....., and so from time to time as vacancies may occur; and the person or persons so appointed shall have all the rights and powers, and be subject to all the liability, to which they would have been subject had they been originally named as party of the second part in these presents.

6. Said party of the third part hereby expresses his assent to, and approbation of, this indenture, and the provisions thereof, and hereby covenants that he will not in any manner, directly or indirectly, interfere with the due execution of the trusts herein declared.

In witness, etc.

§ 1114. **Deed of wife confirming marriage settlement made during infancy.**

This agreement, made this ..... day of ....., 19.., between ....., of ....., hereinafter called the wife; ....., of ....., hereinafter called the husband, and ....., of ....., hereinafter called the trustee, witnesseth:

Whereas, a marriage settlement was made by said husband and wife on the ..... day of ....., 19.., before said wife had attained the age of twenty-one years;

And whereas, said wife has since attained the age of twenty-one years on the ..... day of ...., 19.., and has now agreed to confirm said settlement:

Now, therefore, the said wife, in consideration of the premises, with the approbation of the said husband, hereby confirms the settlement made on the ..... day of ....., 19.., whereby she conveyed to said trustee the hereditaments and premises therein described upon the trusts and powers therein contained, to the intent that the said indenture shall take effect in the same manner in all respects as if the wife had been of full age at the date of said settlement. Therefore, the said wife, with the approbation of the said husband, hereby grants unto said trustees all the within-described premises situated in the town of ....., county of ....., and the state of ....., to have and to hold the same to the use of the said trustees, their heirs, and assigns, upon the trusts and subject to the powers and provisos declared and contained in said marriage settlement, so far as the same are capable of taking effect.

In witness, etc.

§ 1115. **Antenuptial agreement.**

This agreement made this ..... day of ....., 19.., between ..... of ....., hereinafter called the party of the first part, and ..... of ....., hereinafter called the party of the second part, witnesseth:

Whereas, the parties hereto contemplate a marriage with each other, and the party of the first part is seized and possessed of property of value, both real and personal, and desires to make suitable provision for the party of the second part in lieu of dower in his real property and in lieu of any disposition of his personal estate, and any rights or claims which the party of the second part may make as widow, heir, survivor, or next of kin.

Now, therefore, in consideration of said marriage, of the love and affection which said party of the first part bears unto said party of the second part, and of the covenants hereinafter contained, the said party of the first part hereby agrees to pay to said party of the second part immediately after the solemnization

of said intended marriage, the sum of ..... dollars, the same to be and to become her sole and separate property.

In consideration of the payment to her of the said sum, the party of the second part agrees that she will accept the same in lieu of any and all rights or claims of dower, inheritance and descent in and to the real property of the first party now owned or hereafter acquired, and in lieu of any and all rights or claims to a distributive share of his personal estate, now owned or hereafter acquired, and in lieu of any and all other claims which may arise or accrue to her by reason of said marriage; and the party of the second part hereby releases, remises and relinquishes unto said party of the first part, his heirs, executors, administrators, and assigns forever, all the interests, rights and claims herein set out.

And the said party of the second part further agrees to execute and acknowledge upon request of the party of the first part, any and all proper instruments of release or conveyance in order to enable the party of the first part to sell and convey real estate now owned or hereafter to be acquired free and clear of any apparent right of dower.

In witness thereof, the said parties have hereunto set their hands and seals the day and year above written.
(Add acknowledgment.)

§ 1116. **Separation agreement.**

This agreement, made this ..... day of ....., 19.., between ....., of ....., hereinafter called the husband, and ....., of ..... hereinafter called the wife, witnesseth:

Whereas, disputes have arisen between said husband and wife, on account of which they are separated and now live apart, and intend to live apart from each other during the remainder of their natural lives;

Now, therefore, in settlement, adjustment, and in compromise of all property questions and rights, the said husband does hereby assign, convey, transfer and set over unto said wife all the household furniture in the residence lately occupied by said party, and has by good and sufficient deed of even date herewith conveyed unto—, as trustee, the following described property: (here insert description of the premises) with the express stipulation that said ..... shall convey the same to said wife in consideration that said wife does hereby release and discharge said husband

from all obligation of support and from all other claims, rights, and duties arising out of said marital relation. Said parties mutually agree that each may freely sell or otherwise dispose of his or her own property, by gift, deed, or will, without in any wise incumbering the rights of the other. And each party is hereby barred from any and all rights or claims by way of dower, curtesy, inheritance, descent, distribution, or any rights that may arise out of said property.

And each party releases and relinquishes to the other and to the heirs, executors, administrators, and assigns, thereof, all claims or rights of dower or inheritance in and to all real property of the other, whether now owned or hereafter acquired.

Each party also agrees, upon the request of the other, to execute and acknowledge any and all deeds or instruments of release or conveyance in order to enable such other to sell, convey, or otherwise dispose of his or her own real property, free from any apparent right of interest therein.

In witness, etc.

§ 1117. Deed of separation—Another form.

This agreement, made, etc. (parties as in the last form).

1. The said husband and wife hereby mutually agree to separate and live apart from each other during the remainder of their matrimonial obligation, unless they should mutually agree to vacate this agreement.

2. It shall be lawful for the said wife to reside at such place or places, and with such relations, friends and other persons, except immoral persons, as she shall from time to time think fit; and to exercise, carry on, or conduct any trade, business, or employment which she, notwithstanding coverture, shall think fit, for her own sole and separate use and benefit, without any manner of control, restraint, or interference, direct or indirect, by her said husband, or through his means of procurement, and in all respects as if she were sole and unmarried.

3. So long as this agreement on the part of the said husband shall be duly performed, she will not, at any time hereafter, contract any debt or debts, charge, or liability whatever, for which the said husband shall or may be or become personally liable or answerable; and neither she, nor any other person or persons on her behalf, or with her authority, consent, or procurement, shall or will institute any action or civil process, or proceeding what-

ever, against the said husband, either for a divorce, judicial separation, alimony, or for any other purpose whatever, except for personal injuries or wrongs.

4. The receipts in writing of the said wife shall, notwithstanding coverture, be effectual discharges as well for the respective sums which shall be paid to her by virtue hereof, as also for any other sum or sums of money, articles, or things, which she might become entitled to or receive as aforesaid.

5. The said husband, in consideration of the said arrangement, hereby further agrees with the said trustees that, so long as the said separation continues, and his said wife shall live chaste, he will not, in any manner or at any time, molest, disturb, interrupt, or interfere with his said wife; or receive or claim any money, not being his own, furniture, effects, apparel, jewels, trinkets, or other property, which she may earn, or be or hereafter become possessed of, in any manner howsoever, or any part thereof.

6. That she shall or may, notwithstanding coverture, retain, use, and enjoy the same for her own sole and separate use and benefit; and sell and dispose of, or give or bequeath the same, or any part or parts thereof, either in her lifetime or by her last will in writing, or any codicil thereto, or otherwise as fully and effectually, in all respects, as if she were sole and unmarried.

7. And also that he will pay, or cause to be paid, in advance unto the said trustee, or other the trustee acting for her by virtue hereof, during the life of and for the use and benefit of his said wife, if she shall so long continue to live chaste, separate, and apart from him, as aforesaid, the full sum of ..... dollars, weekly and every week, for her maintenance, clothing, and other necessaries, and for her own sole use and benefit, and will make the first payment thereof on the ..... day of ..... next.

8. And it is further mutually stipulated and agreed that if the said wife, or any person or persons on her behalf, either with or without her authority or consent, shall institute any process or proceeding whatever against him, the said husband, either to compel or induce him to pay or allow her any further alimony, or to make her any additional allowance for maintenance or otherwise than that before mentioned, or for a divorce or judicial separation, or for any other purpose whatever, except in cases of personal injuries or wrong; or if he shall at any time

hereafter be sued, or required by any other person to pay any debt or debts, charge, or liability contracted by her, the said wife, without his consent in writing; or if he shall, by or through her consent or procurement, be otherwise annoyed or molested by or on her account; of if she shall not observe and perform the stipulations and agreements on her part hereinbefore contained, then, and in either of such cases, this agreement shall, at the option of the said husband, thenceforth become void, without prejudice, however, to any right which shall have then accrued to either party under or by virtue hereof.

In witness, etc.

APPENDIX

HADDOCK v. HADDOCK.

201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. 525, 5 Ann. Cas. 1.

Where a divorce is decreed by a State to a person *bona fide* domiciled therein and no service has been made on the libellee, who is not resident in such State, otherwise than by publication, and the parties have never lived together in such State, the State of the libellee is not bound by the Constitution of the United States to give full faith and credit to such divorce, but may grant a divorce to the libellee notwithstanding.

BROWN, HARLAN, BREWER and HOLMES, JJ., dissenting.

In reaching this conclusion the court lays down the following propositions.

First. The requirement of the Constitution is not that some, but that full faith and credit shall be given by States to the judicial decrees of other States. That is to say, where a decree rendered in one State is embraced by the full faith and credit clause that constitutional provision commands that the other States shall give to the decree the force and effect to which it was entitled in the State where rendered. Harding v. Harding, 198 U. S. 317, 49 L. ed. 1066.

Second. Where a personal judgment has been rendered in the courts of a State against a non-resident merely upon constructive service and, therefore, without acquiring jurisdiction over the person of the defendant, such judgment may not be enforced in another State in virtue of the full faith and credit clause. Indeed, a personal judgment so rendered is by operation of the due process clause of the Fourteenth Amendment void as against the non-resident, even in the State where rendered, and, therefore, such non-resident in virtue of rights granted by the Constitution of the United States may successfully resist even in the State where rendered, the enforcement of such a judgment. Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565.

Third. The principles, however, stated in the previous proposition are controlling only as to judgment in personam and do not relate to proceedings in rem. That is to say, in consequence of the authority which government possesses over things within its borders there is jurisdiction in a court of a State by a proceeding in rem, after the giving of reasonable opportunity to the owner to defend, to affect things within the jurisdiction of the court, even although jurisdiction is not directly acquired over the person of the owner of the thing. Pennoyer v. Neff, supra.

Fourth. The general rule stated in the second proposition is, moreover, limited by the inherent power which all governments must possess over the marriage relation, its formation and dissolution, as regards their own citizens. From this exception it results that where a court of one State, conformably to the laws of such State, or the State through its legislative department, has acted concerning the dissolution of the marriage tie, as to a citizen of that State, such action is binding in that State as to such citizen, and the validity of the judgment may not therein be questioned on the ground that the action of the State in dealing with its own citizen concerning the marriage relation was repugnant to the due process clause of the Constitution. Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654.

Fifth. It is no longer open to question that where husband and wife are domiciled in a State there exists jurisdiction in such State, for good cause, to enter a decree of divorce which will be entitled to enforcement in another State by virtue of the full faith and credit clause. It has, moreover, been decided that where a bona fide domicil has been acquired in a State by either of the parties to a marriage, and a suit is brought by the domiciled party in such State for a divorce, the courts of that State, if they acquire personal jurisdiction also of the other party, have authority to enter a decree of divorce, entitled to be enforced in every State by the full faith and credit clause. Cheever v. Wilson, 9 Wall. 108, 19 L. ed. 604.

Sixth. Where the domicil of matrimony was in a particular State, and the husband abandons his wife and goes into another State in order to avoid his marital obligations, such other State to which the husband has wrongfully fled does not, in the nature of things, become a new domicil of matrimony, and, therefore, is not to be treated as the actual or constructive domicil of the wife; hence, the place where the wife was domiciled when so abandoned constitutes her legal domicil until a new actual domicil be by her elsewhere acquired. This was clearly expressed in Barber v. Barber, 21 How. 582, 16 L. ed. 226.

Seventh. So also it is settled that where the domicil of a husband is in a particular State, and that State is also the domicil of matrimony, the courts of such State having jurisdiction over the husband may, in virtue of the duty of the wife to be at the matrimonial domicil, disregard an unjustifiable absence therefrom, and treat the wife as having her domicil in the State of the matrimonial domicil for the purpose of the dissolution of the marriage, and as a result have power to render a judgment dissolving the marriage which will be binding upon both parties, and will be entitled to recognition in all other States by virtue of the full faith and credit clause. Atherton v. Atherton, 181 U. S. 155, 45 L. ed. 794.

Mr. Justice White delivered the opinion of the Court.

The plaintiff in error will be called the husband and the defendant in error the wife.

The wife, a resident of the State of New York, sued the husband in that State in 1899, and there obtained personal service upon him. The complaint charged that the parties had been

married in New York in 1868, where they both resided and where the wife continued to reside, and it was averred that the husband, immediately following the marriage, abandoned the wife, and thereafter failed to support her, and that he was the owner of property. A decree of separation from bed and board and for alimony was prayed. The answer admitted the marriage, but averred that its celebration was procured by the fraud of the wife, and that immediately after the marriage the parties had separated by mutual consent. It was also alleged that during the long period between the celebration and the bringing of this action the wife had in no manner asserted her rights and was barred by her laches from doing so. Besides, the answer alleged that the husband had, in 1881, obtained in a court of the State of Connecticut a divorce which was conclusive. At the trial before a referee the judgment roll in the suit for divorce in Connecticut was offered by the husband and was objected to, first, because the Connecticut court had not obtained jurisdiction over the person of the defendant wife, as the notice of the pendency of the petition was by publication and she had not appeared in the action; and, second, because the ground upon which the divorce was granted, viz., desertion by the wife, was false. The referee sustained the objections and an exception was noted. The judgment roll in question was then marked for identification and forms a part of the record before us.

Having thus excluded the proceedings in the Connecticut court, the referee found that the parties were married in New York in 1868, that the wife was a resident of the State of New York, that after the marriage the parties never lived together, and shortly thereafter that the husband without justifiable cause abandoned the wife, and has since neglected to provide for her. The legal conclusion was that the wife was entitled to a separation from bed and board and alimony in the sum of $780 a year from the date of the judgment. The action of the referee was sustained by the Supreme Court of the State of New York, and a judgment for separation and alimony was entered in favor of the wife. This judgment was affirmed by the Court of Appeals As by the law of the State of New York, after the affirmance by the Court of Appeals, the record was remitted to the Supreme Court, this writ of error to that court was prosecuted.

The Federal question is, Did the court below violate the Constitution of the United States by refusing to give to the decree

of divorce rendered in the State of Connecticut the faith and credit to which it was entitled?

As the averments concerning the alleged fraud in contracting the marriage and the subsequent laches of the wife are solely matters of state cognizance, we may not allow them to even indirectly influence our judgment upon the Federal question to which we are confined, and we, therefore, put these subjects entirely out of view. Moreover, as, for the purpose of the Federal issue, we are concerned not with the mere form of proceeding by which the Federal right, if any, was denied, but alone have power to decide whether such right was denied, we do not inquire whether the New York court should preferably have admitted the record of the Connecticut divorce suit, and, after so admitting it, determine what effect it would give to it instead of excluding the record and thus refusing to give effect to the judgment. In order to decide whether the refusal of the court to admit in evidence the Connecticut decree denied to that decree the efficacy to which it was entitled under the full faith and credit clause, we must first examine the judgment roll of the Connecticut cause in order to fix the precise circumstances under which the decree in that cause was rendered.

Without going into detail, it suffices to say that on the face of the Connecticut record it appeared that the husband, alleging that he had acquired a domicil in Connecticut, sued the wife in that State as a person whose residence was unknown, but whose last known place of residence was in the State of New York, at a place stated, and charged desertion by the wife and fraud on her part in procuring the marriage; and, further, it is shown that no service was made upon the wife except by publication and by mailing a copy of the petition to her at her last known place of residence in the State of New York.

With the object of confining our attention to the real question arising from this condition of the Connecticut record, we state at the outset certain legal propositions irrevocably concluded by previous decisions of this court, and which are required to be borne in mind in analyzing the ultimate issue to be decided.

First. The requirement of the Constitution is not that some, but that full faith and credit shall be given by States to the judicial decrees of other States. That is to say, where a decree rendered in one State is embraced by the full faith and credit

clause that constitutional provision commands that the other States shall give to the decree the force and effect to which it was entitled in the State where rendered. Harding v. Harding, 198 U. S. 317.

Second. Where a personal judgment has been rendered in the courts of a State against a non-resident merely upon constructive service and, therefore, without acquiring jurisdiction over the person of the defendant, such judgment may not be enforced in another State in virtue of the full faith and credit clause. Indeed, a personal judgment so rendered is by operation of the due process clause of the Fourteenth Amendment void as against the non-resident, even in the State where rendered, and, therefore, such non-resident in virtue of rights granted by the Constitution of the United States may successfully resist even in the State where rendered, the enforcement of such a judgment. Pennoyer v. Neff, 95 U. S. 714. The facts in that case were these: Neff, who was a resident of a State other than Oregon, owned a tract of land in Oregon. Mitchell, a resident of Oregon, brought a suit in a court of that State upon a money demand against Neff. The Oregon statutes required, in the case of personal action against a non-resident, a publication of notice, calling upon the defendant to appear and defend, and also required the mailing to such defendant at his last known place of residence of a copy of the summons and complaint. Upon affidavit of the absence of Neff, and that he resided in the State of California, the exact place being unknown, the publication required by the statute was ordered and made, and judgment by default was entered against Neff. Upon this judgment execution was issued and real estate of Neff was sold and was ultimately acquired by Pennoyer. Neff sued in the Circuit Court of the United States for the District of Oregon to recover the property, and the question presented was the validity in Oregon of the judgment there rendered against Neff. After the most elaborate consideration it was expressly decided that the judgment rendered in Oregon under the circumstances stated was void for want of jurisdiction and was repugnant to the due process clause of the Constitution of the United States. The ruling was based on the proposition that a court of one State could not acquire jurisdiction to render a personal judgment against a non-resident who did not appear by the mere publication of a summons, and that the want of power to acquire such jurisdiction by publication

could not be aided by the fact that under the statutes of the State in which the suit against the non-resident was brought the sending of a copy of the summons and complaint to the post office address in another State of the defendant was required and complied with. The court said (p. 727):

"Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State and process published within it are equally unavailing in proceedings to establish his personal liability."

And the doctrine thus stated but expressed a general principle expounded in previous decisions. Bischoff v. Wethered, 9 Wall. 812. In that case, speaking of a money judgment recovered in the Common Pleas of Westminster Hall, England, upon personal notice served in the city of Baltimore, Mr. Justice Bradley, J., speaking for the court said (p. 814):

"It is enough to say of this proceeding that it was wholly without jurisdiction of the peson, and whatever validity it may have in England, by virtue of statute law against property of the defendant there situate, it can have no validity here, even of a prima facie character. It is simply null."

Third. The principles, however, stated in the previous proposition are controlling only as to judgments in personam and do not relate to proceedings in rem. That is to say, in consequence of the authority which government possesses over things within its borders there is jurisdiction in a court of a State by a proceeding in rem, after the giving of reasonable opportunity to the owner to defend, to affect things within the jurisdiction of the court, even although jurisdiction is not directly acquired over the person of the owner of the thing. Pennoyer v. Neff, supra.

Fourth. The general rule stated in the second proposition is, moreover, limited by the inherent power which all governments must possess over the marriage relation, its formation and dissolution, as regards their own citizens. From this exception it results that where a court of one State, conformably to the laws of such State, or the State through its legislative department, has acted concerning the dissolution of the marriage tie, as to a citizen of that State, such action is binding in that State as to such citizen,

and the validity of the judgment may not therein be questioned on the ground that the action of the State in dealing with its own citizen concerning the marriage relation was repugnant to the due process clause of the Constitution. Maynard v. Hill, 125 U. S. 190. In that case the facts were these: Maynard was married in Vermont, and the husband and wife removed to Ohio, from whence Maynard left his wife and family and went to California. Subsequently he acquired a domicil in the Territory of Washington. Being there so domiciled, an act of the legislature of the Territory was passed granting a divorce to the husband. Maynard continued to reside in Washington, and there remarried and died. The children of the former wife, claiming in right of their mother, sued in a court of the Territory of Washington to recover real estate situated in the Territory, and one of the issues for decision was the validity of the legislative divorce granted to the father. The statute was assailed as invalid, on the ground that Mrs. Maynard had no notice and that she was not a resident of the Territory when the act was passed. From a decree of the Supreme Court of the Territory adverse to their claim the children brought the case to this court. The power of the territorial legislature, in the absence of restrictions in the organic act, to grant a divorce to a citizen of the Territory was, however, upheld, in view of the nature and extent of the authority which government possessed over the marriage relation. It was therefore decided that the courts of the Territory committed no error in giving effect within the Territory to the divorce in question. And as a corollary of the recognized power of a government thus to deal with its own citizen by a decree which would be operative within its own borders, irrespective of any extraterritorial efficacy, it follows that the right of another sovereignty exists, under principles of comity, to give to a decree so rendered such efficacy as to that government may seem to be justified by its conceptions of duty and public policy.

Fifth. It is no longer open to question that where husband and wife are domiciled in a State there exists jurisdiction in such State, for good cause, to enter a decree of divorce which will be entitled to enforcement in another State by virtue of the full faith and credit clause. It has, moreover, been decided that where a bona fide domicil has been acquired in a State by either of the parties to a marriage, and a suit is brought by the domiciled party in such State for a divorce, the courts of that

State, if they acquire personal jurisdiction also of the other party, have authority to enter a decree of divorce, entitled to be enforced in every State by the full faith and credit clause. Cheever v. Wilson, 9 Wall. 108.

Sixth. Where the domicil of matrimony was in a particular State, and the husband abandons his wife and goes into another State in order to avoid his marital obligations, such other State to which the husband has wrongfully fled does not, in the nature of things, become a new domicil of matrimony, and, therefore, is not to be treated as the actual or constructive domicil of the wife; hence, the place where the wife was domiciled when so abandoned constitutes her legal domicil until a new actual domicil be by her elsewhere acquired. This was clearly expressed in Barber v. Barber, 21 How. 582, where it was said (p. 595):

"The general rule is, that a voluntary separation will not give to the wife a different domiciliation in law from that of her husband. But if the husband, as is the fact in this case, abandons their domicil and his wife, to get rid of those conjugal obligations which the marriage relation imposes upon him, neither giving to her the necessaries nor the comforts suitable to their condition and his fortune, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone makes his domicil hers. . ."

And the same doctrine was expressly upheld in Cheever v. Wilson, supra, where the court said (9 Wall. 123):

"It is insisted that Cheever never resided in Indiana; that the domicil of the husband is the wife's, and that she cannot have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicil whenever it is necessary or proper that she should do so. The right springs from the necessity of its exercise, and endures as long as the necessity continues."

Seventh. So also it is settled that where the domicil of a husband is in a particular State, and that State is also the domicil of matrimony, the courts of such State having jurisdiction over the husband may, in virtue of the duty of the wife to be at the matrimonial domicil, disregard an unjustifiable absence therefrom, and treat the wife as having her domicil in the State of the matrimonial domicil for the purpose of the dissolution of the marriage, and as a result have power to render a judgment dis-

solving the marriage which will be binding upon both parties, and will be entitled to recognition in all other States by virtue of the full faith and credit clause. Atherton v. Atherton, 181 U. S. 155.

Coming to apply these settled propositions to the case before us three things are beyond dispute: a. In view of the authority which government possesses over the marriage relation, no question can arise on this record concerning the right of the State of Connecticut within its borders to give effect to the decree of divorce rendered in favor of the husband by the courts of Connecticut, he being at the time when the decree was rendered domiciled in that State. b. As New York was the domicil of the wife and the domicil of matrimony, from which the husband fled in disregard of his duty, it clearly results from the sixth proposition that the domicil of the wife continued in New York. c. As then there can be no question that the wife was not constructively present in Connecticut by virtue of a matrimonial domicil in that State, and was not there individually domiciled and did not appear in the divorce cause, and was only constructively served with notice of the pendency of that action, it is apparent that the Connecticut court did not acquire jurisdiction over the wife within the fifth and seventh propositions; that is, did not acquire such jurisdiction by virtue of the domicil of the wife within the State or as the result of personal service upon her within its borders.

These subjects being thus eliminated, the case reduces itself to this: Whether the Connecticut court, in virtue alone of the domicil of the husband in that State, had jurisdiction to render a decree against the wife under the circumstances stated, which was entitled to be enforced in other States in and by virtue of the full faith and credit clause of the Constitution. In other words, the final question is whether to enforce in another jurisdiction the Connecticut decree would not be to enforce in one State, a personal judgment rendered in another State against a defendant over whom the court of the State rendering the judgment had not acquired jurisdiction. Otherwise stated, the question is this: Is a proceeding for divorce of such an exceptional character as not to come within the rule limiting the authority of a State to persons within its jurisdiction, but on the contrary, because of the power which government may exercise over the marriage relation, constitutes an exception to that rule, and is

therefore embraced either within the letter or spirit of the doctrines stated in the third and fourth propositions?

Before reviewing the authorities relied on to establish that a divorce proceeding is of the exceptional nature indicated, we propose first to consider the reasons advanced to sustain the contention. In doing so, however, it must always be borne in mind that it is elementary that where the full faith and credit clause of the Constitution is invoked to compel the enforcement in one State of a decree rendered in another, the question of the jurisdiction of the court by which the decree was rendered is open to inquiry. And if there was no jurisdiction, either of the subject matter or of the person of the defendant, the courts of another State are not required, by virtue of the full faith and credit clause of the Constitution, to enforce such decree. National Exchange Bank v. Wiley, 195 U. S. 259, 269, and cases cited.

I. The wide scope of the authority which government possesses over the contract of marriage and its dissolution is the basis upon which it is argued that the domicil within one State of one party to the marriage gives to such a State jurisdiction to decree a dissolution of the marriage tie which will be obligatory in all the other States by force of the full faith and credit clause of the Constitution. But the deduction is destructive of the premise upon which it rests. This becomes clear when it is perceived that if one government, because of its authority over its own citizens has the right to dissolve the marriage tie as to the citizen of another jurisdiction, it must follow that no government possesses as to its own citizens, power over the marriage relation and its dissolution. For if it be that one government in virtue of its authority over marriage may dissolve the tie as to citizens of another government, other governments would have a similar power, and hence the right of every government as to its own citizens might be rendered nugatory by the exercise of the power which every other government possessed. To concretely illustrate: If the fact be that where persons are married in the State of New York either of the parties to the marriage may, in violation of the marital obligations, desert the other and go into the State of Connecticut, there acquiring a domicil and, procure a dissolution of the marriage which would be binding in the State of New York as to the party to the marriage there domiciled, it would follow that the power of the State of New York as to the dissolution of the marriage as to its

domiciled citizen would be of no practical avail. And conversely the like result would follow if the marriage had been celebrated in Connecticut and desertion had been from that state to New York, and consequently the decree of divorce had been rendered in New York. Even a superficial analysis will make this clear. Under the rule contended for it would follow that the States whose laws were the most lax as to length of residence required for domicil, as to causes for divorce and to speed of procedure concerning divorce, would in effect dominate all the other States. In other words, any person who was married in one State and who wished to violate the marital obligations would be able, by following the lines of least resistance, to go into the State whose laws were the most lax, and there avail of them for the purpose of the severance of the marriage tie and the destruction of the rights of the other party to the marriage contract, to the overthrow of the laws and public policy of the other States. Thus the argument comes necessarily to this, that to preserve the lawful authority of all the States over marriage it is essential to decide that all the States have such authority only at the sufferance of the other States. And the considerations just stated serve to dispose of the argument that the contention relied on finds support in the ruling made in Maynard v. Hill, referred to in the fourth proposition, which was at the outset stated. For in that case the sole question was the effect within the Territory of Washington of a legislative divorce granted in the Territory to a citizen thereof. The upholding of the divorce within the Territory was, therefore, but a recognition of the power of the Territorial government, in virtue of its authority over marriage, to deal with a person domiciled within its jurisdiction. The case, therefore, did not concern the extraterritorial efficacy of the legislative divorce. In other words, whilst the ruling recognized the ample powers which government possesses over marriage as to one within its jurisdiction, it did not purport to hold that such ample powers might be exercised and enforced by virtue of the Constitution of the United States in another jurisdiction as to citizens of other States to whom the jurisdiction of the Territory did not extend.

The anomalous result which it is therefore apparent would arise from maintaining the proposition contended for is made more manifest by considering the instrument from which such result would be produced, that is, the full faith and credit clause

of the Constitution. No one denies that the States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce. No one, moreover, can deny that, prior to the adoption of the Constitution, the extent to which the States would recognize a divorce obtained in a foreign jurisdiction depended upon their conceptions of duty and comity. Besides, it must be conceded that the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce. Yet, if the proposition be maintained, it would follow that the destruction of the power of the States over the dissolution of marriage, as to their own citizens, would be brought about by the operation of the full faith and credit clause of the Constitution. That is to say, it would come to pass that, although the Constitution of the United States does not interfere with the authority of the States over marriage, nevertheless the full faith and credit clause of that instrument destroyed the authority of the States over the marriage relation. And as the Government of the United States has no delegated authority on the subject, that Government would be powerless to prevent the evil thus brought about by the full faith and credit clause. Thus neither the States nor the National Government would be able to exert that authority over the marriage tie possessed by every other civilized government. Yet more remarkable would be such result when it is borne in mind that, when the Constitution was adopted, nowhere, either in the mother country or on the continent of Europe, either in adjudged cases or in the treatises of authoritative writers, had the theory ever been upheld or been taught or even suggested that one government, solely because of the domicil within its borders of one of the parties to a marriage, had authority, without the actual or constructive presence of the other, to exert its authority by a dissolution of the marriage tie, which exertion of power it would be the duty of other States to respect as to those subject to their jurisdiction.

II. It is urged that the suit for divorce was a proceeding in rem, and, therefore, the Connecticut court had complete jurisdiction to enter a decree as to the res, entitled to be enforced in the State of New York. But here again the argument is contradictory. It rests upon the theory that jurisdiction in Connecticut depended upon the domicil of the person there suing and yet attributes to the decree resting upon the domicil of one of the parties alone a force and effect based upon the theory that a

thing within the jurisdiction of Connecticut was the subject matter of the controversy. But putting this contradiction aside, what, may we ask, was res in Connecticut? Certainly it cannot in reason be said that it was the cause of action or the mere presence of the person of the plaintiff within the jurisdiction. The only possible theory then upon which the proposition proceeds must be that the res in Connecticut, from which the jurisdiction is assumed to have arisen, was the marriage relation. But as the marriage was celebrated in New York between citizens of that State, it must be admitted, under the hypothesis stated, that before the husband deserted the wife in New York the res was in New York and not in Connecticut. As the husband, after wrongfully abandoning the wife in New York, never established a matrimonial domicil in Connecticut, it cannot be said that he took with him the marital relation from which he fled to Connecticut. Conceding, however, that he took with him to Connecticut so much of the marital relation as concerned his individual status, it cannot in reason be said that he did not leave in New York so much of the relation as pertained to the status of the wife. From any point of view, then, under the proposition referred to, if the marriage relation be treated as the res, it follows that it was divisible, and therefore there was a res in the State of New York and one in the State of Connecticut. Thus considered, it is clear that the power of one State did not extend to affecting the thing situated in another State. As illustrating this conception, we notice the case of Mississippi & Missouri R. R. Co. v. Ward, 2 Black, 485. The facts in that case were these: A bill was filed in a District Court of the United States for the District of Iowa to abate a nuisance alleged to have been occasioned by a bridge across the Mississippi river dividing the States of Illinois and Iowa. Under the assumption that the nuisance was occasioned by the operation of the bridge on the Illinois side, the court, after pointing out that the United States Circuit Court for the District of Iowa exercised the same jurisdiction that a State court of Iowa could exercise and no more, said (p. 494):

"The District Court had no power over the local object inflicting the injury; nor any jurisdiction to inquire of the facts, whether damage had been sustained, or how much. These facts are beyond the court's jurisdiction and powers of inquiry, and outside of the case."

Nor has the conclusive force of the view which we have stated

been met by the suggestion that the res was indivisible, and therefore was wholly in Connecticut and wholly in New York, for this amounts but to saying that the same thing can be at one and the same time in different places. Further, the reasoning above expressed disposes of the contention that, as the suit in Connecticut involved the status of the husband, therefore the courts of that State had the power to determine the status of the non-resident wife by a decree which had obligatory force outside of the State of Connecticut. Here, again, the argument comes to this, that, because the State of Connecticut had jurisdiction to fix the status of one domiciled within its borders, that State also had the authority to oust the State of New York of the power to fix the status of a person who was undeniably subject to the jurisdiction of that State.

III. It is urged that whilst marriage is in one aspect a contract, it is nevertheless a contract in which society is deeply interested and, therefore, government must have the power to determine whether a marriage exists or to dissolve it, and hence the Connecticut court had jurisdiction of the relation and the right to dissolve it, not only as to its own citizen but as to a citizen of New York who was not subject to the jurisdiction of the State of Connecticut. The proposition involves in another form of statement the non sequitur which we have previously pointed out; that is, that, because government possesses power over marriage, therefore the existence of that power must be rendered unavailing.

Nor is the contention aided by the proposition that because it is impossible to conceive of the dissolution of the marriage as to one of the parties in one jurisdiction without at the same time saying that the marriage is dissolved as to both in every other jurisdiction, therefore the Connecticut decree should have obligatory effect in New York as to the citizen of that State. For, again, by a change of form of statement, the same contention which we have disposed of is reiterated. Besides, the proposition presupposes that, because in the exercise of its power over its own citizens, a State may determine to dissolve the marriage tie by a decree which is efficacious within its borders, therefore such decree is in all cases binding in every other jurisdiction. As we have pointed out at the outset, it does not follow that a State may not exert its power as to one within its jurisdiction simply because such exercise of authority may not be extended beyond

its borders into the jurisdiction and authority of another State. The distinction was clearly pointed out in Blackinton v. Blackinton, 141 Massachusetts, 432. In that case the parties were married and lived in Massachusetts. The husband abandoned the wife without cause and became domiciled in New York. The wife remained at the matrimonial domicil in Massachusetts and instituted a proceeding to prohibit her husband from imposing any restraint upon her personal liberty and for separate maintenance. Service was made upon the husband in New York. The court, recognizing fully that under the circumstances disclosed the domicil of the husband was not the domicil of the wife, concluded that, under the statutes of Massachusetts, it had authority to grant the relief prayed, and was then brought to determine whether the decree ought to be made, in view of the fact that such decree might not have extraterritorial force. But this circumstance was held not to be controlling and the decree was awarded. The same doctrine was clearly expounded by the Privy Council, in an opinion delivered by Lord Watson, in the divorce case of Le Mesurier v. Le Mesurier (1895), A. C. 517, where it was said (p. 527):

"When the jurisdiction of the court is exercised according to the rules of international law, as in the case where the parties have their domicil within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilized country. . . . On the other hand, a decree of divorce a vinculo, pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extraterritorial authority.

IV. The contention that if the power of one State to decree a dissolution of a marriage which would be compulsory upon the other States be limited to cases where both parties are subject to the jurisdiction, the right to obtain a divorce could be so hampered and restricted as to be in effect impossible of exercise, is but to insist that in order to favor the dissolution of marriage and to cause its permanency to depend upon the mere caprice or wrong of the parties, there should not be applied to the right to obtain a divorce those fundamental principles which safeguard the exercise of the simplest rights. In other words, the argument but reproduces the fallacy already exposed, which is, that one

State must be endowed with the attribute of destroying the authority of all the others concerning the dissolution of marriage in order to render such dissolution easy of procurement. But even if the true and controlling principles be for a moment put aside and mere considerations of inconvenience be looked at, it would follow that the preponderance of inconvenience would be against the contention that a State should have the power to exert its authority concerning the dissolution of marriage as to those not amenable to its jurisdiction. By the application of that rule each State is given the power of overshadowing the authority of all the other States, thus causing the marriage tie to be less protected than any other civil obligation, and this to be accomplished by destroying individual rights without a hearing and by tribunals having no jurisdiction. Further, the admission that jurisdiction in the courts of one State over one party alone was the test of the right to dissolve the marriage tie as to the other party although domiciled in another State, would at once render such test impossible of general application. In other words, the test, if admitted, would destroy itself. This follows, since if that test were the rule, each party to the marriage in one State would have a right to acquire a domicil in a different State and there institute proceedings for divorce. It would hence necessarily arise that domicil would be no longer the determinative criterion, but the mere race of diligence between the parties in seeking different forums in other States or the celerity by which in such State judgments of divorce might be procured would have to be considered in order to decide which forum was controlling.

On the other hand, the denial of the power to enforce in another State a decree of divorce rendered against a person who was not subject to the jurisdiction of the State in which the decree was rendered obviates all the contradictions and inconveniences which are above indicated. It leaves uncurtailed the legitimate power of all the States over a subject peculiarly within their authority, and thus not only enables them to maintain their public policy but also to protect the individual rights of their citizens. It does not deprive a State of the power to render a decree of divorce susceptible of being enforced within its borders as to the person within the jurisdiction and does not debar other States from giving such effect to a judgment of that character as they may elect to do under mere principles of state comity. It causes

the full faith and credit clause of the Constitution to operate upon decrees of divorce in the respective States just as that clause operates upon other rights, that is, it compels all the States to recognize and enforce a judgment of divorce rendered in other States where both parties were subject to the jurisdiction of the State in which the decree was rendered, and it enables the States rendering such decrees to take into view for the purpose of the exercise of their authority the existence of a matrimonial domicil from which the presence of a party not physically present within the borders of a State may be constructively found to exist.

Having thus disposed of the reasoning advanced to sustain the assertion that the courts of the State of New York were bound by the full faith and credit clause to give full effect to the Connecticut decree, we are brought to consider the authorities relied upon to support that proposition.

Whilst the continental and English authorities are not alluded to in the argument, it may be well, in the most summary way, to refer to them as a means of illustrating the question for consideration. The extent of the power which independent sovereignties exercised over the dissolution of the marriage tie, as to their own citizens, gave rise, in the nature of things, to controversies concerning the extraterritorial effect to be given to a dissolution of such tie when made between citizens of one country by judicial tribunals of another country in which such citizens had become domiciled. We do not deem it essential, however, to consider the conflicting theories and divergent rules of public policy which were thus engendered. We are relieved of the necessity of entering upon such an inquiry, since it cannot be doubted that neither the practice nor the theories controlling in the countries on the continent lend the slightest sanction to the contention that a government, simply because one of the parties to a marriage was domiciled within its borders, where no matrimonial domicil ever existed, had power to render a decree dissolving a marriage which on principles of international law was entitled to obligatory extraterritorial effect as to the other party to the marriage, a citizen of another country. Wharton, Conf. Laws, 3d ed., v. 1, p. 441, sec. 209 and notes.

It cannot be doubted, also, that the courts of England decline to treat a foreign decree of divorce as having obligatory extraterritorial force when both parties to the marriage were not subject to the jurisdiction of the court which rendered the decree. Shaw

v. Gould, L. R. 3 H. L. 55; Harvey v. Farnie, 8 App. Cas. 43. And, although it has been suggested in opinions of English judges treating of divorce questions that exceptional cases might arise which perhaps would justify a relaxation of the rigor of the presumption that the domicil of the husband was the domicil of the wife, per Lords Eldon and Redesdale, in Tovey v. Lindsay, 1 Dow, 133, 140; per Lord Westbury, in Pitt v. Pitt, 4 Macq. 640; per Brett, L. J., in Niboyet v. Niboyet, 4 P. D. 14; Briggs v. Briggs, 5 P. D. 165; and per James and Cotton, L. JJ., in Harvey v. Farnie, 6 P. D. 47, 49, the courts of England, in cases where the jurisdiction was dependent upon domicil, have enforced the presumption and treated the wife as being within the jurisdiction where the husband was legally domiciled. But this conception was not a departure from the principle uniformly maintained, that, internationally considered, jurisdiction over both parties to a marriage was essential to the exercise of power to decree a divorce, but was simply a means of determining by a legal presumption whether both parties were within the jurisdiction. Of course the rigor of the English rule as to the domicil of the husband being the domicil of the wife is not controlling in this court, in view of the decisions to which we have previously referred, recognizing the right of the wife, for the fault of the husband, to acquire a separate domicil. Barber v. Barber, 21 How. 582; Cheever v. Wilson, 9 Wall. 108; Atherton v. Atherton, 181 U. S. 155.

And even in Scotland, where residence, as distinguished from domicil, was deemed to authorize the exercise of jurisdiction to grant divorces, it was invariably recognized that the presence within the jurisdiction of both parties to the marriage was essential to authorize a decree in favor of the complainant. Wharton, Conf. Laws, sec. 215, v. 1, p. 447; per Lord Westbury, in Shaw v. Gould, L. R. 3 H. L. 88.

As respects the decisions of this court. We at once treat as inapposite, and therefore unnecessary to be here specially reviewed, those holding, *a*, that where the domicil of a plaintiff in a divorce cause is in the State where the suit was brought, and the defendant appears and defends, as both parties are before the court, there is power to render a decree of divorce which will be entitled in other States to recognition under the full faith and credit clause (Cheever v. Wilson, supra); *b*, that, as distinguished from legal domicil, mere residence within a particular

State of the plaintiff in a divorce cause brought in a court of such State is not sufficient to confer jurisdiction upon such court to dissolve the marriage relation existing between the plaintiff and a non-resident defendant. Andrews v. Andrews, 188 U. S. 14; Streitwolf v. Streitwolf, 181 U. S. 179; Bell v. Bell, 181 U. S. 175. This brings us to again consider a case heretofore referred to, principally relied upon as sustaining the contention that the domicil of one party alone is sufficient to confer jurisdiction upon a judicial tribunal to render a decree of divorce having extraterritorial effect, viz., Atherton v. Atherton, 181 U. S. 155. The decision in that case, however, as we have previously said, was expressly placed upon the ground of matrimonial domicil. This is apparent from the following passage, which we excerpt from the opinion, at page 171:

"This case does not involve the validity of a divorce granted, on constructive service, by the court of a State in which only one of the parties ever had a domicil; nor the question to what extent the good faith of the domicil may be afterwards inquired into. In this case the divorce in Kentucky was by the court of the State which had always been the undoubted domicil of the husband, and which was the only matrimonial domicil of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky."

The contention, therefore, that the reasoning of the opinion demonstrates that the domicil of one of the parties alone was contemplated as being sufficient to found jurisdiction, but insists that the case decided a proposition which was excluded in unmistakable language. But, moreover, it is clear, when the facts which were involved in the Atherton case are taken into view, that the case could not have been decided merely upon the ground of the domicil of one of the parties, because that consideration alone would have afforded no solution of the problem which the case presented. The salient facts were these: The husband lived in Kentucky, married a citizen of New York, and the married couple took up their domicil at the home of the husband in Kentucky, where they continued to reside and where children were born to them. The wife left the matrimonial domicil and went to New York. The husband sued her in Kentucky for a divorce. Before the Kentucky suit merged into a decree the wife, having a residence in New York sufficient, under

ordinary circumstances to constitute a domicil in that State, sued the husband in the courts of New York for a limited divorce. Thus the two suits, one by the husband against the wife and the other by the wife against the husband, were pending in the respective States at the same time. The husband obtained a decree in the Kentucky suit before the suit of the wife had been determined and pleaded such decree in the suit brought by the wife in New York. The New York court, however, refused to recognize the Kentucky decree and the case came here, and this court decided that the courts of New York were bound to give effect to the Kentucky decree by virtue of the full faith and credit clause. Under these conditions it is clear that the case could not have been disposed of on the mere ground of the individual domicil of the parties, since upon that hypothesis, even if the efficacy of the individual domicil had been admitted, no solution would have been thereby afforded of the problem which would have arisen for decision, that problem being which of the two courts wherein the conflicting proceedings were pending had the paramount right to enter a binding decree. Having disposed of the case upon the principle of matrimonial domicil, it cannot in reason be conceived that the court intended to express an opinion upon the soundness of the theory of individual and separate domicil which isolatedly considered, was inadequate to dispose of, and was, therefore, irrelevant to, the question for decision.

It is contended that an overwhelming preponderance of the decisions of the state courts enforce the doctrine that it is the duty of the States, by virtue of the full faith and credit clause, to give within their borders the full effect required by that clause to decrees of divorce rendered in other States, where there was jurisdiction alone by virtue of the domicil of one of the parties. Whilst we may not avoid the duty of interpreting for ourselves the Constitution of the United States, in view of the persuasive force that would result if an overwhelming line of state decisions held the asserted doctrine, we come to consider that subject. To examine in detail the many decisions of state courts of last resort, most of which are referred to in the margin,[1] would expand this

[1]Cases relating to the validity and extraterritorial effect of a decree of divorce rendered upon constructive notice:

Turner v. Turner, 44 Ala., 437; In re James Estate, 99 Cal. 374; Knowlton v. Knowlton, 155 Ill. 158; Dunham v. Dunham, 162 Ill. 589; Field v. Field,

opinion to undue length. To avoid so doing, if possible, we propose to more particularly direct our attention to the cases in state courts which are specially relied on. In doing so we shall add cases in several of the States not particularly counted on in the argument. We shall do this for the purpose of evolving, if possible, from the state cases thus to be referred to, some classification typical of all the state decisions, hence enabling all the cases to which we do not specially refer to be brought within the appropriate class to which they pertain, without the necessity of reviewing them in detail. We shall not confine ourselves to the particular state decisions relied on, but shall consider such decisions in the light of the general rule obtaining in the particular State.

The cases specially relied on are Thompson v. State, 28 Alabama, 12; Harding v. Alden, 9 Maine, 140; Ditson v. Ditson, 4 R. I. 87; Burlen v. Shannon, 115 Massachusetts, 483; and Felt v. Felt, 59 N. J. Eq. 606, to which we shall add for the purposes above stated cases on the same subject decided in New York, Ohio, Wisconsin, Indiana and Missouri.

New York.—It is not questioned that the courts of New York are vested by statute with authority to render decrees of divorce where the plaintiff is domiciled within the State, which shall be operative in that State, even although the defendant is a non-resident and is proceeded against by constructive service.

Borden v. Fitch, 15 Johns. 121, and Bradshaw v. Heath, 13 Wend. 407, were decided, respectively, in the years 1818 and

215 Ill. 496; Hood v. State, 56 Ind. 263, 270; Hilbish v. Battle, 145 Ind. 59; Kline v. Kline, 57 Ia. 386; Van Orsdal v. Van Orsdal, 67 Ia. 35; Chapman v. Chapman, 48 Kans. 636; Rodgers v. Rodgers, 56 Kans. 483; McCormick v. McCormick, 82 Kans. 31; Maguire v. Maguire, 7 Dana, 181; Hawkins v. Ragsdale, 80 Ky. 353; Edwards v. Green, 9 La. Ann. 317; Smith v. Smith, 43 La. Ann. 1140; Butler v. Washington, 45 La. Ann. 279; Harding v. Alden, 9 Maine, 140; Stilphen v. Stilphen, 58 Maine, 508; Stilphen v. Hondlette, 60 Maine, 447; Garner v. Garner, 56 Md. 127; Lyon v. Lyon, 2 Gray, 367; Wright v. Wright, 24 Mich. 180; Van Inwagen v. Van Inwagen, 86 Mich. 233; Thurston v. Thurston, 58 Minn. 279; Gould v. Crow, 57 Mo. 200; Anthony v. Rice, 110 Mo. 233; Smith v. Smith, 19 Nebr. 706; Leith v. Leith, 39 N. H. 20; Doughty v. Doughty, 28 N. J. Eq. 581; Flower v. Flower, 42 N. J. Eq. 152; Felt v. Felt, 59 N. J. Eq. 606; Wallace v. Wallace, 62 N. J. Eq. 509; Lynde v. Lynde, 162 N. Y. 405; Winston v. Winston, 165 N. Y. 553; Irby v. Wilson, 1 Dev. & Bat. Eq. (21 N. Car.) 568; Harris v. Harris, 115 N. Car. 587; Bidwell v. Bidwell, 139 N. Car. 402; Cox v. Cox, 19 Ohio St. 502; Doerr v. Forsythe, 50 Ohio St. 726; Colon v. Reed, 55 Pa. St. 375; Reel v. Elder, 62 Pa. St. 308; Ditson v. Ditson, 4 R. I. 87; McCreery v. Davis, 44 S. Car. 195; Thoms v. King, 95 Tenn. 60; Prosser v. Warner, 47 Vt. 667, 673; Cook v. Cook, 56 Wis. 195.

1835. These cases, as declared by the Court of Appeals of New York in People v. Baker, 76 N. Y. 78, 82, upheld the principle that a court of another State could not dissolve the matrimonial relation of a citizen of New York, domiciled in New York, unless he was actually served with notice within the other State or voluntarily appeared in the cause. The doctrine that an action of divorce is one inter partes was thus clearly reiterated by Andrews, J., in Jones v. Jones, 108 N. Y. 415, 424:

"The contract of marriage cannot be annulled by judicial sanction any more than any other contract inter partes, without jurisdiction of the person of the defendant. The marriage relation is not a res within the State of the party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted service or actual notice of the proceeding given without the jurisdiction of the court where the proceeding is pending."

That the principle referred to is still enforced by the New York court is shown by recent cases, viz., Lynde v. Lynde, 162 N. Y. 405; Winston v. Winston, 165 N. Y. 553, and the case at bar. And it is indubitable that under this doctrine the courts of New York have invariably refused, as they have done in the case at bar, to treat a divorce rendered in another State, under the circumstances stated, as entitled to be enforced in New York by virtue of the full faith and credit clause of the Constitution of the United States; and, indeed, have refused generally to give effect to such decrees even by state comity.

Massachusetts.—Barber v. Root, 10 Massachusetts, 260; Hanover v. Turner, 14 Massachusetts, 227, and Harteau v. Harteau, 14 Pick. 181, were decided, respectively, in 1813, 1817 and 1833. In 1835 the legislature of Massachusetts incorporated into the statutes of that State, following a section forbidding the recognition of divorces obtained in another jurisdiction in fraud of the laws of Massachusetts, a provision reading as follows: "In all other cases, a divorce decreed in another State or country, according to the law of the place, by a court having jurisdiction of the cause and of both of the parties, shall be valid and effectual in this State." And it may be observed that this section, when submitted to the legislature by the commissioners for revising the Massachusetts statutes, was accompanied by the following comment (Rept. Comrs., pt. 1, p. 123): "This is founded on the

rule established by the comity of all civilized nations; and is proposed merely that no doubt should arise on a question so interesting and important as this may sometimes be."

In Lyon v. Lyon (1854), 2 Gray, 367, the question was as to the validity in Massachusetts of a divorce decreed in Rhode Island in favor of one party to a marriage against the other who was domiciled in Massachusetts. The court refused to give extraterritorial effect to the Rhode Island decree. In the opinion by Chief Justice Shaw it was declared that the three cases which we have previously referred to sustained the doctrine, based upon general principles of law, that a decree of divorce rendered in another State without jurisdiction of both of the parties possessed no extraterritorial force.

In Hood v. Hood (1865), 11 Allen, 196, the controversy was this: The parties were married in Massachusetts and, after a residence in that State, moved together to Illinois. The wife left the domicil of the husband in Illinois and returned to Massachusetts. Thereafter, in Illinois, the husband sued the wife for a divorce on the ground of her desertion, obtained a decree, and married again. The case decided in Massachusetts was a suit brought in that State by the former wife against the former husband for divorce on the ground of adultery alleged to have been committed by him with the person whom he had married after the decree of divorce in Illinois had been rendered. The Illinois decree was pleaded in bar. The question whether the Illinois decree should be given extraterritorial effect in Massachusetts depended, under the rule announced in the previous cases, upon whether both the husband and wife were parties to the Illinois decree. For the purpose of the determination of this jurisdictional question it was held that it was necessary to ascertain whether the wife was justified, by the fault of the husband, in leaving him in Illinois and going back to Massachusetts. It was decided that if she was justified in leaving the husband, her legal domicil was in Massachusetts, and she was not a party to the Illinois decree, and that if she was not justified in living separate from the husband, the ordinary rule being that the domicil of the husband was the domicil of the wife, she was domiciled in Illinois, and must be considered as subject to the jurisdiction of the Illinois court. Applying this legal principle to the facts in the case before it, the court held that as there was no evidence showing that the wife had justifiable cause for leaving her hus-

band, the legal presumption that the domicil of the husband was the domicil of the wife prevailed, and that the Illinois decree was entitled to extraterritorial effect in Massachusetts, and bound the wife, because rendered by a court having jurisdiction over both parties.

In Shaw v. Shaw (1867), 98 Massachusetts, 158, the facts were these: The parties were married in Massachusetts, lived there and left together for the purpose of settling in Colorado. On the journey, at Philadelphia, the wife was forced by the extreme cruelty of the husband to leave him. She returned to Massachusetts, while he went on to Colorado. Subsequently the wife sued in Massachusetts for a divorce from bed and board. The husband was brought in by substituted service and defaulted. The court, in the most explicit terms, recognized that a decree of divorce to have extraterritorial effect must be rendered with jurisdiction over both parties. It said (p. 159): "For the purposes of divorce the general rule of jurisprudence is that a divorce granted in the place of the domicil of both parties, and there valid, is good everywhere." The court came then to consider whether it could render a decree in Massachusetts in favor of the wife. This depended upon a statute of Massachusetts, which authorized the granting of a divorce where the cause for divorce occurred while the parties had lived together as husband and wife in Massachusetts, and where one of them lived in that State when the cause for divorce occurred. It was held that as at the time of the commission of the cruelty in Philadelphia charged against the husband the domicil of the parties in Massachusetts had not been lost, and as by that cruelty the wife was justified in returning to Massachusetts, and the subsequent acquisition of a new domicil by the husband in Colorado did not make such domicil that of the wife, there was jurisdiction, and the divorce was granted.

Hood v. Hood (1872), 110 Massachusetts, 463, was an attempt again to assail the validity of the Illinois decree of divorce which had been adjudged valid in 11 Allen, 196, because it was found that both the husband and wife had been parties to the decree. The Massachusetts decree so holding was therefore held to be res judicata as to all persons and to foreclose further inquiry into the validity of the Illinois decree of divorce.

In Burlen v. Shannon (1874), 115 Massachusetts, 438, the facts leading up to the controversy and those involved therein

were as follows: Shannon and his wife lived together in Massachusetts, where she left him. Without stopping to refer to prior legal controversies which arose between Shannon and his wife and between Shannon and Mrs. Burlen, which are irrelevant to be considered, it suffices to say that Mrs. Burlen sued Shannon in 1850 to hold him liable for necessary supplies furnished to the wife. Shannon resisted on the ground that the wife had been living apart from him without his fault or consent, and this defense was maintained. (3 Gray, 387.) Shannon went to Indiana in 1855 and took up his domicil in that State, where, in 1856, he obtained a decree of divorce upon constructive service. Subsequently, in Massachusetts, Mrs. Burlen again sued Shannon for necessaries furnished to the wife between February 22, 1860, and February 7, 1866. He pleaded the Indiana divorce, and the validity of the divorce was assailed by Mrs. Burlen on the ground that the wife had not been a party to the divorce cause, and therefore the Indiana decree had not extraterritorial effect in Massachusetts. The court, in effect, after reiterating the previous rulings and referring to the statute concerning the necessity for the presence of both parties within the jurisdiction where a decree for divorce of another State was sought to be given effect in Massachusetts, also reiterated the previous ruling that the wife might acquire a separate domicil from the husband if she lived separate from him for justifiable cause. The court was brought, therefore, to consider whether Mr. and Mrs. Shannon were both parties to the Indiana decree on the ground that the domicil of the husband was the domicil of the wife. The solution of this question depended, as it had depended in Hood v. Hood, 11 Allen, 196, upon whether the wife was absent from the husband because of his fault. On this subject it was decided that the previous judgment in favor of Shannon and against Mrs. Burlen in the prior action between the parties had conclusively determined between them that Mrs. Shannon was absent from her husband without his fault or consent, and, therefore, under the legal presumption that the domicil of the husband was the domicil of the wife, both the husband and wife were parties to the Indiana decree and it was not subject to attack in Massachusetts. To cite, as has sometimes been done, the language of the opinion of the court referring to the previous judgment in the earlier action between Mrs. Burlen and Shannon as if that language referred to the Indiana decree of divorce,

leading to the implication that that decree was held to be conclusive, even if only one of the parties was domiciled in the State where the decree was rendered, not only is a plain misconception, but is equivalent to asserting that the Massachusetts court had overruled its previous decisions and disregarded the spirit, if not the letter, of the state statute without the slightest intimation to that effect.

In Cummington v. Belchertown, 149 Massachusetts, 223, the facts were these: The parties to a marriage, celebrated in Massachusetts, lived together in that State until the wife was taken to a Massachusetts asylum for the insane, when the husband abandoned her, acquired a domicil in New York, there brought suit on the ground of fraud for the annulment of the marriage, and obtained a decree. The wife was only constructively served with process, did not appear, and was not represented. The Massachusetts court held, upon the authority of the Blackington case (141 Massachusetts, 432), to which we have already referred, that if the decree was to be recognized in Massachusetts, it could only be on grounds of comity. And in concluding its opinion the court said:

"Upon the ground, then, that the decree of the New York court attempts to annul a marriage in Massachusetts between Massachusetts citizens, and thus affect the legal status of the woman, who has remained domiciled in Massachusetts, and has never been within the jurisdiction of the New York court, and deprive her of the rights acquired by her marriage, and especially because it declares the marriage void for a reason on account of which by the Massachusetts law it cannot be avoided, we are of opinion that it should not be enforced here, and that no principle of interstate comity requires that we should give it effect."

True it is the court reserved the question as to what effect might be given to a divorce if granted by a New York court under circumstances such as existed in that case. But, as a suit for a declaration of nullity and one for divorce are both but modes for determining judicially the status of the parties, it must in reason follow if jurisdiction over both is a prerequisite in the one class, it is of necessity also essential in the other.

Maine.—In Harding v. Alden (1832), 9 Maine, 140, the facts were these: While living together in Maine a husband deserted his wife. He went to North Carolina, where he pretended to

marry, and lived there with another woman. In the meantime the wife whom he had deserted took up her residence in Rhode Island, where she sued for a divorce on the ground of the adultery committed by the husband in North Carolina. The husband, who was notified in North Carolina, did not appear in the Rhode Island divorce cause. A decree of divorce was granted and the wife then remarried. The first husband, during the coverture, owned and alienated real estate in Maine, and a statute of that State provided that where a divorce was decreed for adultery by the husband, dower might be assigned to the divorced wife in the same manner as if the husband were dead. The divorced wife brought an action of dower in a court in Maine. The Rhode Island decree was held to possess validity in Maine and the statute relating to dower was decided not to be limited to divorces decreed within the State of Maine. Considering the opinion in its entirety, it is plain that the Rhode Island divorce was given recognition from considerations of right and justice and upon the ground of state comity. Thus, the court called attention to the fact that adultery was a cause for divorce in both States and that divorces were granted in Maine against non-residents; and, it was observed, that "there would be great inconvenience in holding" that divorces ought not to be recognized in other States when granted in the State where the injured party resided against one who had established his domicil in another State and there committed adultery.

True it is in the course of the opinion reasoning was employed tending to show that the Rhode Island court might be considered to have had jurisdiction in the complete sense and it was intimated that the full faith and credit clause might have application, but the operation of the Rhode Island decree in Maine was by the decree of the Maine court expressly limited to the dissolution of the marriage (p. 151). How far removed this was from giving to the Rhode Island decree the benefit of the full faith and credit clause will, we think, be made clear by what follows.

Harding v. Alden was decided at the July term, 1832. Less than two years afterward, on March 5, 1834, Public Laws, 1834, c. 116, p. 119, the statute of Maine regulating divorces was supplemented by various provisions, one such being the following: "Sec. 2. Be it further enacted, That in all cases where one party has been or shall be divorced from the bonds of matrimony, the court granting the same may, upon applica-

tion therefor, grant to the other party a like divorce, on such terms and conditions as the said court in the exercise of a sound discretion may judge reasonable." This provision was carried into the Revised Statutes of 1840, c. 89, sec. 2, and although repealed in 1850, in a general revision of the divorce laws, it was held that the legislature did not intend to deprive the courts of Maine of the power to entertain a suit for divorce brought by a person from whom the other party to a marriage had already been divorced, and that the courts of Maine still possessed power to exercise jurisdiction over such suits. Stilphen v. Stilphen, 58 Maine, 508. In the cited case, although a husband had already obtained an absolute divorce, a like divorce was granted to the wife, and the court allowed to her certain articles of personal property and the sum of $500. In overruling exceptions to the decree the appellate court adopted the theory that the second decree in no wise impugned the first, and was "important only as enabling the court to make such ancillary decrees concerning the property as justice may seem to require" (p. 517). In the course of the opinion the court said (p. 516):

"There is no class of cases in which the court is so liable to be imposed upon, and a decision obtained contrary to the truth, as ex parte divorce suits. The notice is often imperfect, so that the confession of guilt implied in the default is deceptive. And it is well known that witnesses, testifying in the presence of one of the parties, and in the absence of the other, will so alter and magnify the faults of the absent, and suppress everything that makes against the party present, that it is impossible to tell where the truth and real merits of the controversy are. When both parties are present, each is sure to put the other in the wrong; and, a fortiori is this true, when one of the parties is permitted to testify in the absence of the other, as is now the case in divorce suits. We repeat, therefore, that there is no class of cases in which the court is so liable to be imposed upon; and it seems to us of the utmost importance that the court should be possessed of the power in some form to revise their decisions in this class of cases; otherwise, the grossest injustice is liable to be done."

In the light of this decision it cannot be assumed that the courts of Maine would give to a citizen of that State against whom a divorce had been obtained in a foreign jurisdiction, upon constructive service, a less degree of relief than they afford as

to a decree rendered in Maine, both parties being present and bound by the decree.

Rhode Island.—Ditson v. Ditson (1856), 4 R I. 87, was a suit for divorce on the grounds of desertion, extreme cruelty, and non-support, brought by a wife domiciled in Rhode Island against the husband, who had never resided in Rhode Island, and whose whereabouts was unknown. The question was whether the Rhode Island court ought to exercise jurisdiction. The opinion was mainly devoted to refuting the reasoning employed by Chief Justice Shaw in his opinion in the case of Lyon v. Lyon, 2 Gray, 367, in which case, as we have previously shown, the Massachusetts court refused to give effect to a Rhode Island decree of divorce where both parties were not within the jurisdiction. The Rhode Island court (in the Ditson case) in effect declared that it would not exercise jurisdiction to grant a divorce if it considered that a decree rendered by it would not be entitled to extraterritorial effect because of a lack of actual jurisdiction over the defendant. The court, however, proceeded to reason that a suit for divorce was in effect a proceeding in rem, and that jurisdiction over one of the parties to a suit for the dissolution of the marriage tie drew to the court jurisdiction of the other party, and thereby gave full and complete jurisdiction over the status of both parties, and upon that hypothesis decided that it would exercise jurisdiction, and that its decree dissolving the marriage would be entitled to the benefit of the full faith and credit clause of the Constitution and have binding efficacy in every other State.

New Jersey.—Whilst the courts of New Jersey have exercised the power to grant a divorce from a non-resident defendant, upon constructive service, those courts have from the beginning applied to similar decrees of divorce granted in other States, when sought to be enforced in New Jersey against citizens of that State, a rule like the one prevailing in New York, that is, they decline to enforce them even upon the principles of comity. Doughty v. Doughty, 28 N. J. Eq. 581, 586; Flower v. Flower, 42 N. J. Eq. 152. Recently, however, it has been decided, Felt v. Felt, 59 N. J. Eq. 606, that where a decree of divorce was rendered in another State, and the complainant alone was subject to the jurisdiction of the court, but it was shown that the defendant had been personally served outside of the jurisdiction with

notice of the pendency of the divorce proceeding and was afforded reasonable opportunity to make defense and did not avail of the opportunity, effect would be given to such decree in New Jersey, upon principles of comity, provided that the ground upon which the decree rested was one which the public policy of New Jersey recognized as a sufficient cause for divorce. In Wallace v. Wallace, 62 N. J. Eq. 509, the subject is quite fully reviewed.

Ohio.—In Cooper v. Cooper (1836), 7 Ohio, 594, without citation of authority, a divorce granted in Indiana, from a resident of Ohio, upon constructive service, was held to bar an application for divorce and alimony in Ohio. In Mansfield v. McIntyre (1840), 10 Ohio, 27, despite a divorce obtained in Kentucky, by a husband, upon constructive service, the divorced wife was regarded in Ohio as the widow of her former husband after his decease, and as such widow entitled to dower.

In Cox v. Cox, 19 Ohio St. 502, decided at the December term, 1869, the facts were these: The husband deserted the wife in Ohio, went to Indiana and there obtained a divorce, upon constructive service. The wife remained in Ohio, and three years after the granting of the Indiana divorce to the husband she sued him for divorce and for alimony, alleging abandonment and gross neglect of duty. The trial court granted a divorce and alimony. The husband appealed, but as such an appeal, under the statutes of Ohio, did not affect the decree as to the divorce, the District Court considered only the question of alimony and rendered a new decree for alimony against the defendant. The case was then taken to the Supreme Court of the State. In that court attention was called to the fact that under the statutes of Ohio and the decisions of its courts jurisdiction might be exercised over non-residents in divorce cases, and reference was made to various authorities as tending to show that public policy required the recognition of the validity of such decrees in other States as to the dissolution of the marriage. After stating the facts, and observing that the wife was entitled under the laws of Ohio to either divorce or alimony, or both, at her election, and alluding to the Indiana decree, the court said (p. 512):

"The question, therefore, is, whether the ex parte decree can be made available, not merely to effect a dissolution of the marriage, but to defeat the right of the petitioner to the alimony

which the statute, upon the facts as they exist in regard to the husband's desertion, intended to provide for her.

"We think the decree ought not to have such effect.

"In arriving at this conclusion we make no distinction between a decree rendered, under the circumstances of this case, in a foreign, and one rendered in a domestic forum.

"In either case, to give to a decree thus obtained the effect claimed for it, would be to allow it to work a fraud upon the pecuniary rights of the wife. Such a result, in our opinion, is rendered necessary by no principle of comity or public policy—the only grounds upon which ex parte decrees of divorce are authorized and supported.

"It is not essential to the allowance of alimony that the marriage relation should subsist up to the time it is allowed. On appeal, alimony may be decreed by the District Court, notwithstanding the subsisting divorce pronounced by the Court of Common Pleas. It is true that the statute speaks of the allowance as being made to the wife. But the term 'wife' may be regarded as used to designate the person, and not the actual existing relation; or the petitioner may still be regarded as holding the relation of wife for the purpose of enforcing her claim to alimony."

The following cases were cited by the court as sustaining the right of the wife to maintain an independent proceeding for alimony, even after the husband had obtained a divorce: Richardson v. Wilson, 8 Yerger, 67; Crane v. Meginnis, 1 Gill & J. 464, and Shotwell v. Shotwell, 1 Sm. & M. Ch. R. 51.

In Doerr v. Forsythe (1893), 50 Ohio St. 726, an Indiana divorce granted to a husband, upon constructive service, was held not to bar the right of the wife to dower in lands in Ohio owned during coverture by the husband.

ALABAMA.—In Thompson v. State (1856), 28 Alabama, 12, the facts were these: Thompson deserted his family in Mississippi, went to Arkansas and there obtained a divorce upon constructive service. The wife returned to her father's home in Alabama, and, after the divorce, the husband also went to Alabama, where he again married. He was prosecuted for and convicted of bigamy. The conviction was set side, however, upon the ground that the guilt or innocence of the accused depended upon the question as to whether he had a bona fide domicil in

Arkansas during the pendency of the proceedings for divorce. Harding v. Alden, 9 Maine, 140, was cited as authority.

In a subsequent case, however, Turner v. Turner, (1870), 44 Alabama, 437, the Supreme Court of Alabama strictly limited, as against a citizen of Alabama, the effect of a divorce rendered in another State upon constructive service. The parties were married in Alabama, where the husband deserted the wife, and located in Indiana, where he obtained a divorce upon constructive service. The wife remained in Alabama, and, after the granting of the divorce to the husband, she sued him in Alabama for a divorce and alimony. The husband pleaded the Indiana decree in bar. The trial court, however, held that the wife was entitled to maintain her suit and entered a decree for divorce and alimony. In affirming the decree the Supreme Court of Alabama, upon the authority of Thompson v. State, supra, said that the decree of divorce obtained by the husband in Indiana might protect him against prosecution for bigamy should he marry again in Alabama. Referring to that decree it further said (p. 450):

"But without stopping to inquire whether it was obtained by him by fraud, and therefore is vicious on that account or not, it certainly cannot affect the rights of the complainant, except her right in the husband as husband. If it is valid, it unmarries him and sets him free from his marital vows to her. He is no longer the complainant's husband. But it does not settle her right to alimony; it does not settle her right to dower in his lands, and her statutory right to distribution of his property in this State, in the event she should survive him, nor any other interest of a pecuniary character she may have against him. . . . It is the duty of the State to protect its own citizens, within its own borders. This is the natural compensation for allegiance. This high duty extends to all the pecuniary rights of the citizens, as well as to the rights of security of person. . . . No obligation of comity is paramount to this duty. Without a constant and effective exertion of it, citizenship would become a farce. . . . The wife is as much the citizen of the State as the husband, and is entitled to the protection of its laws to the same extent, so long as she remains within its jurisdiction. It would be a scandal to justice to imperil her, and sacrifice her most important and cherished rights upon a mere technicality; a technicality that often contradicts the truth. When her protection requires it, it would be

cruelly unjust for the State, of her actual residence and domicil, to repudiate its own right of jurisdiction to give her aid. I therefore think that the better opinion is, that she has the right to file her bill here, and to all the relief that the court could give her, notwithstanding her husband might not be domiciled in this State at the commencement and during the whole pendency of her litigation with him. . . .

"Then, if the State courts have competent jurisdiction in such a case, as undoubtedly they have, they may go on and exercise that jurisdiction in the manner and to the extent prescribed by their own laws.

"Under the laws of this State, by the contract and consummation of a marriage, the wife, if she has no separate estate, becomes entitled to dower in the husband's lands, and a certain distributive interest in his personal estate, if she survives him, and to temporary and permanent alimony out of his estate upon a separation by divorce in her favor. These are rights that she cannot legally be deprived of without her consent or her fault. . . . It this were not so, then these important statutory provisions in favor of the wife would be repealed or rendered null by a foreign divorce, of which she had no notice and no knowledge, during its whole progress through the forms of a foreign court. To sue in her own domicil is necessary for the protection of the wife. It, therefore, overrides the technical rule that the husband's domicil is also the domicil of the wife. . . . Here the testimony shows that the wife has no separate estate. The witnesses for the defendants say when she was married she 'brought nothing with her.' It also appears that during her connection with the defendant Matthew Turner, as his wife, she was a chaste, industrious, economical, faithful, useful and obedient wife; and that the husband's property is very considerable, worth possibly not less than one hundred thousand dollars. It is also shown that his three children by a former marriage are already sufficiently provided for.

"Under such a state of facts the sum of thirty thousand dollars was not an unreasonable sum for permanent alimony to be allowed to the wife, nor the sum of eight hundred dollars too large for temporary alimony. . . ."

INDIANA.—In Tolen v. Tolen (1831), 2 Blackf. 407, the facts were these: A wife, on being deserted in Kentucky, removed to

and became domiciled in Indiana, and after a residence there of five years sued for a divorce from the non-resident husband. In an opinion of great length the court considered the question of its power to grant a divorce which would be valid in Indiana, and decided it had such power, but expressly reserved passing on the question whether the decree would have extraterritorial force.

In Hood v. State, (1877), 56 Indiana, 263, 271, it was declared that as an ex parte divorce in favor of one domiciled within the jurisdiction of a State, and against a non-resident, although founded upon constructive service, was valid as to the plaintiff, "public policy demands that it should be held valid as to both parties."

In Hilbish v. Battle (1896), 145 Indiana, 59, certain sections of the Indiana Revised Statutes, wherein it was provided that the divorce of one party to a marriage should dissolve the contract as to both, and that a divorce decreed in another State by a court having jurisdiction of the cause should have full effect in Indiana, were held to be applicable to a decree of divorce granted in another State, in favor of a husband, upon constructive service, and the same effect was given to the decree, as to the rights of the wife in the property of the husband in Indiana, as if the divorce had been rendered in Indiana.

Missouri.—In Gould v. Crow, 57 Missouri, 200, a decree of divorce regularly obtained by a husband in Indiana, on an order of publication, without personal service, was held to operate as a divorce in favor of the husband in Missouri, so as to prevent the wife from claiming her dower in lands in Missouri owned by the husband. Harding v. Alden, 9 Maine, 140, was relied upon as authority. A statute of Missouri, barring the claim of a wife for dower after divorce granted by reason of her fault, was held to apply to all divorces, whether obtained in Missouri or in other States, and whether obtained on personal service or by order of publication. The doctrine of Gould v. Crow was reaffirmed and applied in Anthony v. Rice, 110 Missouri, 233.

Wisconsin.—In Shafer v. Bushnell (1869), 24 Wisconsin, 372, an ex parte divorce granted a wife in Minnesota upon constructive service of the defendant, a citizen of Minnesota, was held upon the grounds of comity to be conclusive in Wisconsin in respect to the status or domestic and social condition of the wife. The decree was held to bar an action for criminal inter-

course against the person whom the complainant in the divorce suit married after the granting of the divorce.

In Cook v. Cook (1882), 56 Wisconsin, 195, however, in an elaborate opinion, an ex parte divorce obtained in Michigan upon constructive service merely, by a husband who had deserted his wife in Wisconsin, was held not to affect the status of the wife in Wisconsin nor to bar her from suing in Wisconsin for divorce, alimony, allowance and a division of the property of such husband situated within Wisconsin.

Deducing the law of the several States from the rulings of their courts of last resort which we have just reviewed and ignoring mere minor differences, the law of such States is embraced within one or the other of the following headings:

a. States where the power to decree a divorce is recognized, based upon the mere domicil of the plaintiff, although the decree when rendered will be but operative within the borders of the State, wholly irrespective of any force which may be given such decree in other States. Under this heading all of the States are embraced with the possible exception of Rhode Island.

b. States which decline, even upon principles of comity, to recognize and enforce as to their own citizens, within their own borders, decrees of divorce rendered in other States, when the court rendering the same had jurisdiction over only one of the parties. Under this heading is embraced Massachusetts, New Jersey (with the qualification made by the decision in 59 N. J. Eq. 606) and New York.

c. States which, whilst giving some effect to decrees of divorce rendered against its citizens, in other States where the court had jurisdiction of the plaintiff alone, either place the effect given to such decrees upon the principle of State comity alone, or make such limitations upon the effect given to such decree as indubitably establishes that the recognition given is a result merely of State comity. As the greater includes the less, this class of course embraces the cases under the previous heading. It also includes the States of Alabama, Maine, Ohio and Wisconsin.

d. Cases which, although not actually so deciding, yet lend themselves to the view that ex parte decrees of divorce rendered in other States would receive recognition by virtue of the due faith and credit clause. And this class embraces Missouri and Rhode Island.

Coming to consider, for the purpose of classification, the decided cases in other States than those previously reviewed, which have been called to our attention, the law of such States may be said to come under one or the other of the foregoing headings, as follows:

Proposition *a* embraces the law of all the States, since in the decision of no State is there an intimation expressing the exception found in the Rhode Island case which caused us to exclude that State from this classification.

Under proposition *b* comes the law of the States of Pennsylvania, Vermont and South Carolina. A line of decisions of the State of North Carolina would also cause us to embrace the law of that State within this classification, but for a doubt engendered in our minds as to the effect of the law of North Carolina on the subject, resulting from suggestions made by the North Carolina court in the opinion in the Bidwell case, 52 S. E. Rep. 58.

Proposition *c* embraces the law of Kansas, Louisiana, Maryland, Michigan, Minnesota, Nebraska and New Hampshire. And it is pertinent here to remark that in Michigan, 3 Comp. Laws Michigan (1897), par. 8617, c. 232, sec. 2, the obtaining of a divorce in another State from a citizen of Michigan is made cause for the granting of a divorce in Michigan to its citizens. A like provision is also in the statutes of Florida. Rev. Stat. Florida (1902), sec. 1480.

Under proposition *d* we embrace the remaining States although as to several the classification may admit of doubt, viz., California, Illinois, Iowa, Kentucky and Tennessee.

It indubitably, therefore, follows from the special review we have made of cases in certain States, and the classification just made of the remaining State cases which were called to our attention and which we have previously cited in the margin, that the contention is without foundation, that such cases establish by an overwhelming preponderance that, by the law of the several States, decrees of divorce obtained in a State with jurisdiction alone of the plaintiff are, in virtue of the full faith and credit clause of the Constitution, entitled to be enforced in another State as against citizens of such State. Indeed the analysis and classification which we have made serves conclusively to demonstrate that the limited recognition which is given in most of the States to such ex parte decrees of divorce rendered in other States is wholly inconsistent with the theory that such limited

recognition is based upon the operation of the full faith and credit clause of the Constitution of the United States, and on the contrary is consistent only with the conception that such limited recognition as is given is based upon State comity. No clearer demonstration can be made of the accuracy of this statement than the obvious consequence that if the full faith and credit clause were now to be held applicable to the enforcement in the States generally of decrees of divorce of the character of the one here involved it would follow that the law of nearly all of the States would be overthrown, and thus it would come to pass that the decisions which were relied upon as establishing that the due faith and credit clause applies to such decrees would be overruled by the adoption of the proposition which it is insisted those decisions maintain. The only escape from this conclusion would be to say that the law of the States as shown by the decisions in question would remain unaffected by the ruling of the full faith and credit clause because not repugnant to that clause. This would be, however, but to assert that the full faith and credit clause required not that full faith and credit be given in one State to the decrees of another State, but that only a limited and restricted enforcement of a decree of one State in another would fulfill the requirements of that provision of the Constitution. To so decide would be to destroy the true import of the full faith and credit clause as pointed out in the outset of this opinion. Thus, in its ultimate aspect the proposition relied upon reduces itself to this, either that the settled law of most of the States of the Union as to divorce decrees rendered in one State, where the court rendering the decree had jurisdiction only of the plaintiff, must be held to be invalid, or that an important provision of the Constitution of the United States must be shorn of its rightful meaning.

Without questioning the power of the State of Connecticut to enforce within its own borders the decree of divorce which is here in issue, and without intimating a doubt as to the power of the State of New York to give to a decree of that character rendered in Connecticut, within the borders of the State of New York and as to its own citizens, such efficacy as it may be entitled to in view of the public policy of that State, we hold that the decree of the court of Connecticut rendered under the circumstances stated was not entitled to obligatory enforcement in the State of New York by virtue of the full faith and credit clause.

It therefore follows that the court below did not violate the full faith and credit clause of the Constitution in refusing to admit the Connecticut decree in evidence; and its judgment is, therefore,

Affirmed.

MR. JUSTICE BROWN, with whom were MR. JUSTICE HARLAN, MR. JUSTICE BREWER and MR. JUSTICE HOLMES, dissenting.

Marriage between these parties was solemnized June 4, 1868. They separated the same day, without a consummation, and have never lived together since. No matrimonial domicil was ever established in New York or elsewhere. Defendant left New York soon after the wedding, drifted about the country for several years, and finally settled in Connecticut in 1877; remained there twelve years, during which time, and in 1881, he obtained a divorce in the Superior Court of Litchfield County, which he now sets up in defense of this action.

Plaintiff took no steps for twenty-six years to obtain a legal separation or maintenance, when, in July, 1894, she applied to the Superior Court of the State of New York for a summons by publication. The defendant did not appear, and a decree was rendered against him by default, separating the parties and granting alimony of $1,500 a year. This decree appears to have been abortive, so far as respects alimony at least, probably for lack of personal service on the defendant. Meantime, and in 1891, defendant had inherited a considerable property from his father.

This action was begun by a summons dated June 3, 1899, thirty-one years after the marriage; was served upon the defendant, who answered December 18, 1899, setting up, amongst other things, the decree of the Superior Court of Litchfield County, dissolving the marriage, the validity of which presents the only Federal question in this case.

1. This decree is attacked upon the ground that the Connecticut court acted without jurisdiction of the parties lawfully obtained. The record in that case shows that notice of the pendency of the petition was ordered to be published in a Litchfield paper, and also that a copy of the petition be sent to the respondent by mail, postage paid, at Tarrytown, New York. While there is no affidavit of the publication of the notice, there is a recital in the decree "that said complaint and writ have been duly served upon the defendant pursuant to an order of notice made thereon by the clerk of this court." This is sufficient prima

facie evidence of the publication to entitle the record to be received. Applegate v. Lexington &c. Mining Co., 117 U. S. 255, 268, wherein it was said by the court that "while it must be conceded that, in order to give the court jurisdiction over the persons of the defendants, all the steps pointed out by the statute to effect constructive service on non-residents were necessary, yet it does not follow that the evidence that the steps were taken must appear in the record, unless indeed the statute, expressly or by implication, requires it. . . . Therefore every presumption not inconsistent with the record is to be indulged in, in favor of its jurisdiction. . . . It is to be presumed that the court before making its decree took care to see that its order for constructive service, on which its right to make the decree depended, had been obeyed."

As the record was rejected for reasons appearing only upon its face, it is unnecessary to decide whether the recitals in the decree can be contradicted. Possibly the New York court might have assailed its validity by showing that, notwithstanding the recitals in the record, the court acquired no jurisdiction of the defendant by failure to comply with the order of the court with reference to the publication of notice in a newspaper, or in sending a copy of the petition and complaint to the defendant by mail at Tarrytown, New York, the last known place of residence. The fact that the referee refused to admit the record, even as prima facie evidence, foreclosed any defense founded upon the actual failure to obtain jurisdiction over the defendant.

There is no doubt of the proposition that a decree of divorce may be lawfully obtained at the matrimonial domicil, notwithstanding that the defendant may have taken up his or her residence separate from the other party in another State, providing that the law of the domicil with respect to the personal service or publication be scrupulously observed. Atherton v. Atherton, 181 U. S. 155.

Doubtless the jurisdiction of the court granting the divorce may be inquired into, and if it appear that the plaintiff had not acquired a bona fide domicil in that State at the time of instituting proceedings, the decree is open to a collateral attack, Bell v. Bell, 181 U. S. 175, and a recital in the proceedings of a fact necessary to show jurisdiction may be contradicted. Thompson v. Whitman, 18 Wall. 457; Streitwolf v. Streitwolf, 181 U. S. 179; Andrews v. Andrews, 188 U. S. 14.

Subject to these conditions, each State has the right to regulate the marital status of its citizens, at least so far as to determine in what manner and by whom marriages may be solemnized, what shall be deemed the age of consent, what obligations are assumed, what property rights are created, for what causes divorces shall be granted, for what length of time the domicil of plaintiff shall have been acquired prior to the institution of the proceedings, and in what manner notice shall be given to the defendant. Nor is the power of the legislature in this connection ousted by the fact that the other party to the contract resides in another State, provided that in case of proceedings adverse to such party he or she shall be given such notice as due process of law requires. If such proceedings be in rem or quasi in rem, notice by publication is ordinarily deemed sufficient. But in case of actions in personam for the recovery of damages, personal service within the jurisdiction is vital to the proceedings. Pennoyer v. Neff, 95 U. S. 714; Huling v. Kaw Vallley Railway and Improvement Co., 130 U. S. 559.

By the laws of Connecticut of 1878, c. 71, p. 305, exclusive jurisdiction is given to the Superior Courts to grant divorces for several causes, among which are "wilful desertion for three years with total neglect of duty," with a further provision (Gen. Stats. 4555), "that plaintiff shall have continuously resided in the State three years next before the date of the complaint," with certain exceptions not material to be noticed. A further provision, sec. 4553, that, "where the adverse party resides out of, or is absent from the State, or the whereabouts of the adverse party is unknown to the plaintiff, any judge or clerk of the Supreme Court of Errors, or the Superior Court, or any county commissioner, may make such order of notice as he may deem reasonable, and, such notice having been given and duly proved to the court, it may hear such complaint if it find that the defendant has actually received notice that the complaint is pending, and it if shall not appear that the defendant has had such notice, the court may hear such case, or, if it see cause, order such further notice to be given as it may deem reasonable, and continue the complaint until the order is complied with."

The complaint alleged a wilful desertion of the plaintiff for more than three years, and the court found this to be the fact.

2. The case turns upon the question whether the Superior Court of Litchfield County gained jurisdiction by a residence

of the plaintiff within the State for more than three years. The testimony also showed that the defendant had acquired a separate domicil in New York, and had been living there for about thirteen years.

In discussing this question two propositions may be admitted at once, and discarded as having no relevancy to the case:

1. That a judgment for damages in an action in personam is valid only when personal service has been made upon the defendant within the jurisdiction of the court rendering the judgment. This disposes at once of the cases of Pennoyer v. Neff, 95 U. S. 714; of Mississippi &c. R. R. Co. v. Ward, 2 Black, 485, where an Iowa court had undertaken to abate a nuisance on the Illinois side of the Mississippi river; and of Delaware &c. R. R. Co. v. Pennsylvania, 198 U. S. 342, where a State had attempted to tax property having a permanent situs in another State.

2. That the courts of one State may not grant a divorce against an absent defendant to any person who has not acquired a bona fide domicil in that State. The same rule applies if he has removed thither solely for the purpose of acquiring a domicil and obtaining a divorce for a cause, which would have been insufficent in the State from which he removed. Andrews v. Andrews, 188 U. S. 14.

The jurisdiction of the Connecticut court in this case is shown, not by the facts as they appear in this case, but from the record in that case, and primarily from the petition, which under the practice in that State is incorporated with the summons. The allegations are:

"On the first day of January, 1869, the defendant wilfully deserted the plaintiff, and has continued said desertion, with total neglect of all the duties of the marriage on her part to be performed to the date of this writ, being for more than three years, and during the plaintiff's residence in this State."

It is conceded that such desertion is good ground for a divorce in Connecticut, which may be granted to a plaintiff who has continuously resided in the State three years next before the date of the complaint. The complaint obviously made a case for divorce under the statute. The court found that the complaint and writ had been duly served on the defendant, pursuant to an order of notice made thereon by the clerk; that the allegations of the complaint had been sustained and a divorce was granted.

The case then resolves itself into the single question whether a divorce granted to a plaintiff lawfully domiciled within a State as against a defendant domiciled in another State, who has been served by publication or letter only, is a valid defense to a suit by the latter for a separation and alimony.

Certain cases in this court tend strongly to support the proceedings in Connecticut. Strader v. Graham, 10 How. 82, was an action to recover the value of certain slaves carried into Ohio, a free State. The case was dismissed, as involving a question of the local law of Kentucky, the court remarking: "Every State has an undoubted right to determine the status, or domestic and social condition, of the persons domiciled within its territory, ... and that it was exclusively in the power of Kentucky," (wherein the suit was brought) "to determine for itself whether their employment in another State should or should not make them free upon their return."

In Barber v. Barber, 21 How. 582, a New York court decreed a separation and alimony to the wife. The husband removed to Wisconsin for the purpose of placing himself beyond the jurisdiction of the court which could enforce it, and there obtained a divorce a vinculo upon the ground of abandonment. The sole question raised by the record was: "Whether a wife divorced a mensa et thoro can acquire another domiciliation in a State of this Union different from that of her husband, to entitle her by her next friend to sue him in a court of the United States, having equity jurisdiction, to recover from him alimony due, and which he refuses to make arrangements to pay; and whether a court of equity is not a proper tribunal for remedy in such a case."

It was a suit to recover upon a judgment obtained in New York before proceedings instituted in Wisconsin, and was sustained. Obviously, the Wisconsin divorce was no defense, but its validity was not impugned.

Cheever v. Wilson, 9 Wall. 109, turned upon certain rights of property, and incidentally upon a divorce obtained in Indiana, in a suit in which the defendant appeared. The case, however, is valuable for two questions decided: First, that a decree of divorce, valid and effectual by the laws of the State in which it was obtained, is valid and effectual in all other States; second, that a wife may acquire a domicil different from her husband's

whenever it is necessary or proper that she should have such a domicil; and on such a domicil, if the case otherwise allow it, may institute proceedings for divorce, though it be neither her husband's domicil nor have been the domicil of the parties at the time of the marriage, or of the offense.

Of course, it follows that if the wife may obtain a new domicil her husband may do likewise, as was done in this case, after the separation or abandonment had taken place. In delivering the opinion, Mr. Justice Swayne observed: "The decree (of divorce) was valid and effectual according to the law and adjudications, in Indiana."

The Constitution and laws of the United States give the decree the same effect elsewhere which it had in Indiana. " 'If a judgment is conclusive in the State where it is rendered, it is equally conclusive everywhere,' in the courts of the United States."

In Cheely v. Clayton, 110 U. S. 701, a divorce obtained in a Territorial court, upon notice by publication insufficient under the laws of the Territory, was held to be of no effect. The court, however, observing: "If a wife is living apart from her husband without sufficient cause, his domicil is in law her domicil; and in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the State of his domicil, after reasonable notice to her, either by personal service or by publication, in accordance with its laws, is valid, although she never in fact resided in that State," citing Burlen v. Shannon, 115 Massachusetts, 439, and Hunt v. Hunt, 72 U. S. 217.

In Maynard v. Hill, 125 U. S. 190, a legislative divorce was upheld, and it was said that the fact that no cause existed for the divorce, and that it was obtained without the knowledge of the wife, cannot affect the validity of the act. It was further said that though the conduct of the husband merited the strongest reprobation, his abandonment of his wife, his loose morals and shameless conduct could have no bearing upon the power of the assembly to pass the act.

Four recent decisions in this court are too important to pass unnoticed. In Bell v. Bell, 181 U. S. 175, and in Streitwolf v. Streitwolf (p. 179), it was held that a divorce obtained in a State in which neither party was domiciled, upon service by publication and in another State, was entitled to no faith and credit. These decisions were unanimous. And in Andrews v. Andrews, 188

U. S. 14, that a divorce obtained by one who had gone into another State to procure a divorce in fraud of the law of the domicil, was also invalid.

There remains the case of Atherton v. Atherton, 181 U. S. 155, a divorce obtained by a husband in Kentucky which had been the matrimonial domicil, though the wife had been absent from the State for several months, and apparently had attempted to acquire a new domicil in New York. The court took care to confine the case to the one point decided, namely, the validity of a divorce obtained at the matrimonial domicil. The court out of abundant caution expressly disclaimed that the case involved the validity of a divorce granted, on constructive service, by the court of a State in which only one of the parties ever had a domicil; nor the question to what extent the good faith of the domicil may be afterwards inquired into. "In this case, the divorce in Kentucky was by the court of the State, which had always been the undoubted domicil of the husband, and which was the only matrimonial domicil of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky."

While the Atherton case, as already stated, was confined to a divorce obtained at the matrimonial domicil, the cases cited by Mr. Justice Gray in his opinion relate to divorces obtained in a State which was the domicil only of the complaining party, and are practically the same as those cited by him in his opinion as Chief Justice of Massachusetts in Burlen v. Shannon, 115 Massachusetts, 438. In reading the two cases together one is strongly impressed with the idea that in the Atherton case he had the former case in mind, and gave it such approval as the facts in the latter case would warrant. Not only had the Court of Appeals of Kentucky decided that a wife residing in that State was entitled to obtain a decree of divorce against her husband who had left the State, Rhyms v. Rhyms, 7 Bush, 315; Purzel v. Purzel, 91 Kentucky, 634, but a number of cases from other States were cited holding to the same principle.

The opinion of the court in the present case admits that where the domicil of the husband is also the domicil of matrimony, the courts of that domicil may disregard an unjustifiable absence of the wife therefrom, and treat her as having her domicil there for the purpose of dissolving the marriage as to both parties, and

that such dissolution would be recognized in all other States by virtue of the full faith and credit clause, citing to this effect Atherton v. Atherton, 181 U. S. 155, and, as a corollary therefrom, it is admitted that no question can arise concerning the right of the State of Connecticut to give effect to a decree of divorce rendered in favor of the husband while domiciled in that State. The question is, undoubtedly, as stated, whether the Connecticut court, in virtue of the domicil of the husband in that State, had jurisdiction to render a decree against the wife which was entitled to be enforced in other States, under the full faith and credit clause.

I deny, however, that the final question is whether this would be enforcing a personal judgment rendered in another State against the defendant, over whom the court rendering the judgment had not acquired jurisdiction. A proceeding for divorce is not in personam nor of an exceptional character, except so far as all proceedings in rem are governed by a different rule from that applicable to proceedings in personam. The validity of the latter class depends upon personal service of the defendant being obtained within the jurisdiction. The validity of the former depends upon the jurisdiction of the court over the res—in this case the marriage relation, the domicil of the plaintiff, and such jurisdiction over the defendant as is consonant with the general principles of the constitution with regard to due process of law.

The propositions of the opinion, as we understand it, may be summarized as follows:

That, if one government by virtue of its authority over marriage, may dissolve the tie as to citizens of another government, that other government would have a similar power, and hence the right of every government over its own citizens might be rendered nugatory by the exercise of the power which every other government possesses. To illustrate by the present case: That, if the husband may desert his original domicil in New York, go to the State of Connecticut, acquire a domicil there and procure a divorce which would be binding in New York as to the party there domiciled, it would follow that the power of the State of New York as to the dissolution of the marriage, as to its domiciled citizen, would be of no practical avail. The opinion, however, fails to state the logical result of this proposition, viz., that no divorce would be possible in either State with-

out a personal service upon the other within the State. If the husband, having his domicil in Connecticut, could not obtain a divorce against his wife domiciled in New York without a personal service, it follows that the wife domiciled in New York could not obtain a divorce against her husband in that State without a personal service there.

Undoubtedly the laws of some States are more liberal upon the subject of divorce than those of other States, but that does not affect the question. If the complaining party has acquired a domicil in the State in which he institutes proceedings, he is entitled to the benefit of the laws of that State with respect to the causes of divorce.

It is argued that, as the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce, yet, if the validity of the Connecticut divorce in this case be sustained, it follows that the destruction of the power of the States over the dissolution of marriage of its own citizens would be brought about by the full faith and credit clause of the Constitution. But this was the very point decided in the Atherton case, where a divorce obtained in Kentucky by publication was held good in New York, as against a proceeding by the wife for a divorce in that State. It is true that the matrimonial domicil was in Kentucky. But this does not affect the proposition asserted in the opinion, that the decree did work a dissolution of the marriage, as to her, by the operation of the full faith and credit clause of the Constitution, and to that extent it did work a destruction of the power of the State of New York over the dissolution of the marriage. But the argument to that effect was not considered by this court to be sound. It does undoubtedly follow that the res, that is, the marriage relation, was as much in the State of New York as it was in the State of Connecticut, but it does not follow that the action of the Connecticut court with respect to that res is not as much obligatory in New York as in Connecticut. It is of the very essence of proceedings in rem that the decree of a court with respect to the res, whether it be a vessel, a tract of land or the marriage relation, is entitled to be respected in every other State or country. The status fixed by the adjudication in the State of the former is operative everywhere. Indeed, the proposition is so elementary as not to need the citation of an authority.

The conclusion of the argument is that, the courts of New

York having the same power to decree a dissolution of the marriage at the suit of the wife, that the courts of Connecticut would have to make a similar decree at the suit of the husband, it would become a mere race of diligence between the parties in seeking different forums in other states; or the celerity by which in such states judgments of divorce might be procured, would have to be considered in order to decide which forum was controlling. Granting this to be the case, does not every plea of res adjudicata presuppose a prior judgment, and is it a defense to such plea that such judgment was obtained by superiority in a race of diligence? The whole doctrine is founded, if not upon the doctrine of superior diligence, at least upon the theory of a prior judgment, which fixes irrevocably the rights of the parties, whenever and wherever these rights may come in question. Nor is the rule less operative where suits are in different states and the laws applicable to the questions therein arising are different. To illustrate: Suppose a note and mortgage were given for usurious interest, and the mortgage was sought to be foreclosed in a State where, by statute, usury would invalidate both principal and interest, and a decree were obtained dismissing the bill, can it be doubted that if the note were sued upon in another State where usury did not invalidate the security the plea of res adjudicata would be sustained upon the ground that the rights of the parties had been definitely fixed in the suit for the foreclosure of the mortgage? It seems to me the same rule applies in this case. So long as no proceedings are taken, the marriage would remain valid both by the laws of Connecticut and of New York. But if a suit be instituted by either party, by the husband for a divorce or by the wife for a maintenance, and the question of marriage or no marriage be made an issue, and decided in the case first brought, that decree is forever binding upon both parties. Had the wife in this case brought suit to dissolve the marriage, or for a maintenance in affirmation of the marriage, the decree of the court in New York would have been as binding upon the court in Connecticut as the decree obtained in Connecticut ought to be upon the wife in New York.

The cases in the State courts, with a few exceptions, hereinafter noted, overwhelmingly preponderate in holding that where the plaintiff has acquired a bona fide domicil in a particular State he may lawfully appeal to the courts of that State for a

dissolution of the marriage tie, for the causes permitted by its statutes, and may call in the non-resident defendant by publication. To abstract all these cases would unduly prolong this opinion.

In many of them the full faith and credit clause of the Constitution does not seem to have been called to the attention of the court, and the case was disposed of upon principles of comity, which give to the court a certain latitude of discretion, whereas, under the full faith and credit clause, the consideration given to a decree in the State where it is rendered is obligatory in every other State.

One of the earliest of these cases is that of Harding v. Alden, 9 Maine, 140, in which the parties separated, the husband going to North Carolina and the wife to Rhode Island. She began proceedings there, which culminated in a divorce for adultery committed in North Carolina, the husband having been personally cited to appear, but refusing to do so. The divorce was held to be valid, the court observing that "the protection of innocent parties and the purity of public morals require that divorces lawfully pronounced in one jurisdiction, and the new relations thereupon formed, should be recognized as operative and binding everywhere," in the absence of fraud or collusion. The ruling was that the wife was entitled to dower in lands of which the husband was seized during coverture, the statute expressly giving the right where divorce was decreed for the cause of adultery, as if the husband were dead.

In Barber v. Root, 10 Massachusetts, 260, the parties originally domiciled in Massachusetts removed to Vermont, and established a permanent domicil there. The court, while repudiating the idea that a divorce could be granted to a person who was not domiciled in Vermont, held the divorce to be good.

In Hood v. Hood, 11 Allen, 196, a divorce obtained in Illinois by the husband for desertion, upon notice by publication in a newspaper, was held to be valid as against the wife, although she was then living in Massachusetts under an agreement on his part to pay her a certain sum per week; and although she had no actual notice of the proceedings, and was not in Illinois during the pendency thereof. It was further held that she could not, in a libel for divorce brought by her in Massachusetts, offer evidence that the Illinois decree was obtained by fraud, and upon facts which would not entitle her to a divorce in Massachusetts. In a

subsequent case between the same parties, 110 Massachusetts, 463, the court again decided that the Illinois decree could not be impeached, and that she was not entitled to dower in any lands of which the husband was seized during the coverture.

The whole subject was very carefully considered in Burlen v. Shannon, 115 Massachusetts, 438, which was an action against the husband for board furnished the wife. The husband, whose wife was living apart from him without justifiable cause, removed to Indiana, acquired a domicil there and obtained a decree of divorce by publication, and by leaving a summons at her abode in Massachusetts. The divorce was held to be valid in Massachusetts as to all persons, although the wife had never been in Indiana, never appeared in the suit there, had no knowledge that her husband contemplated going to that State, or had left Massachusetts, until after he had filed his libel for divorce. The authorities are reviewed by Mr. Justice Gray, and the conclusion reached that the divorce in Indiana was valid.

Cummington v. Belchertown, 149 Massachusetts, 123, was an action to recover expenses incurred by the plaintiff for the support of an insane pauper. The husband had removed to another State and procured a decree annulling the marriage on the ground of fraud in concealing from him the fact of insanity before their marriage. Notice of the proceedings was served upon her, but she was not represented, and it was held that the decree was insufficient to annul her marriage in Massachusetts. It was held, under the familiar rule that the jurisdiction of the foreign court may be inquired into, that the wife, when the proceedings were commenced and concluded was utterly insane, and that the record of the New York courts showed her to have been so, and that no guardian was appointed. The case was disposed of as one over which the New York court had acquired no jurisdiction. It does not qualify in any way the previous case of Burlen v. Shannon.

The case of Ditson v. Ditson, 4 R. I. 87, is directly in point, and I understand it to be so admitted. It was held that a divorce in Rhode Island on the ground of desertion was valid, though the husband had never been within the jurisdiction of Rhode Island, and only constructive notice of the pendency of the petition had been given him.

The rule in Kentucky is settled in Rhyms v. Rhyms, 7 Bush. 316, in which a wife proceeded against her husband as a non-resident by a warning order, and it was held that the court had

jurisdiction to grant her a divorce, Chief Justice Robertson remarking: "It would be a reproach to our legislation if a faithless husband in Kentucky could, by leaving the State, deprive his abandoned wife of the power to obtain a divorce at home." In Hawkins v. Ragsdale, 80 Kentucky, 353, it was held that a divorce obtained by the husband in Indiana by constructive service determined the status of the party in Kentucky, and that under the statutes of that State it barred all claim to curtesy or dower in Kentucky lands. To the same effect is Purzel v. Purzel, 91 Kentucky, 634.

The law of California is settled in In re Newman, 75 California, 213, to the effect that a suit for divorce, so far as it affects the status of the parties and the custody of their children, is a proceeding in rem, and service by publication on a non-resident defendant is good. This ruling was repeated in In re James, 99 California, 374, where it is declared that such decree is equally valid in other states.

Nowhere is the rule more strongly asserted than in Tennessee, where a decree obtained in Illinois by publication was sustained in Thoms v. King, 95 Tennessee, 60, and where it seems to have been held that the decree could not be impeached, even by showing the absence of necessary residence.

In Cooper v. Cooper, 7 Ohio St. 238, it was held that a divorce granted in Indiana precluded an application for a divorce and alimony in Ohio. In Cox v. Cox, 19 Ohio St. 502, the validity of a foreign decree of divorce obtained by constructive service, except so far as regarded the question of alimony, was sustained. The same ruling was made in Doerr v. Forsythe, 50 Ohio St. 726, holding that while the Indiana divorce was good, it did not affect the property rights of the wife in the State of Ohio.

The rule in Missouri is stated in Gould v. Crow, 57 Missouri, 200, that a divorce regularly obtained by the husband in Indiana on an order of publication operates as a divorce in his favor in Missouri, so as to prevent his wife from claiming dower in lands owned by him in that State. The decree so pronounced is a judgment in rem and is valid everywhere under the Constitution and laws of the United States. A like ruling was made in Anthony v. Rice, 110 Missouri, 223.

The law in Kansas is settled in Rodgers v. Rodgers, 56 Kansas, 483, to the effect that the courts of a sister State may dis-

solve a marriage relation between a husband domiciled there and a wife domiciled in Kansas, by publication, although unknown to her; but that such courts have no power to settle the title of lands in Kansas or control the custody of children residing there. But it was also decided in Chipman v. Chipman, 48 Kansas, 636, that a wife having obtained a divorce in Ohio upon service by publication, was not entitled to dower in lands in Kansas fraudulently conveyed by her husband in fraud of her or others.

In Smith v. Smith, 43 La. Ann. 1140, it is held that a wife may acquire a separate domicil from that of her husband where his conduct has been such as to furnish ground for divorce, and her marriage status becomes subject to the jurisdiction of that domicil, and that the courts thereof may grant a divorce upon actual or constructive notice. The rights of the Louisiana courts to decree a divorce against an absentee by means of substituted service is again affirmed in Butler v. Washington, 45 La. Ann. 279.

The law of Wisconsin is the same. Shafer v. Bushnell, 24 Wisconsin, 372; Cook v. Cook, 56 Wisconsin, 195, though in the latter case the right of the wife to an interest in her husband's lands in Wisconsin was preserved.

In Thompson v. State, 28 Alabama, 12, the right of the husband to emigrate and acquire a new domicil and procure a divorce upon publication in the State of his domicil, was also affirmed. See also Turner v. Turner, 44 Alabama, 437. In the latter case it is indicated that a foreign divorce did not settle the rights of the wife to dower in his lands, or any other interests of a pecuniary character.

In Kline v. Kline, 57 Iowa, 386, a decree rendered in another State on service by publication was recognized, except so far as it attempted to fix the custody of the minor children. In Van Orsdal v. Van Orsdal, 67 Iowa, 35, the property rights of the wife were recognized, but this right was limited to property within the State, and which the husband owned at the time of the divorce, and not to what he subsequently acquired. In this case it was said: "The divorce was granted in May, 1880. In November, 1881, the defendant's father died in this State, possessed of certain property which the defendant inherited. Now, while it may be that the plaintiff might be entitled to alimony if the defendant had owned property in the State at the time the

divorce was procured in Nebraska, she cannot be so entitled because he has subsequently acquired property. The plaintiff, if entitled to alimony, was so entitled at the time the divorce was granted. The relation of the husband and wife then ceased, and neither party is entitled to any share or interest in property which may be subsequently acquired."

In Indiana the right of a wife domiciled there to a divorce against the husband who never resided in that State, and upon whom service was only obtained by publication, is recognized in Tolen v. Tolen, 2 Blackford 407; Hood v. State, 56 Indiana, 263, and in Hilbish v. Hattle, 145 Indiana, 59, it was held that the wife had no rights in his property by virtue of her marriage relations with the husband, though the court did not in the divorce proceedings adjudicate the property rights of the parties.

In Garner v. Garner, 56 Maryland, 127, the power to grant a divorce against a non-resident, upon whom process had not been served, was recognized, but the right to a decree that the non-resident should not marry again was denied.

In Thurston v. Thurston, 58 Minnesota, 279, the divorce was recognized, though process was served outside of the State. But it was held that the question of alimony was not res adjudicata by reason of the judgment. The wife was allowed alimony out of property in Minnesota.

The validity of foreign divorces obtained without personal service is recognized in Illinois, in Knowlton v. Knowlton, 155 Illinois, 158, and in Dunham v. Dunham, 162 Illinois, 589.

The law in New Jersey appeared at one time to favor the contention of the wife in this case. The gist of the decisions seemed to be that a foreign decree is enforceable in another State only on the ground of comity. This was indicated in Doughty v. Doughty, 28 N. J. Eq. 581, though the decree in that case was held to have been obtained by fraud. It was admitted that the decree obtained by the husband in Illinois was lawful and binding there, but it was held that it did not change the status of the wife in New Jersey, her citizenship there being admitted. The case was properly decided on the ground that the husband went to Illinois to obtain a divorce, and acquired no bona fide domicil there. The same rule was recognized in Flower v. Flower, 42 N. J. Eq. 152. These cases, however, seem to have been overruled in Felt v. Felt, 59 N. J. Eq. 606, where it was held that the domicil of the complainant in a foreign State was

sufficient to give jurisdiction, notwithstanding the defendant had not been served with process there. The Chief Justice remarked in this case: "A condition of the law which makes the intercourse of a man and woman either legitimate or adulterous as they happen to be within the limits of one State or another is not to be tolerated any further than is plainly required by public policy." This case evidently puts New Jersey in line with the vast majority of other states.

The cases of New York upon this subject are numerous and perhaps not wholly reconcilable, but we think that the law, as summarized in the last case of Winston v. Winston, 165 N. Y. 553, is adverse to the validity of a divorce obtained in another State without service of process within the jurisdiction. Of the same tenor are the cases in Pennsylvania: Colvin v. Reed, 55 Pa. St. 375; Reel v. Elder, 62 Pa. St. 308. North Carolina: Irby v. Wilson, 1 Dev. & Bat. Eq. 568; Harris v. Harris, 115 N. Car. 587. South Carolina: McCreery v. Davis, 44 S. Car. 195.

The law in this country then may be summarized as follows: In Maine, Massachusetts, Rhode Island, Kentucky, California, Tennessee, Ohio, Missouri, Kansas, Louisiana, Wisconsin, Alabama, Iowa, Indiana, Maryland, Minnesota, Illinois and New Jersey, the validity of a divorce obtained in another State by a party there domiciled in a proceeding where constructive service upon the defendant only is obtained, is fully recognized. In Ohio, Iowa and Minnesota, and perhaps also Louisiana and Alabama, her right to alimony and to dower is preserved. But the very cases which limit the effect of the divorce, so far as property rights are concerned, restrict such rights to dower in lands of which the husband was seized during coverture, and inferentially at least to alimony from such property. It is also limited to property within the State where suit is brought. That her rights in her husband's property should extend to property acquired by him long after the divorce is nowhere indicated.

The only states in which it is held that a party domiciled in another State may not obtain a divorce there by constructive service are New York, Pennsylvania, North and South Carolina.

A proceeding for divorce is a suit in rem, with which is often incorporated a suit in personam. The res is aptly stated in Ellis v. Martin, 53 Missouri, 575, as "the status of the plaintiff in relation to the defendant to be acted on by the court. This relation being before the court in the person of the plaintiff, the court

acts on it, and dissolves it by a judgment of divorce." The fact subsequently ascertained, that it may have been procured by fraud or false testimony, is wholly beside the question, as we shall hereafter show. The fact that the husband changed his domicil to another State, after the cause of action arose, is also immaterial. The status of the husband in this case was irrevocably fixed by the decree. It is unnecessary to consider how far it affected the status of the wife in New York, which, in respect to other questions, may be subject to the local law; but her relations as against her husband are controlled by the decree which fixed his status. Indeed, it would be a reproach to our jurisprudence if an injured party residing in one State could not obtain a decree from the other party, without pursuing the offending party into another and distant State, where he or she may have chosen to establish a domicil.

In this case the referee reported that the defendant abandoned the plaintiff without cause or justification. An exception was taken to this report, and the testimony was sent up, which shows that the parties separated on the day of their marriage and have never lived together since. The testimony leaves it doubtful whether it was a case of abandonment or of separation by mutual consent. It does, however, show that plaintiff took no steps to assert her marital rights for twenty-six years after her marriage. Her husband having in the meantime inherited a large amount of property from his father, she began suit for divorce a mensa et thoro and an allowance of alimony. This suit, however, was ineffectual so far as respects the alimony, as no personal service was obtained. She waited again for five years and began this proceeding both for a separation, which she had already obtained, and for alimony.

We think the defendant may lawfully reply thus: "You are pursuing me as your husband for a separation de jure which has existed for thirty-one years de facto, and since 1894 de jure, and for an alimony which is obviously the sole object of your proceeding. Your only claim against me is as your husband. I am not your husband. Twenty-three years ago the Superior Court of Litchfield County, Connecticut, in which State I had an actual and bona fide domicil, and which had sole jurisdiction over my marital status for twelve years, liberated me from the bonds of matrimony and pronounced me a free man. In the meantime I have married another woman, and if your position

be a sound one, I am, at least in the State of New York, a bigamist, and my wife an adulteress." It is difficult to conceive of a case calling more loudly for the application of the general doctrine.

As no question is made as to the validity of the Connecticut decree and its legal effect in that State, and as this court has repeatedly decided that, under the full faith and credit clause of the Constitution, a judgment conclusive in the State where it is rendered is equally conclusive everywhere in the courts of the United States, Cheever v. Wilson, 9 Wall. 108; Mill v. Duryea, 7 Cranch, 483; D'Arcy v. Ketcham, 11 How. 165, I do not understand how this decree can be denied the same effect in New York that it has in Connecticut without disregarding the constitutional provision in question. The result is that the husband, freed from the bonds of matrimony in Connecticut, was at liberty to contract another marriage there, while the wife cannot even at this late day contract another marriage in New York without being guilty of adultery.

3. It is insisted, however, that the decree of the Connecticut court was obtained by the fraud of Haddock, in stating in his complaint that his wife had deserted him, when, in the present case, it appears from his own testimony that he, in fact, abandoned and refused to live with her, or that they separated by mutual consent.

The evidence upon which the Connecticut decree was granted does not appear in the record, and it is possible that the case was made out by the testimony of other witnesses. But, however that may be, this decree cannot be impeached by evidence that it was obtained by false testimony, even though it be testimony of the plaintiff in that proceeding and the defendant in this. Hood v. Hood, 11 Allen, 196, in which it was held that "both parties had their domicil in Illinois, and were subject to the jurisdiction of its courts, and that the fact of desertion by the wife was conclusively settled between the parties by the decree in Illinois, and it was not competent for the wife to contradict it on a libel filed by her afterwards in Massachusetts." See same case, 110 Massachusetts, 463.

The rule is well settled that while a judgment or decree may sometimes be impeached for fraud, it can only be for a fraud extrinsic to the cause—as, that the judgment was collusively obtained to defraud some other person, and that it cannot be

impeached by either of the parties thereto by reason of false testimony given at the time, or which must have been given to establish the plaintiff's case, or even by perjury of one of the parties thereto. Granting that the testimony shows the absence of good faith, and even perjury, on the part of the husband in the Connecticut suit, the decree cannot be opened for that reason, or for any reason, which would not logically involve a reëxamination of the entire facts upon which the decree is obtained. Christmas v. Russell, 5 Wall. 290; United States v. Throckmorton, 98 U. S. 61; Sims v. Slocum, 3 Cranch, 300; Ammidon v. Smith, 1 Wheat. 447; Smith v. Lewis, 3 Johns. 157; Marriott v. Hampton, 7 T. R. 265; Demerit v. Lyford, 7 Foster, 541, 546; Peck v. Woodbridge, 3 Day, 30; Dilling v. Murray, 6 Indiana, 324; Homer v. Fish, 1 Pick. 435; Lewis v. Rogers, 16 Pa. St. 18; Sidensparker v. Sidensparker, 52 Maine, 481; B. & W. R. R. Company v. Sparhawk, 1 Allen, 448; Damport v. Sympson, Croke, Eliz'bth, 520; Eyres v. Sedgwicke, Croke, James, 601; Mason v. Messenger, 17 Iowa, 261, 272; Walker v. Ames, 2 Connecticut, 488; White v. Merritt, 7 N. Y. 352.

When it is considered that the status of the defendant was fixed by the decree of the Connecticut court in 1881, in a proceeding of which his wife had due notice, that upon the faith of this decree he remarried the following year, and that the plaintiff made no move to establish her conjugal rights for thirteen years thereafter, and for twenty-six years after her marriage, the injustice of holding all these proceedings to be null and void, even upon the assumption of perjury committed by the defendant, becomes the more manifest. We think that at least the record should have been received.

I regret that the court in this case has taken what seems to me a step backward in American jurisprudence, and has virtually returned to the old doctrine of comity, which it was the very object of the full faith and credit clause of the Constitution to supersede.

Mr. Justice Holmes, with whom concurred Mr. Justice Harlan, Mr. Justice Brewer and Mr. Justice Brown, dissenting.

I do not suppose that civilization will come to an end whichever way this case is decided. But as the reasoning which prevails in the mind of the majority does not convince me, and as I think that the decision not only reverses a previous well-

considered decision of this court but is likely to cause considerable disaster to innocent persons and to bastardize children hitherto supposed to be the offspring of lawful marriage, I think it proper to express my views. Generally stated, the issue is whether, when a husband sues in the court of his domicil for divorce from an absent wife on the ground of her desertion, the jurisdiction of the court, if there is no personal service, depends upon the merits of the case. If the wife did desert her husband in fact, or if she was served with process, I understand it not to be disputed that a decree of divorce in the case supposed would be conclusive, and so I understand it to be admitted that if the court of another State on a retrial of the merits finds them to have been decided rightly its duty will be to declare the decree a bar to its inquiry. The first form of the question is whether it has a right to inquire into the merits at all. But I think that it will appear directly that the issue is narrower even than that.

In Atherton v. Atherton, 181 U. S. 155, a divorce was granted, on the ground of desertion, to a husband in Kentucky against a wife who had established herself in New York. She did not appear in the suit and the only notice to her was by mail. Before the decree was made she sued in New York for a divorce from bed and board, but pending the latter proceedings the Kentucky suit was brought to its end. The husband appeared in New York and set up the Kentucky decree. The New York court found that the wife left her husband because of his cruel and abusive treatment, without fault on her part, held that the Kentucky decree was no bar and granted the wife her divorce from bed and board. The New York decree, after being affirmed by the Court of Appeals, was reversed by this court on the ground that it did not give to the Kentucky decree the faith and credit which it had by law in Kentucky. Of course, if the wife left her husband because of his cruelty and without fault on her part, as found by the New York court, she was not guilty of desertion. Yet this court held that the question of her desertion was not open but was conclusively settled by the Kentucky decree.

There is no difference, so far as I can see, between Atherton v. Atherton and the present case, except that in Atherton v. Atherton the forum of the first decree was that of the matrimonial domicil, whereas in this the court was that of a domicil afterwards acquired. After that decision any general objec-

tion to the effect of the Connecticut decree on the ground of the wife's absence from the State comes too late. So does any general objection on the ground that to give it effect invites a race of diligence. I therefore pass such arguments without discussion, although they seem to me easy to answer. Moreover, Atherton v. Atherton decides that the jurisdiction of the matrimonial domicil, at least, to grant a divorce for the wife's desertion without personal service, does not depend upon the fact of her desertion, but continues even if her husband's cruelty has driven her out of the State and she has acquired a separate domicil elsewhere upon the principles which we all agree are recognized by this court.

I can see no ground for giving a less effect to the decree when the husband changes his domicil after the separation has taken place. The question whether such a decree should have a less effect is the only question open, and the issue is narrowed to that. No one denies that the husband may sue for divorce in his new domicil, or, as I have said, that if he gets a decree when he really has been deserted, it will be binding everywhere. Hawkins v. Ragsdale, 80 Kentucky, 353, cited 181 U. S. 162. Cheely v. Clayton, 110 U. S. 701, 705. It is unnecessary to add more cases. The only reason which I have heard suggested for holding the decree not binding as to the fact that he was deserted, is that if he is deserted his power over the matrimonial domicil remains so that the domicil of the wife accompanies him whereever he goes, whereas if he is the deserted he has no such power. Of course this is a pure fiction, and fiction always is a poor ground for changing substantial rights. It seems to me also an inadequate fiction, since by the same principle, if he deserts her in the matrimonial domicil, he is equally powerless to keep her domicil there, if she moves into another State. The truth is that jurisdiction no more depends upon both parties having their domicil within the State. than it does upon the presence of the defendant there, as is shown not only by Atherton v. Atherton, but by the rights of the wife in the matrimonial domicil when the husband deserts.

There is no question that a husband may establish a new domicil for himself, even if he has deserted his wife. Yet in these days of equality I do not suppose that it would be doubted that the jurisdiction of the court of the matrimonial domicil to grant a divorce for the desertion remained for her, as it would

for him in the converse case. See Cheever v. Wilson, 9 Wall. 108. Indeed in Ditson v. Ditson, 4 R. I. 87, which, after a quotation of Judge Cooley's praise of it, is stated and relied upon as one of the pillars for the decision of Atherton v. Atherton, a wife was granted a divorce, without personal service, in the State of a domicil acquired by her after separation, on the sole ground that in the opinion of the court its decree would be binding everywhere. If that is the law it disposes of the case of a husband under similar circumstances, that is to say of the present case, a fortiori; for I suppose that the notion that a wife can have a separate domicil from her husband is a modern idea. At least Ditson v. Ditson confirms the assumption that jurisdiction is not dependent on the wife's actually residing in the same State as her husband, which has been established by this court. Atherton v. Atherton, 181 U. S. 155; Maynard v. Hill, 125 U. S. 190; Cheever v. Wilson, 9 Wall. 108. When that assumption is out of the way, I repeat that I cannot see any ground for distinguishing between the extent of jurisdiction in the matrimonial domicil and that, admitted to exist to some extent, in a domicil later acquired. I also repeat and emphasize that if the finding of a second court, contrary to the decree, that the husband was the deserter, destroys the jurisdiction in the later acquired domicil because the domicil of the wife does not follow his, the same fact ought to destroy the jurisdiction in the matrimonial domicil if in consequence of her husband's conduct the wife has left the State. But Atherton v. Atherton decides that it does not.

It is important to bear in mind that the present decision purports to respect and not to overrule Atherton v. Atherton. For that reason, among others, I spend no time in justifying that case. And yet it appears to me that the whole argument which prevails with the majority of the court is simply an argument that Atherton v. Atherton is wrong. I have tried in vain to discover anything tending to show a distinction between that case and this. It is true that in Atherton v. Atherton, Mr. Justice Gray confined the decision to the case before the court. Evidently, I should say, from internal evidence, in deference to scruples which he did not share. But a court by announcing that its decision is confined to the facts before it does not decide in advance that logic will not drive it further when new facts arise. New facts have arisen. I state what logic seems to me to require if that case is to stand, and I think it reasonable to ask for an articulate indication of how it is to be distinguished.

I have heard it suggested that the difference is one of degree. I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort, and are none the worse for it. But the line which is drawn must be justified by the fact that it is a little nearer than the nearest opposing case to one pole of an admitted antithesis. When a crime is made burglarly by the fact that it was committed thirty seconds after one hour after sunset, ascertained according to mean time in the place of the act, to take an example from Massachusetts (R. L. c. 219, § 10), the act is a little nearer to midnight than if it had been committed one minute earlier, and no one denies that there is a difference between night and day. The fixing of a point when day ends is made inevitable by the admission of that difference. But I can find no basis for giving a greater jurisdiction to the courts of the husband's domicil when the married pair happens to have resided there for a month, even if with intent to make it a permanent abode, than if they had not lived there at all.

I may add, as a consideration distinct from those which I have urged, that I am unable to reconcile with the requirements of the Constitution, Article 4, section 1, the notion of a judgment being valid and binding in the State where it is rendered, and yet depending for recognition to the same extent in other States of the Union upon the comity of those states. No doubt some color for such a notion may be found in State decisions. State courts do not always have the Constitution of the United States vividly present to their minds. I am responsible for language treating what seems to me the fallacy as open, in Blackinton v. Blackinton, 141 Massachusetts, 432, 436. But there is no exception in the words of the Constitution. "If the judgment is conclusive in the State where it was pronounced it is equally conclusive everywhere." Christmas v. Russell, 5 Wall. 290, 302; Marshall, C. J., in Hampton v. McConnel, 3 Wheat. 234; Mills v. Duryee, 7 Cranch, 481, 485; Story, Const. § 1313. See also Hancock National Bank v. Farnum, 176 U. S. 640, 644, 645. I find no qualification of the rule in Wisconsin v. Pelican Ins. Co., 127 U. S. 265. That merely decided, with regard to a case not within the words of the Constitution, that a State judgment could not be sued upon when the facts which it established were not a cause of action outside the State. It did not decide or even remotely suggest that the judgment would not be conclusive as to

the facts if in any way those facts came in question. It is decided as well as admitted that a decree like that rendered in Connecticut in favor of a deserting husband is binding in the State where it is rendered. Maynard v. Hill, 125 U. S. 190. I think it enough to read that case in order to be convinced that at that time the court had no thought of the divorce being confined in its effects to the Territory where it was granted, and enough to read Atherton v. Atherton to see that its whole drift and tendency now are reversed and its necessary consequences denied.

Note:—The question in this case was whether the provisions of the Constitution of the United States requiring full faith and credit to be "given in each State to the judicial proceedings of every other State" applies to cases of divorce where the libellant only is within the jurisdiction of the court granting the decree, and service on the libellee, resident in another State, is by publication only. The court has heretofore decided that it does so apply when the parties have at any time during marriage lived together in the State. It now decides that it does not apply where there has been no such marital domicil. It does not deny that every State may deal with the question of the status as to marriage of its own citizens, but it does say that one State cannot unmarry the citizen of another State. That is to say, if A and B are married, Connecticut may unmarry A, resident therein, but B, residing in New York, will remain married, although having no spouse, if New York, B's residence, refuses full faith and credit to the divorce by the Connecticut court.

It is not denied that the marriage status is a thing subject to the jurisdiction where it subsists, but it is said that it cannot subsist in two different States; and that to permit the action of one State to destroy it in another is to deprive the latter of jurisdiction over the status of its own citizens. By this roundabout reasoning the court thinks to abate somewhat the evils of the conflict of the diverse laws of the several States.

It does not seem that such reasoning is convincing. The effect of the decision, however, will not be to invalidate divorces of the Connecticut-Haddock kind. The great majority of the States have in some fashion recognized the validity of such divorces, as pointed out by the dissenting opinion of Judge Brown. Indeed, the prevailing opinion states that the cases in the State courts "overwhelmingly preponderate in holding that where the plaintiff has acquired a bona fide domicil in a particular State he may lawfully appeal to the courts of that State for dissolution of the marriage tie, and may call in the non-resident defendant by publication." The contention of the majority of the court is that the clause of the Constitution has not been the ground of sustaining such divorces, but the doctrine of comity between the States. The several States are not likely to cease their recognition of divorces obtained in other States because of this decision. They could not well do so in the face of statute provisions in almost every State for summoning non-resident defendants by publication.

No fear need be entertained as to an attack upon the validity of divorces like the Connecticut-Haddock one in any States except New York, Pennsyl-

vania and North and South Carolina, and the state of things in these States remains as it has been. They have heretofore refused to recognize divorces of the Haddock kind. The true criterion should be found in the statement that "If the judgment is conclusive in the State where it was pronounced, it is equally conclusive elsewhere," quoted by Judge Holmes from Christmas v. Russell, 5 Wall. 290; 18 L. ed. 475.

The situation may perhaps best be stated, since the decision in the Haddock case, in the language of Adams v. Adams, 154 Massachusetts, 296, where the judge says, and the language is pat from its own lack of lucidity: "But if the judgment is thus binding to all intents and purposes in California, it would be binding elsewhere, which, as has been shown, is not the law."

See the comment on the Haddock case in McCormick v. McCormick, 82 Kan. 31, and the statute enacted as a result of the Haddock decision, (Kansas Laws 1907, p. 297, c. 184), giving full faith and credit to judgments of courts of other states just as if they had been rendered in Kansas.

Haddock v. Haddock is cited in Pettis v. Pettis, 91 Conn. 608, 101 Atl. 13, 4 A. L. R. 852, where it is held that a judgment of separation from bed and board rendered against a non-resident defendant, who does not appear and is not served with process within the state, is not enforceable in the state of defendant's domicil. See also note, 4 A. L. R. 858, 9 R. C. L. 400, and 15 R. C. L. 932.

Haddock v. Haddock is cited in Bigelow v. Old Dominion Copper Co., 225 U. S. 111, 137, where the court says: "It is an elementary principle of jurisprudence, that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government." See also Sistare v. Sistare, 218 U. S. 1, 54 L. ed. 905.

In Williams v. Osenton, 232 U. S. 619, Haddock v. Haddock is cited and the proposition is laid down that, however it may be in England, in this country a wife who has justifiably left her husband may acquire a different domicil from his not only for the purpose of obtaining a divorce, but also for other purposes.

In Olmsted v. Olmsted, 216 U. S. 385, 391, 54 L. ed. 530, the court holds that the legislature of Michigan had no power to pass an act affecting the transmission of title to lands in New York.

In Sistare v. Sistare, 218 U. S. 1, 54 L. ed. 905, the court holds that a judgment enforceable in the state where rendered must be given effect in another state, under the full faith and credit clause of the United States Constitution, although the method of procedure to enforce its collection may not be the same in both states.

In Zentzis v. Zentzis, 163 Wis. 342, 158 N. W. 284, (citing with approval Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565), the Wisconsin court upheld a division of the husband's property by the Montana court, although some of the property was in Wisconsin, saying: "It is manifest that the Montana court obtained jurisdiction of the parties to the divorce action and of the sub-

ject-matter of the action. These facts make the judgment of the Montana court binding on the husband as to all rights that inhered in and arose out of the marital relations. The husband, the plaintiff in the instant action, being domiciled in Montana when he was served with process in the divorce action, was properly subjected to the process of the Montana court, and is bound by the judgment pronounced against him by that court. Under these facts and conditions a judgment of the sister state must be given faith and credit in Wisconsin under section 1, art. 4, Constitution of the United States." See the reference to Doughty v. Doughty, 28 N. J. Eq. 581, and compare with the New Jersey case of Lister v. Lister cited at the end of this note. As is pointed out by the Wisconsin court, the plaintiff in Zentzis v. Zentzis occupies a different position.

The view referred to in the New Jersey cases will be found approved by the Supreme Court of the United States in Thompson v. Thompson, 226 U. S. 551, 561, 57 L. ed. 347, 33 Sup. Ct. 129 where the court says: "It is established that the full faith and credit clause, and the statutes enacted thereunder, do not apply to judgments rendered by a court having no jurisdiction of the parties or subject-matter, or of the res in proceedings in rem. D'Arcy v. Ketchum, 11 How. 165; Thompson v. Whitman, 18 Wall. 457; Bigelow v. Old Dominion Copper Co., 225 U. S. 111, 134.

But in order to make a divorce valid even when granted by the courts of the state of the matrimonial domicil, there must be notice to the defendant, either by service or process, or (if the defendant be a non-resident) by such publication or other constructive notice as is required by the law of the state. Cheely v. Clayton, 110 U. S. 701; Atherton v. Atherton, 181 U. S. 155, 171, 172. In Cheely v. Clayton, because the notice was published against the defendant without making such effort as the local law required to serve process upon her within the state, this court held, following repeated decisions of the state court, that the decree of divorce was wholly void for want of jurisdiction in the court that granted it; and that the liberty conferred by the local statute upon a defendant on whom constructive service only had been made to apply within three years to set the decree aside did not make it valid when the constructive service was so defective."

In Perkins v. Perkins, 225 Mass. 82, 113 N. E. 841, the court in holding that a Georgia decree was no bar to the wife's suit for divorce in Massachusetts on the ground of desertion, said: "The principles upon which judgments of foreign courts are accorded their full effect is that where parties have once litigated fairly a dispute in the courts of any civilized country, the same question ought not to be tried anew by the courts of another jurisdiction. Old Dominion Copper Mining and Smelting Co. v. Bigelow, 203 Mass. 159, 213, 89 N. E. 193, 40 L. R. A. (N. S.) 314. That principle applies with diminishing force where the essential elements of valid litigation are not all present, and reaches almost a vanishing point where the hearing is ex parte and the subject matter of the litigation is not in an international sense within the jurisdiction of the foreign court. On the other hand, it is highly desirable that as to a subject of such vital and far-reaching importance as the dissolution of the marriage relation, there should be uniformity of practice between the several states of the Union in the recognition of judgments of sister states. Assertions of jurisdiction by one state should so far as possible be the correlative of recognition of jurisdiction in other states.

The Federal Supreme Court, although without jurisdiction over the subject of divorce, is vested with power to declare with reference to it the principles by which interstate rights and obligations exist and will be enforced. If the principles so declared as to divorce are made a common basis for the exercise of interstate comity, there may be a closer approach to unity of decision among the several states. Two rules have been established. First: A decree of divorce by a court not having actual jurisdiction of both parties and of the subject, does not come within the full faith and credit clause of the Constitution of the U. S. Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867, 5 Ann. Cas. 1. Second: The state having jurisdiction of the matrimonial domicil and of one spouse, innocent according to the decision of the courts of that state of matrimonial wrong, has jurisdiction of the matrimonial status and is clothed with power, after reasonable ex re notice, to enter judgments concerning it, which must be recognized by courts of the jurisdiction of the domicil of the other spouse. Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. ed. 794; Thompson v. Thompson, 226 U. S. 551, 562, 33 Sup. Ct. 129, 57 L. ed. 347."

In Lister v. Lister, 86 N. J. Eq. 30, 97 Atl. 170, the court declined to recognize the validity of the defendant's absolute divorce in the state of Nevada because it had been fraudulently obtained on his false representation of his residence in that state, and, in discussing this question, said: "A divorce suit is a suit in rem." The term "res" is one of somewhat wide content, and it embraces not only land and chattels, but also the status of individuals as parent and child, husband and wife, guardian and ward, and also the status of an individual as a citizen and as a voter. The essential characteristic of an action in rem, I think, is to be found in the power of the state through the decree or judgment of its court to dispose of the subject-matter of the suit, the res, in accordance with the object of the suit, whether that subject-matter be physical property or the status of one or both of the parties litigant. See Amparo Mining Co. v. Fidelity Trust Co., 74 N. J. Eq. 197, 203, 71 Atl. 605 In actions in personam, judgments or decrees do not ipso facto accomplish the objects of the suits in which they are rendered. An execution follows which may be abortive, or proceedings may be taken to compel the defendant to do what he is directed to do by the decrees, which proceedings may be inefficacious. Suits for specific performance of contracts to convey real estate formerly were actions in personam and the decree only operated upon the person and might never operate to give the complaintant the relief which was awarded him by the decree. Subsequent legislation, however, has in many states made such a suit an action in rem or quasi in rem. At present, such suits, when brought in a foreign state where the land in question does not lie, are purely actions in personam, although if the land lay in the state where the suit was brought the action might be in rem or quasi in rem. * * *."

"It has become a common practice in the eastern states, among incompatible spouses, to arrange for a divorce without scandal, taking advantage of the laws of some of the western states which seem to foster the divorce industry for the benefit of their legal practitioners. The scheme is a very simple one. One spouse goes to a western state, Nevada for instance, stays six months at a hotel, perhaps making frequent visits back east, and then institutes a suit for divorce in Nevada. The other spouse, the defendant,

making no pretense of changing his or her domicil from the eastern state, retains a Reno lawyer who enters an appearance and files an answer, and thus makes a show of defense. The trial often is a sham. The divorce is granted. The plaintiff spouse returns immediately to his or her eastern domicil, and both spouses, the mock combatants, assume that under the full faith and credit clause their status as husband and wife in their eastern domicil has been abolished. In my judgment the state of New Jersey will not recognize such a proceeding as having any validity in her territory where one of her residents, subject to her power and governed by her laws, is one of the spouses in the affair. Nor do I think that if the emigrant spouse in fact becomes a resident of Nevada in good faith, animo manendi, and the New Jersey spouse in good faith litigates the Nevada suit, the full faith and credit clause can in the slightest degree affect the status in New Jersey of the New Jersey spouse. This clause is potent, but it cannot enlarge the Nevada decree, which, when left unaided by New Jersey law, can only affect the status of the Nevada spouse in Nevada. New Jersey will not allow her citizens to transport their matrimonial status to a foreign state and subject that status to the decree of a foreign court, except by transporting their bona fide residence to such state, animo manendi. How far New Jersey will accept and enforce in her territory a Nevada decree divorcing a spouse resident in Nevada, from a spouse resident in New Jersey, is a matter, I think, which New Jersey has a right to determine for herself. If the plaintiff has a bona fide residence in Nevada so that there is a res of which the Nevada court has full jurisdiction, then in large numbers of cases and under certain conditions New Jersey law ordains that the Nevada decree affecting the Nevada res shall in like manner affect the New Jersey res. Felt v. Felt, 59 N. J. Eq. 606, 45 Atl. 105, 49 Atl. 1071, 47 L. R. A. 546, 83 Am. St. 612. The full faith and credit clause, however, is, in my judgment, entirely inoperative in this class of cases."

INDEX

[*References are to Sections.*]

ABANDONMENT,
alimony, husband, 749.
definition, 326.
divorce, evidence, 511.
forms, 964.
pleading, 494.
husband, alimony, 749.
imprisonment, 300.
marriage, generally, 325-347.
separate maintenance, 644.
cause, 642, 643.
effect, 635.

ABATEMENT OF ACTIONS,
breach of promise, 25.
divorce, death, 436.

ABDUCTION,
marriage, Hawaii, 816.
Montana, 832.
Phillipine Islands, 846.
South Carolina, 849.
Virginia, 855.

ABORTION,
breach of promise, aggravated damages, 45.
defense, 30.
cruelty, 291.
forced submission, 279.

ABSENCE,
bigamy, 263.

ABSENTEE,
divorce, validity of decree, 482.

ABSOLUTE DIVORCE,
alimony, 610.
a vinculo matrimonii, 195.
causes, Alabama, 865.
Arizona, 867.
Arkansas, 868.
California, 869.
Colorado, 870.
Connecticut, 871.
Delaware, 873.
District of Columbia, 874.
Florida, 875.

[*References are to Sections.*]

ABSOLUTE DIVORCE—Continued.
Georgia, 876.
Hawaii, 877.
Idaho, 878.
Illinois, 879.
Indiana, 881.
Indian Territory, 880.
Iowa, 882.
Kansas, 883.
Kentucky, 884.
Louisiana, 885.
Maine, 886.
Maryland, 887.
Massachusetts, 888.
Michigan, 889.
Minnesota, 890.
Mississippi, 891.
Missouri, 892.
Montana, 893.
Nebraska, 894.
Nevada, 895.
New Hampshire, 896.
New Jersey, 897.
New Mexico, 898.
New York, 899.
North Carolina, 900.
North Dakota, 901.
Ohio, 902.
Oklahoma, 903.
Oregon, 904.
Pennsylvania, 906.
Philippine Islands, 907.
Porto Rico, 908.
Rhode Island, 909.
South Dakota, 911.
Tennessee, 912.
Texas, 913.
Utah, 914.
Vermont, 915.
Virginia, 916.
Washington, 917.
West Virginia, 918.
Wisconsin, 919.
Wyoming, 920.
effect of decree, 606.
estate by entireties, 610.
grounds are statutory, 199.
husband, rights, property, 607.
legal effect, 199.
marriage settlement, 611.
property, Maine, 610.
Missouri, 610.
property rights, 610.
tenancy in common, 610.
wife, insurance, 609.
rights, dower, 608.

[*References are to Sections.*]

ACCEPTANCE AND OFFER,
marriage, 5.

ACCEPTANCE OF MARRIAGE,
acts and relations of parties, 6.
marriage, by letter, 80.
marriage, time limit, 5.
seduction as proof, 6.
sexual intercourse as proof, 6.

ACCEPTANCE OF SERVICE,
divorce, 484.

ACTIONS, ABATEMENT,
breach of promise, 25.

ACTIONS, SURVIVAL,
breach of promise, 25.

ADMINISTRATOR,
breach of promise, survival of actions, 25.
divorce, vacating, 559.

ADMISSIONS,
marriage, proof of, 132.

ADULTERY,
adulterous disposition, evidence of, 243.
Alabama, confessions, 249.
alienation of affection, 157, 158, 159.
alimony, husband, 748.
wife, 768.
Arizona, confessions, 249.
bigamy, 266.
burden of proof, 241.
chastity, evidence, 251.
children, legitimacy, 234, 235.
circumstantial evidence, 242.
complaint, amendment, 240.
burden of proof, 241.
connivance, 239.
particeps criminis named, 238.
place, 238.
specifications, 237.
time, 238.
concubinage, 226, 230.
condonation, 424.
connivance, agreement to commit, 421.
definition, 229.
criminal conviction, evidence, 253.
cruelty, 290.
definition, 225.
desertion, defense, 228.
divorce, Christ's teaching, 195.
cohabiting after, 540.
custody of children, 589.
evidence, 511.
complaint, specifications, 237.

[*References are to Sections.*]

ADULTERY—Continued.
forms, Massachusetts, 935.
grounds, 225, 414.
pleading, 497.
emission not necessary, 225.
evidence, antenuptial incontinence, 243.
confessions, corroboration, 249.
criminal conviction, 253.
detectives, 245.
entering house of ill fame, 246.
familiarities, 252.
gonorrhea, 247.
letters of paramour, 248.
opportunity for act, 244.
pimps, 250.
prostitutes, 250.
reputation for chastity, 251.
sexual intercourse, 243.
husband, alimony, 748.
insanity, when effects, 226.
joinder of actions, 236.
Kentucky, 225.
knowledge, defense, 233.
letters, proof, 229.
Louisiana, 225N.
Maine, confessions, 249.
maintenance, separate, 640. 643, 645.
marriage formalities not observed, 61.
Massachusetts, paramour, 227.
mistake of fact, as defense, 232.
mistake of law, no defense, 231.
New York, joinder of actions, 236.
non-access of husband, 235.
North Carolina, 225.
paramour, defense, 227.
particeps criminis, defense, 227.
penetration essential, 225.
pleading, specifications, 237.
polygamy, no defense, 226.
rape, grounds for divorce, 225.
religious belief, 226.
separation agreement, defense, 212, 233.
effect, 228.
syphilis, evidence, 247.
venereal disease, evidence, 247.
voluntary act, requisite, 226.
wife, counsel fees, 725.

AFFECTIONS,
alienation, 150.
loss, breach of promise, 20.
want marriage contract, 16.

AFFIDAVIT,
divorce, form of answer, 959.

AFFIDAVIT OF NOTICE,
divorce, forms, 1008.

[*References are to Sections.*]

AFFINITY,
marriage, 111.

AFFIRMATION,
divorce, decree, 527.

AGE,
disparity marriage contract, 16.
impotency, advanced age, 368.
infants, marriage, 95.
marriage, common law, 95.
marriage, Alabama, 805.
Alaska, 806.
Arizona, 807.
Arkansas, 808.
breach of promise, 33.
California, 809.
Colorado, 810.
Connecticut, 811.
Delaware, 812.
District of Columbia, 813.
Florida, 814.
Georia, 815.
Hawaii, 816.
Idaho, 817.
Illinois, 818.
Indiana, 820.
Indian Territory, 819.
Iowa, 821.
Kansas, 822.
Kentucky, 823.
Louisiana, 824.
Maine, 825.
Maryland, 826.
Massachusetts, 827.
Michigan, 828.
Minnesota, 829.
Mississippi, 830.
Missouri, 831.
Montana, 832.
Nebraska, 833.
Nevada, 834.
New Hampshire, 835.
New Jersey, 836.
New Mexico, 837.
New York, 838.
North Carolina, 839.
North Dakota, 840.
Ohio, 841.
Oklahoma, 842.
Oregon, 843.
Panama, 844.
Pennsylvania, 845.
Phillipine Islands, 846.
Porto Rico, 847.
Rhode Island, 848.
South Carolina, 849.
South Dakota, 850.

[*References are to Sections.*]

AGE—Continued.
table by states, 98.
Tennessee, 851.
Texas, 852.
Utah, 853.
Vermont, 854.
Virginia, 855.
Washington, 856.
West Virginia, 857.
Wisconsin, 858.
Wyoming, 859.
marriageable, 59.
marriage, infants, common law, 95.
misrepresentation, marriage, 169.
statutory, 95.

AGE OF CONSENT,
infants, marriage, 95.
marriage, legislative control, 59.
marriage under, nullity, 169.

AGE OF PARTIES,
engagement agreement, 1.

AGGRAVATION OF DAMAGES,
breach of promise, when recoverable, 44.

AGREEMENTS,
alimony, temporary, 699.
common law marriage, 73.
divorce, custody of children, 591.
dismissal of suit, 565.
support of children, 597.
vacating, 554.
maintenance, separate, bar to action, 640.

AGREEMENT, ANTENUPTIAL,
See Antenuptial Agreements

AGREEMENT OF ENGAGEMENT,
age of parties, 1.
capacity of parties, 1.
nature, 1.

AGREEMENTS OF SEPARATION,
divorce, 432.
nature, 210.

ALABAMA,
adultery, confessions, 249.
children, illegitimate, marriage, 805.
common law marriages, 805.
criminal marriages, 805.
divorce, alimony, 865.
children, 865.
crime against nature, 406.
dower, 865.
evidence, 865.

[*References are to Sections.*]

ALABAMA—Continued.
grounds, 865.
jurisdiction, 865.
laws, 865.
non-age, 865.
remarriage, 865.
residence, 865.
service, 865.
eugenics, 805.
illegitimate children, marriage, 805.
incapacity, physical, 805.
incestuous marriages, 805.
marriageable age, 98, 805.
marriage, bigamy, 805.
consanguinity, 805.
criminal, 805.
duress, 805.
eugenics, 805.
examination, 805.
fraud, 805.
incestuous, 805.
male, examination, 805.
menace, 805.
negroes and whites, 805.
physical incapacity, 805.
pregnancy before, 805.
prohibited, 805.
relationship, 805.
voidable, 805.
physical incapacity, 805.
partial divorce, causes, 865.

ALASKA,
common law marriages, 806.
divorce, alimony, 866.
children, 866.
grounds for, 866.
modification of decree, 866.
name of wife, 866.
pleas in bar, 866.
remarriage, 866.
residence, 866.
voiding marriage, 866.
marriage, age, 806.
consanguinity, 806.
force, 806.
fraud, 806.
prohibited, 806.
relationship, 806.
validity, 866.
voidable, 806.
voiding, 866.

ALIENATION OF AFFECTIONS,
action, husband's right, 151.
parties, 154.
wife's right, 152.
adultery, 157, 158, 159.

[*References are to Sections.*]

ALIENATION OF AFFECTIONS—Continued.
agreements not to prosecute, 155.
brothers, advice, 153.
burden of proof, 158.
cohabitation, 159.
common law, wife's rights, 152.
complaint, 157.
consortium, definition, 150, 151.
interference, 150, 151.
conspiracy, 154.
damages, character, 162.
loss of consortium, 162.
loss of services, 162.
mental anguish, 162.
mitigation, 161.
support, protection, 162.
defenses, affections, loss, 156.
cause of alienation, 156.
connivance, 156.
divorce, 156.
estrangement, 156.
repute for chastity, 156.
seduction, 156.
unhappy relations, 156.
divorced women, right of action, 152.
evidence, adultery, 159.
circumstantial, 159.
cohabitation, 159.
conditions of life, 159.
declarations, 159, 160.
divorce decree, 159.
illicit relations, 159.
ill treatment, 159.
letters, 159, 160.
malice, 159.
motives, 159.
property settlement, 159.
relation of parties, 159.
wealth, disinheritance, 159.
exemplary damages, 162.
form, husband's parents, 998.
wife's seducer, 999.
husband's right of action, 151.
mental suffering, 157.
mitigation of damages, 161, 162.
nature of action, 150.
parental advice, 153.
parties to action, 154.
pleading, adultery, 157, 158.
mental suffering, 157.
intent to alienate, 157.
loss of consortium, 157.
malice, if relative, 157, 158.
presumptions, 158.
sisters, advice, 153.
wife, separate actions, 152.
right of action, 152.

[*References are to Sections.*]

ALIENS,
divorce, jurisdiction, 442.
parties, 457.

ALIMONY,
ad interim, 660.
adultery of wife, modification of decree, 768.
Alabama, 865.
Alaska, 866.
amount, appeal, 684.
determination, 668.
anticipation of, not allowable, 676.
appeal, jurisdiction thereafter, 685.
pending, 685.
amount, 684.
orders allowable, 684.
appearance essential, 679.
Arizona, 867.
Arkansas, 868.
assignment, not allowable, 676.
attachment, 796, 797.
not subject, 674.
bankruptcy, 674, 801.
effect of discharge, 686.
California, 869.
children, support, 588.
collusion, agreements, 420.
Colorado, 870.
common law marriage, 664
community property, 675.
complaint, 680.
confirming, forms, 1029.
Connecticut, 871.
constitutional law, 678, 775.
constructive notice, 678.
contempt proceedings, 793, 794.
conveyances, fraudulent, 791.
counsel fees, 721.
creditors' bills, 674.
date of commencement, 668.
death, effect, 769.
debt, nature of, 674, 801.
application on, 674.
definition, 660.
defendant's rights, denial, 792.
Delaware, 873.
divorce, absolute, 610.
District of Columbia, 874.
effect, 614.
equity courts, 440.
forms, 939.
Georgia, 876.
Idaho, 878.
Indian Territory, 880.
Iowa, 882.
New York, 899.
parties, 456.
husband, 672.

[*References are to Sections.*]

ALIMONY—Continued.
Pennsylvania, 906.
without, 670.
domicil, defined, 775.
determines jurisdiction, 682.
dower, distinguished, 663.
due process of law, 678.
enforcement, attachment, 796, 797.
bankruptcy, 801.
courts, 785.
contempt, power to punish, 785.
contempt proceedings, 793, 794.
debt, 801.
decree as lien, 798.
execution, 796.
extradition, 799.
fraudulent conveyances, 791.
guardian, 785.
infant husband, 785.
injunction, 789.
insolvency, 801.
jurisdiction, 785.
lis pendens, project, 787.
ne exeat, 790.
poor debtor, 800.
receiver, 788.
security, 786.
striking pleadings and evidence, 792.
trustee, 802.
wards, 785.
wife as creditor, 801.
equity courts, authority, 677.
equity of wife, 662.
execution, 796.
not subject, 674.
extradition, 799.
faith and credit clause, 678.
Florida, 875.
foreign decree, collection, 622.
effect in other states, 775.
forms, 941, 971.
contempt for non-payment, 1043, 1044, 1045.
decree for permanent, 1101, 1102.
demand on party liable, 1041.
decree, 969, 1074.
complaint, 930.
granting, 1029.
master's report, 1099.
modification of decree, 1106.
motion, 1032.
notice of non-payment, 1047.
order granting, 1039.
order of allowance, 1036.
order to show cause, 1046.
permanent, decree, 1085.
petition for after divorce, 1096, 1097.
reference to determine, 1034.
reference to master, 1098.

[*References are to Sections.*]

ALIMONY—Continued.
report of referee, 1035.
security for payment, 1100.
temporary, order, 1037, 1038.
fraudulent conveyance, 791.
full faith and credit clause, 775.
guardian, enforcement, 785.
liability, 666.
Hawaii, 877.
husband's denial, effect, 671.
right, 673.
Illinois, 879.
imprisonment, 793, 794.
wife, 771.
Indiana, 881.
infant husband, enforcement, 785.
injunction, 789.
insolvency, 801.
interim money, 690.
judgments, set off, 674.
jurisdiction dependent on domicil, 682.
statutory, 677.
Kansas, 883.
Kentucky, petition for, 680, 884.
liability, 666.
lien, decree as, 798.
lis pendens, property, 787.
Louisiana, 885.
Maine, 886.
maintenance, separate, effect, 639.
mandamus proceedings, 684.
manner of awarding, 668.
marriage essential, 661.
Maryland, 887.
Massachusetts, 888.
Michigan, writ of ne exeat, 790, 889.
Minnesota, 890.
Mississippi, 891.
Missouri, 892.
Montana, 893.
modification of decree, adultery of wife, 768.
agreement, 766.
changed conditions, 767.
generally, 765.
nature of, 660.
Nebraska, husband, 673, 894.
necessaries, liability of husband, 681.
ne exeat, 790.
Nevada, 895.
New Hampshire, 896.
New Jersey, 897.
New Mexico, 898.
non-resident, 667, 683.
defendant, 678.
North Carolina, 900.
North Dakota, 901.
notice, service of, 678.
nullity of marriage, 185.

[*References are to Sections.*]

ALIMONY—Continued.
suits, 669.
Ohio, 902.
Oklahoma, husband, 673, 903.
order, forms, 1028.
Oregon, husband, 673, 904.
parents, liability, 666.
pendente lite, 660, 690.
pending appeal, 685.
permanent, 660.
abandonment by husband, 749.
adultery of husband, 748.
allowance, 741.
permanent, amount, 740.
children, 752.
conduct of parties, 744, 745.
continuing allowance, 741.
cruelty of husband, 751.
estate of husband, 756.
family, condition of, 752.
gross sum, 741.
husband's resources, 743.
impotency, 750.
joint property, 746.
mutual agreement, 747.
nature in general, 740.
necessity of divorce, 757.
provision for wife, 753.
reference to arbitrator, 759.
reference to master, 758.
statutory in character, 740.
valid marriage essential, 742.
when allowed, 740.
wife at fault, 746.
wife, property, 754, 755.
personal service essential, 678, 775.
Philippine Islands, 907.
pleadings, 490, 680.
striking, 792.
poor debtor, 800.
Porto Rico, 908.
prayer, 680.
property division, 675.
foreign courts, 777, 778.
fraudulent conveyance, 791.
injunction, 789.
lis pendens, 787.
receiver, 788.
receivership, 674, 788.
reconciliation, effect, 770.
remarriage, effect, 772.
residence of parties, 682.
Rhode Island, 909.
security enforcement, 786.
separate maintenance, effect, 639, 670.
separation agreements, 212, 217.
separation essential, 665.
service, nature of, 678.

[*References are to Sections.*]

ALIMONY—Continued.
set off, 674.
sister state, enforce payments, 776.
South Dakota, 911.
statutory in nature, 677.
suit money, definition, 711.
discretionary with court, 711.
proceedings, 712.
suspension, imprisonment, 771.
temporary, 660.
agreements between parties, 699.
allowance, 693.
amount, 690, 708, 694.
application for, 703.
children, 709.
commencement, 709.
conditional orders, 707.
counsel fees, 721.
decree, 706.
defenses, 700.
definition, 690.
discretion of court, 694.
duress, 693.
fraud, 693.
guardian, 693.
hearing, 704.
husband's ability, 696.
husband's allowance, 697.
infancy, 693.
insanity, 693.
intoxication, 693.
jurisdiction, 690.
marital relation, proof, 705.
marriage essential, 695.
marriage, proof of, 695.
modification, 710.
notice, 702.
objections, 700.
order for payment, 706.
ownership of property by wife, 701.
proceedings, 692.
termination, 709.
vacation, 710.
validity of marriage, 693.
wife's good faith, 698.
Tennessee, 912.
termination, 769.
Texas, 913.
trustee, 802.
Utah, 914.
Vermont, 915.
Virginia, 916.
wards, enforcement, 785.
Washington, 917.
West Virginia, 918.
wife as creditor, 801.
imprisonment, 771.
wife's equity, 662.

[*References are to Sections.*]

ALIMONY—Continued.
Wisconsin, 919.
writ of ne exeat, 790.
Wyoming, 920.

ALLOWANCES,
alimony, temporary, 693.
partial divorce, 199.

AMBASSADORS,
marriage, forms, compliance with, 65.

AMENDMENT,
divorce, complaint, 467.

A MENSA ET THORO,
divorce decree, 531.
temporary separation, 195.

ANNULMENT OF MARRIAGE.
Arizona, 867.
California, 869.
Cuba, 872.
Delaware, 873.
District of Columbia, 874.
Hawaii, 877.
Idaho, 878.
Indiana, 881.
Indian Territory, 880.
Iowa, 882.
Kansas, 883.
Kentucky, 884.
Louisiana, 885.
Maryland, 887.
Massachusetts, 888.
Minnesota, 890.
Missouri, 892.
Montana, 893.
Nebraska, 894.
Nevada, 895.
New Hampshire, 896.
New Jersey, 897.
New Mexico, 898.
New York, 899.
North Dakota, 901.
Oklahoma, 903.
Oregon, 904.
Pennsylvania, 906.
Philippine Islands, 907.
Porto Rico, 908.
Rhode Island, 909.
South Carolina, 910.
South Dakota, 911.
Tennessee, 912.
Texas, 913.
Utah, 914.
Vermont, 915.
Virginia, 916.

[*References are to Sections.*]

ANNULMENT OF MARRIAGE—Continued.
Washington, 917.
West Virginia, 918.
Wisconsin, 919.
Wyoming, 920.
bigamy, 260.
condonation, no defense, 424.
decree of validity, forms, 989, 990.
definition, 166.
divorce, effect, 605-614.
domicil, 453.
false representations, forms, 982, 983.
form of prayer, 984.
fraud, answer, form, 986.
fraudulent, marriage, 355-357.
impotency, answer, form, 987.
infant, party, 458.
insanity, forms, 976, 977.
intoxication, answer, form, 988.
marriage foreign state, forms, 981.
former, forms, 980.
non-age, forms, 974, 985.
parties, guardian, 458.
parents of infant, 458.
parties married, 458.
unsound mind, forms, 975.
physical incapacity, forms, 979.
suit money, 711.

ANSWER,
co-respondent, divorce, form, 960.
divorce, form of affidavit, 959.
forms, 961.

ANSWER IN DISCHARGE OF RULE,
forms, 1048.

ANTENUPTUAL AGREEMENT,
form, 1115.
marriage, void, 58.
separate maintenance, effect, 639.

ANTENUPTUAL DEBTS,
forms, 1001.

ANTENUPTUAL WILLS,
women, 62.

APPEALS,
alimony, amount, 684
from orders allowable, 684.
jurisdiction pending, 685.
pending, 685.
divorce, counsel fees, 730.
right, 580.

APPEARANCE,
divorce, 476.

[*References are to Sections.*]

ARBITRATION,
alimony, 759.

ARIZONA,
absolute divorce, causes, 867.
adultery, confessions, 249.
alimony, 867.
bigamy, 807.
common law marriage, 807.
criminal marriages, 807.
divorce, causes, 867.
decree, form, 1073.
evidence, 867.
jurisdiction, 867.
name of wife, 867.
non-age, 867.
pleadings, 867.
re-marriage, 867.
residence, 867.
service, 867.
limited, 867.
marriage, age, 98, 807.
annulment, 867.
consanguinity, 807.
mongolians, 807.
negroes, 807.
parents' consent, 807.
personation, 807.
physical incapacity, 807.
relationship, 807.
solemnization, without license, 807.
prohibited, 807.
void, 807.
voidable, 807.
prohibited marriages, 807.

ARKANSAS,
alimony, 868.
common law marriage, 808.
criminal marriages, 808.
divorce, evidence, 868.
grounds, 868.
jurisdiction, 868.
name of wife, 868.
non-age, 868.
pleading, 868.
residence, 868.
marriage, age, 98, 808.
bigamous, 808.
consanguinity, 808.
criminal, 808.
force, 808.
fraud, 808.
illegitimates, 808.
incestuous, 808.
insanity, 808.
mulattoes, 808.
negroes, 808.

[*References are to Sections.*]

ARKANSAS—Continued.
parental consent, 808.
physical incapacity, 808.
prohibited, 808.
relationship, 808.
voidable, 808.
void, 808, 868.

ARREST,
breach of promise, 27.

ASSIGNMENT,
See Alimony.

ASSOCIATIONS, IMPROPER,
cruelty, 290.

ATTACHMENT,
alimony, 796, 797.
not subject, 674.
breach of promise, denied, 27.
divorce, forms, 1019, 1020, 1022, 1023.

ATTACHMENT FOR CONTEMPT,
forms, 1042, 1051.

ATTORNEYS,
divorce, advertising to procure, 204.

ATTORNEYS FEES,
divorce proceedings, 720.

AUNT,
marriage, 110n.

AVERSION,
cruelty, 288.

A VINCULO MATRIMONII,
absolute divorce, 195.
divorce decree, 529.

B

BANKRUPTCY,
alimony, 674, 801.
effect of discharge, 686.

BARRENNESS,
impotency, does not invalidate marriage, 373.
marriage, 86.

BASTARD CHILD,
breach of promise, aggravated damages, 45.
marriage contract, breach, 16.

BASTARDY,
breach of promise, defense, 30.
fraudulent marriage, 356.
marriage, as consideration, 7.
nullity of marriage, 168.

[*References are to Sections.*]

BED AND BOARD,
divorce from, 199, 200.
forms, 970, 971.

BELIEF,
marriage, not sufficient, 61.

BETROTHAL CEREMONIES,
fraud, forms, 983.

BIBLE ENTRIES,
marriage, proof 141.

BIGAMY,
absence, defense, 263.
adultery, 266.
Alabama, 805.
annulment, 260.
Arizona, 807.
Arkansas, 808.
children, legitimacy, 265.
cohabitation, definition, 264.
common law, unknown, 260.
definition, 260.
divorce, 260.
defense, 261.
evidence, foreign marriage, 267.
marriage license, 261.
jurisdiction, 260.
legitimacy, 265.
license of marriage, evidence, 261.
marriage, California, 809.
Colorado, 810.
Connecticut, 811.
Delaware, 812.
District of Columia, 813.
Florida, 814.
Georgia, 815.
Hawaii, 816.
Idaho, 817.
Illinois, 818.
Indiana, 820.
Indian Territory, 819.
Iowa, 821.
Kentucky, 823.
Louisiana, 824.
Maine, 825.
Maryland, 826.
Massachusetts, 827.
Michigan, 828.
Minnesota, 829.
Mississippi, 830.
Missouri, 831.
Montana, 832.
Nebraska, 833.
Nevada, 834.
New Hampshire, 835.
New Jersey, 836.

[*References are to Sections.*]

BIGAMY—Continued.
New Mexico, 837.
New York, 838.
North Carolina, 839.
North Dakota, 840.
Ohio, 841.
Oklahoma, 842.
Oregon, 843.
Philippine Islands 846.
Pennsylvania, 845.
Porto Rico, 847.
Rhode Island, 848.
South Carolina, 849.
South Dakota, 850.
Tennessee, 851.
Texas, 852.
Utah, 853.
Vermont, 854.
Virginia, 855.
Washington, 856.
West Virginia, 857.
Wisconsin, 858.
Wyoming, 859.
prior, 261.
proof, declarations, 268.
divorce proceedings, 268.
letters, 268.
license, 268.
records, 268.
witnesses, 268.
nullity of marriage, 175.
remarriage, before decree, 266.
statutory crime, 260
unheard of for years, 262, 263.

BILLS FOR DIVORCE,
forms, 925.
instructions for drawing, 925.

BILL OF PARTICULARS,
divorce, 471.

BIRTH CERTIFICATES,
marriage, proof, 140.

BISHOP,
marriage, defined, 56.

BLACKSTONE,
marriage, defined, 56.

BONA FIDE CONTRACTS,
marriage, 12.

BREACH OF MARRIAGE CONTRACT,
bastard, child, 16.
church rules, date, 14, 15.
contingent, events, 14.
married party; damages, 12.
place, woman's residence, 14.

[*References are to Sections.*]

BREACH OF PROMISE,
statement of action on marriage, 25.
abortion, aggravated damages, 45.
defense, 30.
accrual of action, 24.
actionable breach, character, 21.
actions, abatement, 25.
counting tort wise, 24.
survival, 25.
when liability for accrues, 24.
administrator, survival of actions against, 25.
affection, loss of, suit, 20.
aggravated damages, attacks on character, 46.
childbirth, 45.
seduction, 45.
sexual intercourse, 45.
pregnancy, 45.
slander, 46.
aggravation of damages, 34.
breaking engagement, 44.
venereal disease, 44
when recoverable, 44.
answer, fraud, forms, 993.
arrest, 27.
attachment, denied, 27.
bastard child, aggravated damages, 45.
bastardy, defense, 30.
character, derogatory statements, 21.
compensatory damages, 42.
complaint, forms, 991, 992.
conduct of parties, 21.
consideration as defense, 32.
contingent event, 21.
contract by married party, 11.
courtship, evidence of contract, 37.
court, questions, 40.
damages, 34.
action, 24.
amount of award, 49.
earning capacity of defendant, 48.
excessive amounts, illustrations, 49n.
exemplary, when awarded, 47.
financial ability, how determined, 48.
fixed as in torts, 41.
mitigation, 43.
pecuniary circumstances of parties, 48.
social position of defendant, 48.
date of marriage, 21.
defenses, abortion, 30.
agreement between parties, 28.
bastardy, 30.
character of woman, 28.
consideration, 32.
diseases, 29.
engagement to another, 28.
fraudulent representation, 28.
impediments, 29.
inability to procreate, 29.

[*References are to Sections.*]

BREACH OF PROMISE—Continued.
infancy, 28.
infirmity of woman, 28.
insanity, 29.
lewdness of woman, 30.
matters in bar, 35.
matters in mitigation, 35.
marriage of promise, N.3.
money payments, 28.
non assumpsit or general denial, 35.
offer of marriage, 31.
prohibited degrees, 28.
relationship, 28.
release generally, 32.
seduction, 28.
sexual impotency, 29.
sickness, 29.
structural malformation, 29.
tuberculosis, 29.
unchastity, 30.
venereal disease, 29.
demand for performance, 23.
denial, forms, 996.
disease, defense, 29.
dower right, pleading, 34.
duress, forms, 994.
engagement, breaking, damages, 44.
evidence, 37.
equitable actions, 24.
essentials of generally, 21.
evidence, burden of proof, 36.
conduct of parties, 37.
courtship, 37.
defendant, 36.
engagement, 37.
letters, 38.
unmarried, 2.
existence of contract, 37.
opinions of witnesses, 39.
plaintiff, 36.
previous contract, 37.
rape, 37.
resolution of lodge, 39.
ex contractu actions, 24.
ex delicto actions, 24.
exemplary damages, 34.
definition, 47.
forfeiture of position, 47.
fraud, 47.
seduction, 47.
sexual intercourse, 47.
slander, 47.
venereal disease, 47.
when awarded, 47.
existing marriage, forms, 997.
forfeiture of position, exemplary damages, 47.
forms, answer duress, 994.
answer, fraud, 993.

[*References are to Sections.*]

BREACH OF PROMISE—Continued.
complaint, 991, 992.
denial, 996.
existing marriage, 997.
special damages, 992.
unchastity, 995.
fraud, exemplary damages, 47.
imprisonment, 27.
inability to execute contract, 21.
induced by third parties,, 22.
infants, suit for damages, 3.
insanity, defenses, 29.
jurisdiction, 24.
jury, questions for, 40.
letters as evidence, 38.
lewdness of woman, defense, 30.
limitation of actions, 26.
Louisiana, survival of actions, 25.
lunacy, action will not lie, 4.
Maine, damages, 34.
marriage, as consideration, 7.
during engagement, 21.
party, 21.
promise, 3n.
miscarriage, aggravated damages, 45.
mitigation of damages, character of plaintiff, 43.
defendant, 43.
mental or physical condition, 43.
motives, 43.
New Hampshire, survival of actions, 25.
offer of marriage, 31.
opinions of witnesses, 39.
performance demand, 23.
pleading, abandonment of contract, 35.
age of parties, 33.
aggravation of damages, 34.
character of plaintiff, 35.
damages, 34.
date of contract, 33.
diseases, 35.
dower right, 34.
fraud, 35.
form of complaint, 33.
form of words, 33.
illness, 35.
incapacity, 35.
infant, consent of parents, 33.
jointure of counts, 33.
promise taken as basis, 33.
release, 35.
request, 33.
seduction, 35.
unchastity, 35.
postponement, 21.
pregnancy, aggravated damages, 45.
preparations for ceremony, 23.
procreation, inability, defense, 29.
property, denuded, 21.

[*References are to Sections.*]

BREACH OF PROMISE—Continued.
questions for court and jury, 40.
rape, evidence, 37.
Rhode Island, jointure of courts, 33.
release as defense, 32.
induced by fraud of third party, 32.
infant, 32.
return of ring and letters, 32.
repudiation of contract, 21.
request for performance, 23.
seduction, 21.
aggravated damages, 45.
arrest, 27.
exemplary damages, 47.
sexual impotency, defense, 29.
sexual intercourse, aggravated damages, 45.
exemplary damages, 47.
sickness, defense, 29.
performance, 23.
slander, aggravated damages, 46.
exemplary damages, 47.
special damages, forms, 992.
action, 25.
statute of limitations, when begins to run, 26.
structural malformation, defenses, 29.
survival of actions, 25.
against administrator, 25.
Louisiana, 25.
New Hampshire, 25.
third parties, induced by, 22.
tort damages, 41.
tuberculosis, defenses, 29.
unchastity, defense, 30.
unchastity, forms, 995.
venereal disease, aggravated damages, 44.
defense, 29.
exemplary damages, 47.

BROKERAGE CONTRACTS,
marriage, void, 123.

BROTHER,
marriage, 110n.
alienation of affections, advice, 153.

BROTHER IN LAW,
marriage, 110, 110n

C

CALIFORNIA,
alimony, 869.
common law marriage, 809.
condonations, cruelty, 424.
criminal marriages, 809.
cruelty, mental suffering, 283.
divorce, causes, 869.
criminal conduct, 407.
evidence, 869.

[*References are to Sections.*]

CALIFORNIA—Continued.
forms, 935.
decree, form, 1073.
jurisdiction, 869.
non-age, 869.
partial, causes, 869.
remarriage, 869.
residence, 869.
service, 869.
marriage, age, 98, 809.
annulment, 869.
bigamous, 809.
consanguinity, 809.
criminal, 809
force, 809.
fraud, 809.
impersonation, 809.
incestuous, 809.
insanity, 809.
Mongolians, 809.
Mulattoes, 809.
negroes, 809.
parental consent, 809.
physical incapacity, 809.
prohibited, 809.
relationship, 809.
void, 809.
voidable, 809.
sexual intercourse, denial, 281.

CANON LAW,
marriage, concept of, 70.
celebrations, Council of Trent, 70.
decree of Council of Trent, 70.
witnesses, 70.

CAPACITY OF PARTIES,
cousins, 3.
divorced persons, 2.
essential to marriage, 2.
guardianship, under, incompetent, 4.
imbecility, contract void, 4.
incompetency, lunacy proceedings, 4.
infants, promise voidable, 3.
lunacy, record of proceedings conclusive, 4.
married persons, void, 2.
mental capacity, 4
sexual obligations, 2.
spendthrifts, incompetent, 4.

CAPACITY TO MARRY,
barrenness, 86.
constitutional guarantees, 87.
copulation, capacity, 86.
drunkenness, 85.
epileptics, 87.
eugenics laws, 88.
feeble-minded, 87.

[*References are to Sections.*]

CAPACITY TO MARRY—Continued.
idiots, 85.
imbecile, 85, 87.
impotency, 86.
insane, 85.
intoxication, 85.
lunatics, 85.
venereal disease, 88.

CAPTION OF DECREE,
forms, 1072.

CARNAL INTERCOURSE,
common law marriage, 76.

CEREMONIES,
marriage, 61.

CERTIFICATE OF MARRIAGE,
proof, 139.

CELEBRATION OF MARRIAGE,
statutory provisions, 61.
Sunday, performance, 10.

CHARACTER,
marriage, fraud, 16.

CHARACTER, DEFORMATION,
divorce, grounds, 412.

CHASTITY,
adultery, evidence, 251.
annulment, forms, 982.
separation agreements, 212.

CHILDBIRTH,
breach of promise, aggravated damages, 45.

CHILDREN, See Infant,
abuse of, cruelty, 287.
adultery, legitimacy, 234, 235.
alimony, award, 752.
alimony, temporary, 709.
bigamy, legitimacy, 265.
custody in divorce, forms, 971.
divorce, Alaska, 866.
alimony, 588.
allowance for support, amount, 598.
alternate custody, 592.
award modification, 594.
award, referee, 594.
change of allowance, 600.
Connecticut, 871.
Cuba, 872.
custody, 490, 585, 586.
custody, access of other parent, 592.

[*References are to Sections.*]

CHILDREN—Continued.
custody, agreement of parents, 591.
custody, Alabama, 865.
custody in case of adultery, 589.
custody in separation, 586.
custody pending hearing, 588.
custody, poverty of mother, 589.
custody, preference of child, 590.
custody, welfare of, 589.
decree, 525.
decree, contempt, 593.
decrees,vacating, 550.
discretion of court, 585.
effect of decree dispose, of, 593.
evidence, 522.
Florida, 875.
foreign, custody and support, 623.
forms, 939.
forms for custody, 930.
Georgia, 876.
grandparents as custodians, 587.
guardian, 593.
habeas corpus proceedings, 593.
Kansas, 883.
Maine, 886.
Maryland, 887.
Massachusetts, 888.
Minnesota, 890.
Missouri, 892.
mother as custodian, 587.
Nebraska, 894.
Nevada, 895.
Oklahoma, 903.
parents, fitness, 587.
parties, 456.
Philippine Islands, 907.
Porto Rico, 908.
removal from jurisdiction, 588.
Rhode Island, 909.
support, agreement, 597.
support, father, 595, 596.
support, New Hampshire, 596.
support, non-resident father, 599.
support, parents, 596.
support, termination, adoption, 601.
support, termination, majority, 601.
vacating, 558.
forms, custody, averment, 1055.
custody, decree, 1063, 1064, 1065, 1068, 1074.
custody of third party, 1059.
custody, petition, 1056.
maintenance after divorce, 1057.
notice of custody, 1060.
order as to custody, 1058, 1061.
production, habeas corpus, 1066, 1067.
production in court, 1062.
legitimacy, adultery, 234, 235.
legitimacy, nullity decree, 613.

[*References are to Sections.*]

CHILDREN—Continued.
legitimizing, forms, 984.
maintenance, separate, 635.
nullity decree, legitimacy, 613.
nullity of marriage, legitimacy, 175.

CHINESE,
marriage, Nebraska, 833.

CHLORAL,
drunkenness, habitual, 311.

CHLOROFORM,
drunkenness, habitual, 311.

CHURCH CUSTOMS IN MARRIAGE,
part of contract, 13.

CHURCH RULES,
marriage, date, 14, 15.

CIRCUMSTANTIAL EVIDENCE,
marriage, proof, 135.

CITIZENSHIP,
desertion, husband determines, 340.

COCAINE,
drunkenness, habitual, 311.

COERCION,
divorce, vacating, 554.
maintenance, separate, 640.
marriage, Delaware, 812.

COHABITING,
alienation of affections, 159.
common law marriage, 76.
definition, 264.
desertion, refused to cohabit, 343.
refusal to renew, 342.
divorce, 414.
after granting, 540.
dismissal of suit, 565.
limited, 605.
vacating, 554.
infants, marriage, 95.
intolerable, grounds of divorce, 414.
lunatic, marriage not caused, 85.
marriage, agreement as to void, 58.
marriage, proof, 136, 137.

COITION,
marriage, not essential, 57.

COLLATERAL AGREEMENTS,
marriage, void, 58.

[*References are to Sections.*]

COLLATERAL ATTACK,
divorce decree, 534.

COLLUSION,
alimony, agreements, 420.
definition, 420.
delay in bringing suit, 426.
distinguished from connivance, 420n.
divorce, 204.
definition, 420.
dismissal of suit, 565.
evidence, 518.
forms, 951.
vacating, 553.
nullity of marriage, evidence, 184.
property, division agreement, 420.

COLORADO,
marriage, age, 98, 810.
alimony, 870.
common law marriages, 810.
criminal marriages, 810.
divorce, causes, 870.
jurisdiction, 870.
parties, attorney, 462.
remarriage, 870.
residence, 870.
service, 870.
trial, 870.
marriage, bigamous, 810.
consanguinity, 810.
incestuous, 810.
insanity, 810.
Mulattoes, 810.
negroes, 810.
parental consent, 810.
physical incapacity, 810.
prohibited, 810.
relationship, 810.
void, 810, 870.
voidable, 810.

COMMISSIONER,
divorce trial, 576.

COMMON LAW,
alienation of affections, wife's rights, 152.
bigamy, 260.
breach of promise, survival of action, 25.
contract, per verba de futuro cum copula, 71, 72.
per verba de praesenti, 71.
conviction of crime, divorce, 300.
divorce, children custody, 587.
does not govern, 196.
habitual drunkenness, 310.
infant, contracts to marry, ratification, 3.
marriage, 95.
marriage, revocation of woman's will, 62.

[*References are to Sections.*]

COMMON LAW—Continued.
will made by man, 62.
nullity of marriage, 175.
cohabitation, 175.
separate maintenance, 636.

COMMON LAW MARRIAGE.
acceptance by letter, 80.
agreement, 73.
agreement and contract, 71.
mutual, only essential, 70.
Alabama, 805.
Alaska, 806.
alimony, 664.
Arizona, 807.
Arkansas, 808.
binding effect, 74.
California, 809.
Canon law concept of marriage, 70.
capacity of parties, 73.
carnal intercourse, 76.
celebration, 76.
decree of council of Trent, 70.
unnecessary, 70.
cohabitation, 76.
Colorado, 810.
Connecticut, 811.
consent, mutual, 73.
oral or written, 73.
consummation, removal or inpediments, 77.
contract, nature, 71.
rescinding, 73.
council of Trent, decree of, 70.
declaration of parties, 75.
definition, 70.
Delaware, 812.
dissolution, 74.
District of Columbia, 813.
divorce, 74.
marriage, subsequent to, 77.
duties, 74.
Florida, 814.
Georgia, 815.
Idaho, 817.
illicit relations, 76.
Illinois, 818.
impediments, removal, 77.
impersonation, void, 75.
Indiana, 820.
intent of parties, 73, 75.
Iowa, 821.
Kansas, 822.
Kentucky, 823.
letter, marriage, 80.
Louisiana, 824.
Maine, 825.
Maryland, 826.
masquerade, void, 75.

[*References are to Sections.*]

COMMON LAW MARRIAGE—Continued.
Massachusetts, 827.
matrimonial intent, 75.
mental reservations, 74.
Michigan, 828.
Minnesota, 829.
Mississippi, 830.
Missouri, 831.
Montana, 832.
natural law concept of marriage, 70.
Nebraska, 833.
Nevada, 834.
New Hampshire, 835.
New Jersey, 836.
New Mexico, 837.
New York, 838.
North Carolina, 839.
North Dakota, 840.
obligations, 74.
Ohio, 841.
Oklahoma, 842.
Oregon, 843.
Panama, 844.
Pennsylvania, 845.
promise and cohabitation, 72.
good faith, 75.
rescinding contract, 73.
Rhode Island, 848.
rights, 74.
sexual relations, 76.
South Carolina, 849.
South Dakota, 850.
statutes prohibiting, retroactive effect, 70.
telephone, marriage, 81.
Tennessee, 851.
Texas, 852.
Utah, 853.
Vermont, 854.
Virginia, 855.
Washington, 856.
West Virginia, 857.
Wisconsin, 858.
Wyoming, 859.

COMMUNITY PROPERTY.
alimony, 675.

COMPETENCY OF PARTIES.
breach of promises, abandonment of business, 42.
essential to marriage, 2.
presumption indulged by courts, 2.
engagement, breaking, 42.
church membership, 42.
definition, 42.
dower, 42.
gifts, 42.
injury to prospects, 42.
mental suffering, 42.

[*References are to Sections.*]

COMPETENCY OF PARTIES—Continued.
nervous shock, 42.
pecuniary loss, 42.
second marriage, allowable, 42.

COMPLAINT,
adultery, 237.
alienation of affections, 157.
alimony, 930.
cruel treatment, 929.
divorce, particulars, 490.
formal opening, 927, 928.
forms, 925.
custody of children, 930.
infant wife, 928.
instructions for drawing, 925.
separate maintenance, 650.
title of cause, 926.
court, 926.

CONCEALMENT,
marriage contract, 16.

CONCUBINAGE,
adultery, 226.

CONCUBINE,
adultery, keeping, 230.

CONDITIONAL PROMISE OF MARRIAGE,
validity, 9.

CONDONATION,
adultery, 424.
annulment, no defense, 424.
California, cruelty, 424.
cruelty, 424.
definition, 424.
delay in bringing suit, 426.
divorce, 424.
dismissal of suit, 565.
evidence, 511.
forms, 949, 950.
pleadings, 500.
vacating, 554.
express, 424.
implied, 424.
letters, 424.
Oregon statute, 424.
reconciliation, offers, 424.
revival of offense, 425.
separate maintenance, 647.
sexual intercourse, 424.

CONDONED OFFENSES,
divorce, defense, 427.

CONFESSIONS,
adultery, corroboration, 249.
marriage, proof, 134.

[*References are to Sections.*]

CONNECTICUT,
alimony, 871.
common law marriages, 811.
criminal marriages, 811.
divorce, causes, 871.
children, 871.
evidence, 871.
jurisdiction, 871.
name of wife, 871.
non-age, 871.
remarriage, 871.
residence, 871.
service, 871.
marriage, age, 98, 811.
bigamous, 811.
consanguinity, 811.
criminal, 811.
epileptics, 811.
fraud, 811.
imbeciles, 811.
incestuous, 811.
laws, 87.
parental consent, 811.
prohibited, 811.
relationship, 811.
void, 811.
voidable, 811.
partial divorce, causes, 871.

CONNIVANCE,
adultery, agreement to commit, 421.
complaint, 239.
definition, 229.
delay in bringing suit, 426.
desertion, 421.
detectives, procurement of evidence, 421.
divorce, forms, 952, 953.
procuring, 421.

CONSANGUINITY,
marriage, 110.
Alabama, 805.
Alaska, 806.
Arizona, 807.
Arkansas, 808.
California, 809.
Colorado, 810.
Connecticut, 811.
Delaware, 812.
District of Columbia, 813.
Florida, 814.
Georgia, 815.
Hawaii, 816.
Idaho, 817.
Illinois, 818.
Indiana, 820.
Indian Territory, 819.
Iowa, 821.

[*References are to Sections.*]

CONSANGUINITY—Continued.
Kansas, 822.
Kentucky, 823.
legislative control, 59, 60.
Louisiana, 824.
Maryland, 826.
Massachusetts, 827.
Michigan, 828.
Minnesota, 829.
Mississippi, 830.
Missouri, 831.
Montana, 832.
Nebraska, 833.
Nevada, 834.
New Hampshire, 835.
New Jersey, 836.
New Mexico, 837.
New York, 838.
North Carolina, 839.
North Dakota, 840.
nullity of marriage, 170.
Ohio, 841.
Oklahoma, 842.
Oregon, 843.
Pennsylvania, 845.
Philippine Islands, 846.
Porto Rico, 847.
Rhode Island, 848.
South Carolina, 849.
South Dakota, 850.
Tennessee, 851.
Texas, 852.
Utah, 853.
Vermont, 854.
Virginia, 855.
Washington, 856.
West Virginia, 857.
Wisconsin, 858.
Wyoming, 859.

CONSENT,
common law marriage, 73.
divorce, forms, 953.
marriage, common law, 73.
character, 57.
essential, 57.
legislative control, 59.

CONSENT OF PARTIES,
essential to contract, 2.

CONSIDERATION,
marriage, mutual promise, 7.
separation agreements, 214.

CONSORTIUM,
loss, 150, 151.

[*References are to Sections.*]

CONSPIRACY,
alienation of affection, 154.

CONSTITUTION,
children, custody, service on father, 585.
divorce control, 196.
decree of another state, vacating, 560.

CONSTITUTIONAL LAW,
alimony, 678, 775.

CONSTITUTIONAL GUARANTEES,
marriage, 87.

CONSTRUCTIVE DESERTION,
separate maintenance, 643.

CONSTRUCTIVE SERVICE,
divorce, 882.

CONSULS,
marriage, forms, compliance with, 65.

CONSUMMATION,
marriage, 57.

CONSUMPTION,
cruelty, affliction, 280.
divorce, grounds, 414.

CONTEMPT,
alimony, 793, 794.
divorce decree, custody of children, 593.
forms, order convicting, 1053.
order purging, 1054.
power to punish, 785.

CONTRACT, EXECUTORY,
engagement agreement, age of parties, 1.

CONTRACT, OBLIGATION,
marriage of races, 105.
miscegenation, 105.

CONTRACT OF MARRIAGE,
affection, want, fraud, 16.
age, disparity, fraud, 16.
antenuptial agreements, void, 58.
bastard child, breach of contract, 16.
bona fide not essential, 122.
capacity of parties, 1.
character of parties, fraud, 16.
children, damages for breach, 3.
church customs, 13.
church rules, date, 14, 15.
cohabiting, agreement as to void, 58.
contract not essential, 57.
collateral agreements, void, 58.

[*References are to Sections.*]

CONTRACT OF MARRIAGE—Continued.
consideration, money, void, 11.
common law, 70, 73.
concealment, 16.
conditional promise, 9.
consent, essential character, 57.
mutual, 57.
parties, 2.
consideration, mutual promise, 7.
consummation, 57.
contingent events, 14.
contingent on divorce, 11.
contingent promise, 9.
death, dissolves, 20.
definition, judicial, 3.
disease, postponement of performance, 15.
dissolution, death, 20.
impotency, 20.
incapacity, 20.
infancy, 20.
mutual consent, 20.
prohibited degrees, 20.
divorce, contingent, 11.
duration, generally, 20.
duress, not binding, 16.
ex contractu actions, 24.
ex delicto actions, 24.
fraud, 16.
health of parties, postponement, 15.
impotency, 2.
dissolution of contract, 20.
incapacity, fraud, 16.
parties, dissolution, 20.
infants, damages for breach, 3.
infancy, dissolution of contract, 20.
interlocutory decree, 11.
letter, marriage, 80.
lewd woman, valid, 11.
lex domicilii governs, 63.
mala fide, 12.
married parties, 11.
mercenary motives, fraud, 16.
minors, damages for breach, 3.
money consideration, void, 11.
mutual promise, consideration, 7.
essential, 5.
nature, 55.
negro blood, fraud, 16.
option not enforcible, 7.
original, subsequent ratification, 1.
parties, age, 1.
capacity, 1.
physical incapacity, fraud, 16.
place of performance, 14.
postponement, parties bedridden, 15.
postponement of ceremony, 15.
prohibited degrees, dissolution, 20.
regulation by state, 59.

[*References are to Sections.*]

CONTRACT OF MARRIAGE—Continued.
religious customs, 13.
sexual obligations, implications, 2.
statute of frauds, when within, 8.
Sunday, 10.
time, disease, 15.
time of ceremony, postponement, 15.
time of performance, 14.
venereal disease, postponement, 15.
wager, dependent or void, 11.
writing, when should be, 8.

CONTRACTS,
divorce, 198.
dependent on event, 204.
impairing obligations, divorce, 196.
marriage brokage, 123.
in restraint of, 118, 119.
legislative control, 59.
obligation, 196.
to facilitate, 123.
to procure, 204.

CONTINGENT EVENTS,
marriage, breach of promise, 21.

CONTINGENT FEES,
eugenics law, 88.
divorce cases, 728.

CONTINGENT PROMISE OF MARRIAGE,
valid, 9, 14.

CONTINUANCES,
divorce, trial, 572.

CONVERSATION, CRIMINAL,
separation agreements, 212.

CONVEYANCE,
alimony, fraudulent, 791.
divorce, fraudulent, 791.
rescission, divorce, forms, 972.

CONVICTION OF CRIME,
adultery evidence, 253.
assault, attempt to rape, 300.
conviction and sentence necessary, 302.
divorce grounds, 300.
imprisonment in foreign state, 301.
pardon after sentence, 304.

CONVICTION OF FELONY,
divorce, forms, Illinois, 932.

COPULATION,
impotency, must be defect, 373.
marriage, essential, 86.

[*References are to Sections.*]

CO-RESPONDENT,
divorce, form of answer, 960.
party, 462.
notice, divorce, forms, 1012.

CORROBORATION,
divorce, evidence, 518.

COSTS,
divorce, allowable to wife, 732.
husband, 732.

COUNCIL OF TRENT,
marriage, decree, 70.

COUNSEL FEES,
adultery of wife, 725.
alimony, reduction, 721.
temporary, 721.
amount, determination, 720, 723.
appeals, allowance, 730.
contingent fees, 728.
death, effect, 726.
divorce, 720, 721.
forms, divorce, 1028.
motion, 1032.
order to pay, 1037, 1038.
generally, 720.
husband, liability, 732.
independent suit, 731.
Kentucky, 720, 725.
Missouri, 720.
New Hampshire, 720.
number of counsel, 728, 729.
proceedings in which allowed, 721.
reconciliation, effect, 727.
separate maintenance suits, 721.
suit, 731.
temporary alimony, 721.
Texas, 720.
time of allowance, 722.
when allowed, 720, 721.
wife, desertion, 725.
liability, 732.
adultery, 725.
name, order, 724.
Wisconsin, 722.

COURTS,
competency of parties, presumption, 2.

COURTESY,
divorce, 606.
separation agreements, 212.

COURTSHIP,
breach of promise, evidence of contract, 37.

COUSINS,
marriage, 2, 110.

[*References are to Sections.*]

CRIME, CONVICTION,
assault, attempt to rape, 300.
conviction and sentence necessary, 302.
deductions for good conduct, 306.
divorce, 406.
grounds, 300.
fraud, 357.
imprisonment in foreign state, 301.
pardon after sentence, 304.

CRIMINAL,
divorce, pending appeal, 305.

CRIMINAL CONVERSATION,
divorce, 614.

CRIMINAL MARRIAGES,
Alabama, 805.
Arizona, 807.
Arkansas, 808.
California, 809.
Colorado, 810.
Connecticut, 811.
Delaware, 812.
District of Columbia, 813.
Florida, 814.
Georgia, 815.
Hawaii, 816.
Idaho, 817.
Illinois, 818.
Indiana, 820.
Indian Territory, 819.
Iowa, 821.
Kansas, 822.
Kentucky, 823.
Louisiana, 824.
Maine, 825.
Maryland, 826.
Massachusetts, 827.
Michigan, 828.
Mississippi, 830.
Minnesota, 829.
Missouri, 831.
Montana, 832.
Nebraska, 833.
Nevada, 834.
New Hampshire, 835.
New Jersey, 836.
New Mexico, 837.
New York, 838.
North Carolina, 839.
North Dakota, 840.
Ohio, 841.
Oklahoma, 842.
Oregon, 843.
Pennsylvania, 845.
Philippine Islands, 846.
Porto Rico, 847.

[*References are to Sections.*]

CRIMINAL MARRIAGES—Continued.
Rhode Island, 848.
South Carolina, 849.
South Dakota, 850.
Tennessee, 851.
Texas, 852.
Utah, 853.
Vermont, 854.
Virginia, 855.
Washington, 856.
West Virginia, 857.
Wisconsin, 858.
Wyoming, 859.

CRIMINAL OFFENSES,
divorce, disclosed, 540.

CRIMINALS,
marriage, Washington, 856.

CROSS BILL,
divorce, forms, 961, 964.
jurisdiction, 452.

CROSS COMPLAINT,
divorce, forms, 963.
pleading, 500.

CROSS-PLEADING,
divorce, 465.

CRUEL TREATMENT,
maintenance, separate, 643.
meaning, 496.

CRUELTY,
abortion, forced submission, 279, 291.
abuse of others, 287.
adultery, 290.
absence from home, 275n.
acts endangering life, 278.
acts necessary, 275.
alimony, husband, 751.
associations, improper, 290.
aversion, 288.
California, mental suffering, 283.
children, abuse, 287.
choking, 278.
condonation, 424.
consumption, affliction, 280.
disease, communicative, 280.
discourtesy, 288.
divorce, form of complaint, 929.
forms, 956, 964.
forms, Massachusetts, 935.
grounds, 275.
pleading, 496.
unsafe cohabitation, 414.

[*References are to Sections.*]

CRUELTY—Continued.
drenching, 278.
drunkenness, 295.
entertainment, refusal, 288.
false accusations, 285.
family quarrels, 284.
general nature, 275.
hair-pulling, 278.
health, endangering, 279.
home, providing suitable, 293.
husband, alimony, 751.
indignities of others, 292.
infidelity, charge, 285.
insanity, declaration, 286.
intoxication, 295.
kicking, 278.
life, endangering, 278.
masturbation, 294.
mental cruelty, 275.
mental suffering, 283.
morphine, use, 295.
mutual cruelty, 284.
North Dakota, mental suffering, 283.
personal violence, 277.
physical cruelty, 275.
pleading, 296.
profanity, 289.
providing, refusal, 293.
separate maintenance, 643.
sexual intercourse, abuse, 282.
denial, 281.
sick spouse, refusal to care, 293.
social station of person considered, 279.
sodomy, 294.
spitting in face, 278.
drinking, 278.
syphilis, affliction, 280n.
Utah, mental suffering, 283.
venereal disease, communicating, 280.
violence, reasonable apprehension, 276.
whipping, 278.

CUBA,
divorce causes, 872.
children, 872.
jurisdiction, 872.
non-age, 872.
marriage annulment, 872.

CUSTODY,
children, divorce, 585, 586.
divorce, forms, 971.

D

DAMAGES,
alienation of affections, 161, 162.
breach of promise, 34, 41, 44.
infants, 3.
pecuniary circumstance of parties, 48.

[*References are to Sections.*]

DAMAGES—Continued.
mitigation, breach of promise, 43.
nullity of marriage, fraud, 188.

DAMAGES, COMPENSATORY.
breach of promise, 42.
minors, breach of promise, 3.

DATE OF MARRIAGE.
breach of promise, 21.
necessity of definiteness to validity of contract, 14.

DAUGHTER-IN-LAW.
marriage, 110n.

DAUGHTER.
marriage, 110n.

DEATH.
alimony, effect, 769.
counsel fees, effect, 726.
desertion, 347.
divorce, does not survive, 436.
vacating, 554, 559.
marriage contract, dissolution, 20.

DEBT.
alimony, 674, 801.
alimony, application, 674.
antenuptual, forms, 1001.
suit money, 716.

DEBTOR, POOR.
alimony, oath, 800.

DECEPTION.
marriage, effect, 355, 357.

DECLARATION OF MARRIAGE PROMISE.
evidence, 6.

DECREE.
divorce, absolute divorce, 529.
affirmation, 527.
children, 525.
collateral attack, 534.
compliance with evidence, 525.
conclusiveness, 536.
death of plaintiff, 554.
desertion, 525.
effect, 535.
evidence insufficient, 547.
extra territorial effect, 536.
interlocutory, 530.
judgment by default, 528.
Louisiana, separation, 532.
Michigan, 536.
modification, 533.

[*References are to Sections.*]

DECREE—Continued.
name of wife, resumption, 537.
nisi, 530.
nullity, 526.
petition to vacate, 549.
res adjudicata, 536.
residence, 525.
restrictions on marrying, 539.
separate maintenance, 538.
separation from bed and board, 531.
statutory, 525.
vacating, administrator, 559.
vacating, agreement of parties, 554.
vacating, by another state, 560.
vacating, cohabiting after, 554.
vacating, coercion, 554.
vacating, collusion, 553.
vacating, condonation, 554.
vacating, death, 559.
vacating, false testimony, 551.
vacating, fraud, 545.
vacating, impersonation, 552.
vacating, imposition, 545.
vacating, laches, 555.
vacating, motion at term of rendition, 546.
vacating, motion of court, 548.
vacating, nisi made absolute, 557.
vacating, property rights, 559.
vacating, remarriage, 558.
vacating, repeated statute, 556.
vacating, statutory grounds, 545.
vacating, suppression of evidence, 554.
vacating, who may petition, 550.
Wisconsin, 529.

DECREE OF ANNULMENT,
forms, 990.

DECREE OF VALIDITY,
annulment, forms, 989.

DECLARATIONS,
marriage, proof, 133.

DEED OF SEPARATION,
form, 1117.
marriage, restraints, 120.

DEFAMATION OF CHARACTER,
divorce, grounds, 412.

DEFAULT,
non-residents, forms, 1004.
personal service, forms, 1002.
service by publication, forms, 1003.

DEFENSE,
alienation of affection, 156.

[*References are to Sections.*]

DEFENSE—Continued.
breach of promise, marriage of promisee, 3n, 28.
divorce, condonation, 424, 425.
collusion, 420.
connivance, 421.
delay in suit, 426.
drunkenness, 431.
excuse, 434.
influence of third persons, 423.
insanity, 430.
insincerity, 422.
invalidity of marriage, 435.
justification, 434.
mistake, 428.
notice of grounds, 429.
provocation, 433.
recrimination, 427.
separate agreements, 432.

DEFINITIONS,
adultery, 225.
alimony, temporary, 660, 690.
bigamy, 260.
cohabitation, 264.
collusion, 420.
condonation, 424.
desertion, 326.
domicil, 443.
drunkenness, habitual, 310, 312, 313.
marriage, 56, 260.
marriage, void, 165.
marriage, voidable, 165.
recrimination, 427.
residence, 443.
separate maintenance, 635.
suit money, 711.
support, 395.

DELAWARE,
alimony, 873.
common law marriages, 812.
criminal marriages, 812.
divorce, causes, 873.
evidence, 873.
jurisdiction, 873.
name of wife, 873.
non-age, 873.
remarriage, 873.
residence, 873.
service, 873.
marriage, age, 98, 812.
annulment, 873.
bigamous, 812.
coercion, 812.
consanguinity, 812.
criminal, 812.
drug addicts, 812.
drunkards, 812.

[*References are to Sections.*]

DELAWARE—Continued.
epileptics, 812.
force, 812.
fraud, 812.
incestuous, 812.
insane, 812.
impotency, 812.
mulattoes, 812.
negroes, 812.
paupers, 812.
prohibited, 812.
parental consent, 812.
relationship, 812.
venereal disease, 812.
void, 812.
voidable, 812.
partial divorce, 873.

DELAY IN BRINGING SUIT,
divorce, time of bringing suit, 426.

DEMENTIA,
divorce, grounds, 386.
marriage, effect, 386.

DENIAL,
divorce, forms, 948, 949.

DEPOSITIONS,
divorce, evidence, 520.
suit money, 716.

DESERTION,
adultery, defense, 228.
citizenship, determination by husband, 340
cohabitation, refusal, 342, 343.
connivance, 421.
continuous for statutory period, 329.
consent, mutual, separation, 336.
constructive desertion, 334.
counsel fees, wife, 725.
credit, husband's liability for wife, 344.
death, presumption, 347.
definition, 326.
deliberate act, 328.
divorce, cause, 325.
decree, 525.
evidence, 511.
forms, 935.
forms, Iowa, 933.
pleadings, 494.
proceedings, interruptions, 331.
domicil, determined by husband, 338.
dwelling under same roof, 337.
excuse, 434.
foreign country, refusal to go, 340.
forms, divorce, 932.
husband. liability for support of wife, 344.

[*References are to Sections.*]

DESERTION—Continued.
refusal of wife to follow, 338.
refusal to follow wife, 339.
insanity as defense, 330.
intent, permanent separation, 327.
involuntary absence, 332.
imprisonment, 300.
justification, 434.
misconduct of complainant, defense, 335.
mutual consent, separation, 336.
necessaries, liability of husband to wife, 344.
notice not to pay wife's bills, 345.
posting wife, 345.
presumption of death, 347.
reconciliation, offered in good faith, 336, 341.
refusal to leave native country, 340.
separate maintenance, cause, 642, 643.
separation, actual, 337.
separation agreements, 432.
separation by mutual consent, 336.
sexual intercourse, denial, 281.
refusal, 333.
support, liability of husband, 344.
not excused, 346.
refusal, 395.
termination of abandonment, 329.
voluntary act, 327.
wife, liability of husband to support, 344.

DETECTIVES,
adultery, evidence, 245.
connivance, to procure evidence, 421.

DIPSOMANIACS,
drunkenness, habitual, 314.

DISABILITIES,
divorce, 606.

DISCOURTESY,
cruelty, 288.

DISCRETIONARY CAUSES OF DIVORCE,
discretion of courts, 350.
generally, 350.
Rhode Island, 351.
Washington, 352.

DISEASE,
breach of promise, defense, 29.
pleading, 35.
cruelty, communicating, 280.
impotency, cause, 367.
loathsome, grounds for divorce, 414.
marriage, postponement of ceremony, 15.
nullity of marriage, 171.

[*References are to Sections.*]

DISMISSAL OF SUIT,
divorce, agreement, 565.
bar to subsequent libel, 566.
cohabitation, 565.
collusion, 565.
condonation, 565.
plaintiff, 565.
motion of court, 565.
recrimination, 565.
want of evidence, 565.
want of prosecution, 565.
without prejudice, 567.

DISSOLUTION OF MARRIAGE,
causes, legislature may prescribe, 59.
common law, 74.
means, 20.

DISTRICT OF COLUMBIA,
common law marriages, 813.
divorce, alimony, 874.
causes, 874.
evidence, 874.
jurisdiction, 874.
non-age, 874.
remarriage, 874.
residence, 874.
service, 874.
marriage, age, 98, 813.
annulment, 874.
bigamous, 813.
consanguinity, 813.
criminal, 813.
force, 813.
fraud, 813.
idiots, 813.
incestuous, 813.
lunatics, 813.
parental consent, 813.
physical incapacity, 813.
prohibited, 813.
relationship, 813.
void, 813.
voidable, 813.
partial divorce, causes, 874.
prohibited marriages, 813.

DOLE,
marriage, defined, 56.

DOMICIL,
alimony, 775.
jurisdiction, 682.
change, 445.
definition, 443.
divorce, evidence, 514.
foreign, review, 626.
jurisdiction, 441, 442.

[*References are to Sections.*]

DOMICIL—Continued.
limited, woman, 605.
meaning, 882.
vacating decree, 560.
Indiana, 444.
intent of party, 444.
Kentucky, 444.
Maine, 444.
marriage, 55.
law governs, 63.
Michigan, 444.
Missouri, 444.
miscegenation, 105.

DOWER,
alimony, distinguished from, 663.
breach of promise, compensatory damages, 42.
divorce, 606.
Alabama, 865.
rights of wife, 608.
maintenance, separate, effect, 635.
separation agreements, 212.

DRENCHING,
cruelty, 278.

DRUG ADDICTS,
marriage, Delaware, 812.

DRUG HABIT,
divorce, forms, Massachusetts, 935.

DRUGS,
drunkenness, habitual, 311.

DRUNKARDS,
marriage, Delaware, 812.
Washington, 856.

DRUNKENNESS,
cruelty, 295.
divorce, as defense, 431.
pleading, 495.
marriage, not void, 85.

DRUNKENNESS, HABITUAL,
see Habitual Drunkenness.
chloral, 311.
chloroform, 311.
cocaine, 311.
common law, not grounds for divorce, 310.
complainant furnishing liquor, 317.
conviction unnecessary, 316.
court records as proof, 315.
definition, 310, 312, 313.
degree, 313.
dipsomaniacs, 314.
divorce, grounds, 310.

[*References are to Sections.*]

DRUNKENNESS, HABITUAL—Continued.
drugs, 311.
habitual intemperance, 321.
knowledge at time of marriage, 320.
morphine, 311.
narcotics, 311.
occasional intoxication, 319.
opium, 311.
periodical debauches, 318.
reformation of addict, 310.

DUE PROCESS CLAUSE,
divorce, 882.
marriage relations, 882.

DUE PROCESS OF LAW,
alimony, service, 678.
alimony, temporary, 693.
divorce, ground, 358.
marriage, Alabama, 805.
promise, 16.
under void, 358.
nullity of marriage, 168.

E

EMISSION,
adultery, unnecessary, 225.

ENFORCEMENT OF ALIMONY,
procedure, 785-802.

ENGAGEMENT AGREEMENT,
age of parties, 1.
capacity of parties, 1.
contract, executory, 1.
executory contract, 1.
nature, 1.

ENGAGEMENT TO MARRY,
breach of promise, 21.
declaration of woman, as evidence, 6.
evidence, 37.
Sunday, made, 10.

ENTERTAINMENT,
refusal, not cruelty, 288.

EPILEPTICS,
marriage, 87.
Connecticut, 811.
Delaware, 812.
Kansas, 822.
legislative control, 59.
Michigan, 828.
Minnesota, 829.
Missouri, 831.
New Hampshire, 835.
New Jersey, 836.
Wisconsin, 858.
nullity of marriage, 171.

[*References are to Sections.*]

EQUITABLE ACTIONS,
breach of promise, 24.

EQUITY COURTS,
divorce, jurisdiction, 440.

ERROR,
marriage, effect, 359.

ESTATE BY ENTIRETIES,
divorce, 610.

ESTOPPEL,
divorce, 437.
nullity of marriage, 175.

EUGENICS,
Alabama, 805.

EUGENICS LAW,
police power, within, 88.
Wisconsin, 88.

EVIDENCE,
adultery, 243, 253.
alienation of affections, 159.
alimony, striking, 792.
bigamy, 267, 268.
marriage license, 261.
breach of promise, 33, 36.
unmarried woman, 2.
competency of parties to marriage, 2.
divorce, abandonment, 511.
adultery, 511.
Alabama, 865.
Arizona, 867.
Arkansas, 868.
burden of proof, 511.
California, 869.
children, 522.
collusion, 518.
condonation, 511.
Connecticut, 871.
coroboration, 518.
degree of proof, 518.
Delaware, 873.
depositions, 520.
desertion, 511.
District of Columbia, 874.
domicil, 514.
ex parte affidavits, 520.
Georgia, 876.
Hawaii, 877.
Idaho, 878.
Illinois, 879.
impotency, 511.
Indiana, 881.
Indian Territory, 880.

[*References are to Sections.*]

EVIDENCE—Continued.
Iowa, 882.
jurisdiction, 515.
Kansas, 883.
Kentucky, 884.
libellee, 517.
Louisiana, 885.
Maine, 886.
Maryland, 887.
Michigan, 889.
Minnesota, 890.
Mississippi, 891.
Missouri, 892.
Montana, 893.
Nebraska, 894.
Nevada, 895.
New Hampshire, 896.
New Jersey, 897.
New York, 899.
North Carolina, 900.
North Dakota, 901.
Ohio, 902.
Oklahoma, 903.
parties as witnesses, 513.
Pennsylvania, 906.
pleadings, 512.
presumption, 516.
reconciliation, 511.
records of conviction, 521.
recrimination, 511.
residence, 514.
Rhode Island, 909.
rules generally, 510.
South Dakota, 911.
Tennessee, 912.
Texas, 913.
Utah, 914.
Vermont, 915.
violence, 511.
Virginia, 916.
Washington, 917.
West Virginia, 918.
Wisconsin, 919.
Wyoming, 920.
lunacy, record of proceedings, 4.
marriage, offer and acceptance, 5.
preparation, 6.
promise, declaration of woman, 6.
promise, 5.
nullity of marriage, 184.
separate maintenance, 651.
sexual intercourse, marriage contract, 6

EXAMINATION,
impotency, refusal to submit, presumption, 376.

EX CONTRACTU ACTIONS,
breach of promise, 24.

[*References are to Sections.*]

EXCUSE,
divorce, 434.

EX DELICTO ACTIONS,
breach of promise, 24.

EXECUTION,
alimony, 796.
not subject, 674.

EXECUTION AND ORDER OF COMMITMENT,
forms, 1052.

EXECUTORY CONTRACT,
engagement agreement, 1.

EXECUTRIX,
marriage promise, 7n.

EXEMPLARY DAMAGES,
alienation of affections, 162.
breach of promise, 34.
definition, 47.

EX PARTE AFFIDAVITS,
divorce, evidence, 520.

EXTRA TERRITORIAL EFFECT,
divorce, decree, 536.

EXTRA TERRITORIAL LAWS,
marriage, 59.

EXTRADITION,
alimony, enforcement, 799.

F

FACT,
divorce, questions, 575.

FAILURE TO PROVIDE,
divorce, forms, 935.

FAILURE TO SUPPORT,
divorce, grounds, 395, 400.

FAITH AND CREDIT CLAUSE,
alimony, 678.

FALSE TESTIMONY,
divorce, vacating, 551.

FALSE REPRESENTATIONS,
annulment, forms, 982, 983.

FAMILIARITIES,
adultery, evidence, 252.

[*References are to Sections.*]

FAMILY QUARRELS,
cruelty, 284.

FATHER,
children, support, divorce, 595, 596.
divorce, custody of children, 587.
marriage, 110n.

FEDERAL COURTS,
divorce jurisdiction, do not possess, 440.

FEEBLE MINDED,
marriage, 87.
Kansas, 822.
Michigan, 828.
Minnesota, 829.
Missouri, 831.
Montana, 832.
New Hampshire, 835.
New Jersey, 836

FEES OF COUNSEL,
divorce proceedings, 720.

FELONY, CONVICTION,
divorce, forms, 932.

FEMALES, INFANT,
marriage, consent of parents, 3.

FEME COVERT,
divorce, party, 461.

FINDINGS OF COURT,
divorce trial, 577.

FLORIDA,
alimony, 875.
common law marriages, 814.
divorce, causes, 875.
children, 875.
grounds for divorce, 388.
jurisdiction, 875.
non-age, 875.
remarriage, 875.
residence, 875.
service, 875.
violent temper, 415.
marriage, age, 98, 814.
bigamous, 814.
consanguinity, 814.
criminal 814.
impotency, 814.
incestuous, 814.
insanity, 814.
negroes, 814.
parental consent, 814.
prohibited, 814.

[*References are to Sections.*]

FLORIDA—Continued.
relationship, 814.
void, 814, 875.
voidable, 814.
partial divorce, causes, 875.

FOOD,
poisoning, divorce, 414.

FORCE,
marriage, Alaska, 806.
Arkansas, 808.
California, 809.
Delaware, 812.
District of Columbia, 813.
Idaho, 817.
Indian Territory, 819.
Kansas, 822.
Kentucky, 823.
Louisiana, 824.
Michigan, 828.
Minnesota, 829.
Montana, 832.
Nebraska, 833.
New Mexico, 837.
New York, 838.
North Dakota, 840.
Oklahoma, 842.
Oregon, 843.
Pennsylvania, 845.
Philippine Islands, 846.
Porto Rico, 847.
South Dakota, 850.
Tennessee, 851.
Texas, 852.
Utah, 853.
Vermont, 854.
Washington, 856.
Wisconsin, 858.
Wyoming, 859.

FOREIGN COUNTRY,
marriage celebrated, 63.

FOREIGN DECREES,
alimony, effect, 775.

FOREIGN DIVORCE,
alimony, collection, 622.
children, custody and support, 623.
comity, 620.
decree, conclusiveness, 621.
decree, validity, 628.
domicil, review, 626.
full faith and credit, 620.
fraud, renew, 626.
jurisdiction, necessity, 624.
non-residents, relief, 627.

[*References are to Sections.*]

FOREIGN DIVORCE—Continued.
personal service, 625.
rabbinical divorces, 629.
recognition in general, 620.
remarriage, 630.
res adjudicata, 621.

FOREIGN MARRIAGE,
proof, 144.

FOREIGN STATES,
divorce, jurisdiction, 882.

FOREIGNERS,
marriage, forms, compliance with, 65.

FORGERY,
divorce, grounds, 414.

FORMALITIES,
marriage, when essential, 61.

FORMS,
abandonment, divorce, 964.
adultery, divorce, 931.
affidavit of notice, 1008.
injunction, 1021.
publication, non-resident, 1009, 1010.
alienation of affections, husband's parents, 998.
wife's seducer, 999.
alimony and separation, decree, 969.
confirming, 1029.
contempt for non-payment, 1043, 1044, 1045.
decree for permanent, 1101, 1102.
demand on party liable, 1041.
divorce, 971.
form of decree, 1074.
granting, 1029.
master's report, 1099.
modification of decree, 1106.
motion, 1032.
notice of non-payment, 1047.
order, 1028.
order granting, 1039.
order of allowance, 1036.
order to show cause, 1046.
permanent, decree, 1085.
petition for after divorce, 1096, 1097.
reference to determine, 1034.
reference to master, 1098.
report of referee, 1035.
security for payment, 1100.
temporary, order, 1037, 1038.
annulment, decree, 990.
decree of validity, 989.
false representations, 982, 983.
former marriage, 980.
fraud, answer, 986.

[*References are to Sections.*]

FORMS—Continued.
impotency, answer, 987.
intoxication, answer, 988.
marriage in foreign state, 981.
marriage, impotency, 978, 979.
marriage, insanity, 976, 977.
marriage, unsound mind, 975.
non-age, answer, 985.
physical incapacity, 979.
prayer, 984.
answer in discharge of rule, 1048.
antenuptual agreement, 1115.
antenuptial debts, 1001.
attachment and publication, 1022.
attachment, divorce, 1019, 1020, 1023.
contempt, 1042, 1051.
averment for injunction, 1024.
bed and board, divorce from, 970, 971.
betrothal ceremony, fraud, 983.
bills for divorce, instructions for drawing, 925.
bond, ne exeat, 1017, 1018.
breach of promise, answer duress, 994.
answer fraud, 993.
complaint, 991, 992.
denial, 996.
existing marriage, 997.
special damages, 992.
unchastity, 995.
California, 935.
caption of decree, 1072.
chastity, annulment, 982.
children, custody, averment, 1055.
custody, decree, 1063, 1064, 1065, 1068, 1074.
custody, notice, 1060.
custody of third party, 1059.
custody, petition, 1056.
legitimizing, 984.
maintenance after divorce, 1057
order as to custody, 1058.
order for custody, 1061.
production, habeas corpus, 1066, 1067.
production in court, 1062.
complaint for divorce, instructions for drawing, 925.
conviction of felony, divorce, Illinois, 932.
contempt, order convicting, 1053.
order purging, 1054.
conveyance, recession, divorce, 972.
co-respondent, answer, divorce, 960.
notice, 1012.
counsel fees, 1028.
motion, 1032.
order, 1037, 1038.
cross-bill, divorce, 964.
cross-complaint, divorce, 963.
cruelty, divorce, 956, 957, 964.
custody of children, divorce, 971.
debts, antenuptual, 1001.
decree of annulment, 990.

[*References are to Sections.*]

FORMS—Continued.
divorce, 1073.
validity, annulment, 989.
deed of separation, 1117.
default, non-residents, 1004.
defendant, 1002, 1003.
personal service, 1002.
service by publication, 1003.
desertion, divorce, Illinois, 932.
divorce, Iowa, 933.
divorce, abandonment, 964.
adultery, Illinois, 931.
adultery, Massachusetts, 935.
affidavit for injunction, 1021.
affidavit of notice, 1008.
affidavit to answer, 959.
agreement to modify decree, 1104.
agreement to sustain decree, 1103.
alimony, 939, 971.
alimony, allowance, 1086.
alimony, separation, decree, 969.
alimony, confirming, 1029.
alimony, Illinois, 930.
answer, affidavit, 959.
answer and cross-bill, 961.
answer, collusion, 951.
answer, condonation, 950.
answer, connivance, 951.
answer, consent and connivance, 953.
answer, cruelty, 956, 964.
answer of co-respondent, 960.
answer—general denial, 948.
answer—recrimination, 954.
appeals, dismissal, 1089.
attachment, 1023.
attachment clause, 1019, 1020.
averment for injunction, 1024.
conclusion of answer and cross-bill, 961.
connivance and consent, 953.
answer, existing marriage, 955.
certificate of decree, 1109.
complaint, cruel treatment, 929.
complaint, custody of children, 930.
complaint, formal opening, 927, 928.
complaint, infant wife, 928.
complaint, separate maintenance, 965.
complaint, title of cause, 926.
complaint, title of court, 926.
consent and connivance, 953.
conviction of felony, Illinois, 932.
counsel fees, 1086.
co-respondent, answer, 960.
cross-bill, abandonment, 964.
cross-bill and answer, 961.
cross-complaint, 963.
cruelty, justification, 957.
cruelty, Massachusetts, 935.
custody of children, 939, 944, 971.

[*References are to Sections.*]

FORMS—Continued.
degree, 1073, 1074.
conviction of crime, 1076.
costs, 1095.
cross complaint and amendment, 1086.
default, 1075.
default, personal service, 1077.
default, publication, 1078.
denial and condonation, 949.
desertion, 932, 933, 935.
dismissing bill, 1090.
dismissing cross-bill, 1094.
dismissing libel, 1088, 1091, 1092, 1093.
drug habit, Massachusetts, 935.
existing marriage, 955.
facts and law, separate maintenance, 467.
failure to provide, 935.
final after interlocutory decree, 1083.
final decree after nisi, 1083.
formal opening, 946.
fraudulent conveyance, 936.
from bed and board, 970, 971.
general prayer, 937, 938, 939.
Illinois, 927.
impotency, 935.
imprisonment, Massachusetts, 935.
Indiana, 929, 939.
injunction, affidavit, 1026.
interlocutory decree, 1079, 1081.
intoxication, Massachusetts, 935.
justification for cruelty, 957.
law and facts, separate maintenance, 968.
libel, Massachusetts, 934, 935, 938.
maiden name, 942, 1076.
maiden name, Illinois, 932.
modification for alimony, 1106.
motion for specifications, 958.
ne exeat, bond, 1017, 1018.
ne exeat, endorsement, 1014.
ne exeat, order for issuance, 1015, 1016.
ne exeat, petition, 1013.
nisi, 1079.
nisi absolute, 1084.
nisi, fact and laws, 1081.
nisi, guardian, 1082.
non-resident publication, 1009, 1010.
notice to correspondent, 1012.
objections to decree, 1080.
order for examination for impotency, 1110.
ordering trial by jury, 1108.
order to modify decree, 1105.
pleas and answers, 945.
plea to jurisdiction, 947.
poisoning, 935.
prayer for alimony, 941.
prayer for summons, 940.
publication attachment, 1022.

[*References are to Sections.*]

FORMS—Continued.
publication, non-resident, 1009, 1010.
rescission of conveyance, 972.
recrimination, 954.
replication, 962.
restraining order, 943, 1027.
restraint, personal liberty, 1025.
service of notice, 1011.
separate maintenance, decree, 968.
separate maintenance, complaint, 965.
separate maintenance, petition, 966.
separation and alimony, decree, 969.
setting aside decree, 1087.
sexual intercourse, Massachusetts, 935.
specifications, 958.
suit-money, 1028.
suit money, application, 1031, 1033.
title of cause, 945.
title of court, 945.
transfer of suit, 1107.
venue, 945.
verdict of jury, 1075.
witnesses, affidavit of physician, 1111.
writ of protection, petition, 1112.
execution and order of commitment, 1052.
existing marriage, forms, 955.
false representations, annulment, 982, 983.
felony, conviction of, divorce, Illinois, 932.
fraud, annulment, answer, 986.
homestead, sale of, decree, 1071.
use of, decree, 1068, 1069, 1070.
impotency, annulment form, 978, 979, 987.
injunction, affidavit, 1026.
injunction, affidavit, divorce, 1021.
averment, 1024.
intoxication, annulment, answer, 988.
Iowa, 933.
judgment for commitment, contempt, 1050.
libel for divorce, instructions for drawing, 925.
maiden name, divorce, Illinois, 932.
maintenance, order allowing, 1040.
marriage annulment, foreign state, 981.
annulment, impotency, 978, 979.
annulment, insanity, 976, 977.
annulment, non-age, 974.
annulment, physical incapacity, 979.
annulment, restoration of reason, 977.
annulment, unsound mind, 975.
declaring void, 973.
former annulment, 980.
settlement, 1113.
settlement, deed of wife confirming, 1114.
Massachusetts, divorce, 934, 935.
necessaries furnished wife, 1000.
ne exeat, bond, 1017, 1018.
endorsement, 1014.
order for issuance, 1015, 1016.
petition for writ, 1013.

[*References are to Sections.*]

FORMS—Continued.
non-residents, publication, 1009, 1010.
notice, 1060.
notice, affidavit, 1008.
notice of application, 1031, 1033.
order to pay, 1037, 1038.
co-respondent, 1012.
publication, order, 1007.
service, 1011.
petition for divorce, instructions for drawing, 925.
physical incapacity, annulment, 979.
publication, affidavit, non-resident, 1009, 1010.
publication and attachment, 1022.
rescission of conveyance, divorce, 972.
recognizance to appear, 1049.
recrimination, divorce, 954.
replication, divorce, 962.
restoration of reason, annulment, 977.
restraining order, 1027.
notice, 1060.
personal liberty, 1025.
separate maintenance, 966.
vacate decree, 1005.
separate maintenance, divorce, 965, 966.
separation agreement, 1116, 1117.
separation and alimony, decree, 969.
separation, deed, 1117.
specifications, divorce, 958.
suit-money, 1028.
summons, 1006.
vacation of decree, petition, 1005.
voiding marriage, 973.

FORMS FOR DENIAL,
Illinois, 930, 931, 932.
Indiana, 929.

FRAUD,
alimony, temporary, 693.
annulment, answer, form, 986.
bastardy, 356.
breach of promise, as defense, 28.
exemplary damages, 47.
pleading, 35.
concealment of conviction of crime, 357.
conviction of crime, 357.
divorce, 204.
decrees, vacating, 545.
foreign, review, 626.
essentials, 356.
impotency, knowledge, 366.
maintenance, separate, 640.
marriage, Alabama, 805.
Alaska, 806.
Arkansas, 808.
California, 809.
Connecticut, 811.
contract, 16.

[*References are to Sections.*]

FRAUD—Continued.
damages, 188.
Delaware, 812.
District of Columbia, 813.
effect, 355.
Georgia, 815.
Idaho, 817.
Indian Territory, 819.
Kansas, 822.
Kentucky, 823.
Louisiana, 824.
Michigan, 828.
Minnesota, 829.
Montana, 832.
Nebraska, 833.
New York, 838.
North Dakota, 840.
nullity of marriage, 173.
Oregon, 843.
Nevada, 834.
Pennsylvania, 845.
Philippine Islands, 846.
Porto Rico, 847.
pregnancy by another, 356.
separation agreement, 218.
separate maintenance, 640.
South Dakota, 850.
Tennessee, 851.
Texas, 852.
unchastity, 356.
Utah, 853.
Vermont, 854.
Washington, 856.
Wisconsin, 858.
Wyoming, 859.

FRAUDS STATUTE OF.
marriage contract when within, 8.

FRAUDULENT CONVEYANCE.
divorce, forms, 936.

FUGITIVE FROM JUSTICE.
divorce, 408.

FULL FAITH AND CREDIT CLAUSE.
alimony, 775.
divorce, effect on decrees, 882.

G

GAMBLING.
support, refusal, not grounds for divorce, 395.

GENERAL PRAYER.
divorce, forms, 937, 938, 939.

[*References are to Sections.*]

GEORGIA,
common law marriages, 815.
divorce, alimony, 876.
causes, 876.
children, 876.
evidence, 876.
jurisdiction, 876.
non-age, 876.
procedure, 876.
remarriage, 876.
residence, 876.
marriage, age, 98, 815.
bigamous, 815.
consanguinity, 815.
criminal, 815.
fraud, 815.
incestuous, 815.
insanity, 815.
negroes, 815.
parental consent, 815.
physical disability, 815.
prohibited, 815.
relationship, 815.
void, 815.
voidable, 815.
partial divorce, causes, 876.
prohibited marriage, 815.

GONORRHEA,
adultery, evidence, 247.
marriage, Utah, 853.
nullity of marriage, 171.

GRANDDAUGHTER,
marriage, 110n.

GRANDFATHER,
marriage, 110n.

GRANDMOTHER,
marriage, 110n.

GRANDPARENTS,
divorce, custody of children, 587.

GRANDSON,
marriage, 110n.

GUARDIAN,
alimony, enforcement, 785.
liability, 666.
temporary, 693.
annulment, party, 458.
divorce, children, 593.
Massachusetts, 466.
parties to, 460.
lunatic, marriage, 85.

[*References are to Sections.*]

GUARDIAN AD LITEM,
infants, marriage contract, 3.

GUARDIANSHIP,
marriage, incompetent, 4.

H

HABEAS CORPUS,
divorce, custody of children, 593.

HABITUAL DRUNKENNESS,
chloral, 311.
chloroform, 311.
cocaine, 311.
common law, not grounds for divorce, 310.
complainant furnishing liquor, 317.
conviction unnecessary, 316.
court records as proof, 315.
definition, 310, 312, 313.
degree, 313.
dipsomaniacs, 314.
divorce, grounds, 310.
drugs, 311.
habitual intemperance, 321.
knowledge at time of marriage, 320.
morphine, 311.
narcotics, 311.
occasional intoxication, 319.
opium, 311.
periodical debauches, 318.
reformation of addict, 310.

HAIR PULLING,
cruelty, 278.

HAWAII,
alimony, 877.
divorce, causes, 877.
evidence, 877.
jurisdiction, 877.
libel, 877.
non-age, 877.
residence, 877.
remarriage, 877.
service, 877.
marriage, abduction, 816.
age, 816.
annulment, 877.
bigamous, 816.
consanguinity, 816.
criminal, 816.
incestuous, 816.
insanity, 816.
prohibited, 816.
physical disability, 816.
relationship, 816.
voidable, 816.
partial divorce, causes, 877.

[*References are to Sections.*]

HEALTH,
cruelty, endangering, 279.

HEALTH OF PARTIES TO MARRIAGE,
postponement of ceremony, 15.

HOMESTEAD,
forms, use, decree, 1068, 1069, 1070.
sale, decree, 1071.

HOMESTEAD RIGHT,
divorce, 612.

HOTEL EXPENSES,
suit money, 716.

HUSBAND,
abandonment, alimony, 749.
adultery, alimony, 748.
alienation of wife's affections, 151.
alimony, abandonment, 749.
ability to pay, 696.
adultery, 748.
allowance, 697.
cruelty, 751.
denial, 671.
estate, 756.
right, 673.
resources, 743.
desertion of wife, 338-340.
divorce, costs, 732.
counsel fees, 732.
domicil, 446.
rights, property, 607.
promise of marriage, intent, 1.
suit money, ability to pay, 714.
wills, common law rule, 62.

HOUSE OF ILL FAME,
adultery, entering, 246.

HYDROCELES,
impotency, cause, 367.

HYMEN, IMPERFORATED,
impotency, 367.

I

IDAHO,
alimony, divorce, 878.
common law marriages, 817.
divorce, attorney, 462.
causes, 878.
decree, form, 1073.
evidence, 878.
jurisdiction, 878.
non-age, 878.
remarriage, 878.

[*References are to Sections.*]

IDAHO—Continued.
residence, 878.
service, 878.
insanity, grounds for divorce, 388.
marriage, age, 98, 817.
annulment, 878.
bigamous, 817.
consanguinity, 817.
criminal, 817.
force, 817.
fraud, 817.
incestuous, 817.
insanity, 817.
impersonation, 817.
Mongolians, 817.
mulattoes, 817.
negroes, 817.
parental consent, 817.
physical disability, 817.
prohibited, 817.
relationship, 817.
void, 817.
voidable, 817.

IDIOCY,
divorce, grounds, 367.
marriage, bar, 385.
Illinois, 818.
ullity of marriage, 167.

IDIOTS,
marriage, District of Columbia, 813.
incapacity, 85.
Indiana, 820.
Kentucky, 823.
Maine, 825.
Massachusetts, 827.
Michigan, 828.
Nebraska, 833.
New Hampshire, 835.
Rhode Island, 848.
South Carolina, 849.
Utah, 853.
Wisconsin, 858.
Wyoming, 859.

ILLEGITIMATE CHILDREN,
marriage, Alabama, 805.
Arkansas, 808.

ILLICIT RELATIONS,
common law marriage, 76.
promise of marriage, 1.

ILLINOIS,
alimony, 879.
common law marriages, 818.
divorce, causes, 879.

[*References are to Sections.*]

ILLINOIS—Continued.
evidence, 879.
forms, 927, 930, 931, 932.
jurisdiction, 879.
non-age, 879.
remarriage, 879.
residence, 879.
service, 879.
marriage, age, 98, 818.
bigamous, 818.
consanguinity, 818.
criminal, 818.
incestuous, 818.
idiocy, 818.
insanity, 818.
parental consent, 818.
prohibited, 818.
relationship, 818.
void, 818.
voidable, 818.
partial divorce, causes, 879.

ILLNESS,
breach of promise, pleading, 35.

IMBECILE,
marriage, 85, 87.
Connecticut, 811.
Kansas, 822.
Michigan, 828.
Minnesota, 829.
Missouri, 831.
New Hampshire, 835.
Ohio, 841.
promise void, 4.

IMPEDIMENT,
marriage, removal, 137.

IMPERFECT MARRIAGES,
infants, 95.

IMPERSONATION,
common law marriage, void, 75.
divorce, vacating, 552.
marriage, California, 809.
common law, void, 75.
Idaho, 817.
South Dakota, 850.
Utah, 853.

IMPOSITION,
divorce, decrees, vacating, 545.

IMPOTENCE,
age, advanced, 368.
alimony, 750.
allegation, must be alleged, 378.

[*References are to Sections.*]

IMPOTENCE—Continued.
annulment, answer, form, 987.
contract to marry void, 2.
copulation, must be defect, 373.
curable, 372.
disease, 367.
divorce, evidence, 511.
forms, 935.
annulment, forms, 978.
barrenness does not invalidate, 373.
burden of proof, 374.
causes, disease, 367.
hydroceles, 367.
idiocy, 367.
lack of development, 367.
loss of testes, 367.
malformation, 367.
relaxation of parts, 367.
rupture, 367.
examination, ordered by court, 376.
refusal to submit, presumption, 376.
existence at time of marriage, 369.
hymen, imperforated, 367.
idiocy, not ground for divorce, 367.
incurable, must be, 369.
knowledge of defect, 366.
labia, adhesion, 367.
malformation of parts, 367.
marriage, 86.
contract, dissolution, 20.
Delaware, 812.
Florida, 814.
Maryland, 826.
North Carolina, 839.
Philippine Islands, 846.
Tennessee, 851.
Wisconsin, 858.
natural, 370.
nullity of marriage, 171.
physical defect, 365.
proceedings, when instituted, 379.
procreation, defect in void, 373.
relation of parts, 367.
reproduction, defect in void, 373.
rupture, 367.
sexual intercourse, absence, 375.
sterility, 367.
temporal, 371.
testes, loss, 367.
tumors, 367.
vagina, narrowness, 367.

IMPRISONMENT.
abandonment, 300.
alimony, 793, 794.
alimony, effect, 771.
breach of promise, 27.
definition as ground for divorce, 303.

[*References are to Sections.*]

IMPRISONMENT—Continued.
desertion, 300.
divorce, forms, Massachusetts, 935.
grounds, 300.
foreign state, not cause for divorce, 301.
support, refusal, not valid ground, 399.

INCAPACITY,
divorce, pleading, 495.
marriage, Alabama, 805.
dissolution of contract, 20.

INCEST,
law of place, 63, 65.
marriage, Alabama, 805.
Arkansas, 808.
California, 809.
Colorado, 810.
Connecticut, 811.
degrees of relationship, 110.
Delaware, 812.
District of Columbia, 813.
Florida, 814.
Georgia, 815.
Hawaii, 816.
Idaho, 817.
Illinois, 818.
Indiana, 820.
Indian Territory, 819.
Iowa, 821.
Kansas, 822.
Kentucky, 823.
Louisiana, 824.
Maine, 825.
Maryland, 826.
Massachusetts, 827.
Michigan, 828.
Minnesota, 829.
Mississippi, 830.
Missouri, 831.
Montana, 832.
Nebraska, 833.
Nevada, 834.
New Hampshire, 835.
New Jersey, 836.
New Mexico, 837.
New York, 838.
North Carolina, 839.
North Dakota, 840.
Ohio, 841.
Oklahoma, 842.
Oregon, 843.
Pennsylvania, 845.
Philippine Islands, 846.
Porto Rico, 847.
Rhode Island, 848.
South Carolina, 849.
South Dakota, 850.

[*References are to Sections.*]

INCEST—Continued.
Tennesee, 851.
Utah, 853.
Vermont, 854.
Virginia, 855.
West Virginia, 857.
Wisconsin, 858.
Wyoming, 859.

INCESTUOUS MARRIAGES.
degrees of relationship, 110.

INCHOATE MARRIAGES,,
infants, 95.

INCOMPATABILITY OF TEMPER,
divorce grounds, 415.

INCOMPETENCY,
promise of marriage, void, 4.

INDIANA,
alimony, 881.
common law marriages, 820.
divorce, causes, 881.
evidence, 881.
forms, 929, 939.
incestuous, 820.
jurisdiction, 881.
non-age, 881.
parties, attorney, 462.
remarriage, 881.
residence, 881.
service, 881.
domicil, 444.
limited divorce, causes, 881.
marriage, age, 98, 820.
annulment, 881.
bigamous, 820.
consanguinity, 820.
criminal, 820.
idiots, 820.
insane, 820.
negroes, 820.
prohibited, 820.
relationship, 820.
void, 820, 881.
voidable, 820.
residence, 444.
separation, limited, 881.

INDIANS.
marriage, Nevada, 834.
North Carolina, 839.
Oregon, 843
South Carolina, 849.
tribal customs, 106.
with white person, 105.

[*References are to Sections.*]

INDIAN TERRITORY,
divorce, alimony, 880.
causes, 880.
evidence, 880.
jurisdiction, 880.
non-age, 880.
residence, 880.
service, 880.
marriage, age, 98, 819.
annulment, 880.
bigamous, 819.
consanguinity, 819.
criminal, 819.
force, 819.
fraud, 819.
incestuous, 819.
insanity, 819.
Mulattoes, 819.
negroes, 819.
physical incapacity, 819.
prohibited, 819.
relationship, 819.
void, 819.
voidable, 819.

INDIGNITIES,
cruelties, 292.
divorce, grounds, 411.

INFAMOUS CRIME,
manslaughter, 300.
rape, 300.

INFANCY,
alimony, temporary, 693.
marriage contract, dissolution, 20.

INFANTS,
alimony, enforcement against husband, 785.
annulment, party, 458.
breach of promise, release, 32.
common law rule, 95.
divorce, party, 459.
imperfect marriage, 95.
inchoate marriage, 95.
marriage age, 98, 95.
cohabitation, 95.
common law, 3.
consent of parents, 3, 96.
contract, refusal to perform, 3.
disaffirming, 95.
guardian ad litem, 3.
Massachusetts, 97.
non-age table, states, 98.
promise voidable, 3.
puberty, 95.
repudiation, 95.
sexual intercourse, 95.
voiding, 95.

[*References are to Sections.*]

INFANTS—Continued.
mutuality, actions, 3.
nullity of marriage, 169.
promise of marriage, voidable, 3.
seduction, liability for breach of marriage, 3.

INFIDELITY,
cruelty, 285.

INJUNCTION,
alimony, 789.
divorce, application, 203.

INSANITY,
accruing after marriage, 388.
adultery, when affects, 226.
alimony, temporary, 693.
annulment of marriage, forms, 976, 977.
breach of promise, defense, 29.
chronic maniac, effect, 386.
collateral attack, marriages, 387.
cruelty, acts, 385.
degree, necessary, 386.
dementia, effect, 386.
desertion, as defense, 330.
divorce, 85.
defense, 430.
party, 459.
pleadings, 500.
existence at time of marriage, 385.
Florida, grounds for divorce, 388.
Idaho, grounds for divorce, 388.
Kentucky, grounds for divorce, 388.
mania, effect, 386.
marriage, Arkansas, 808.
bar, 385.
California, 809.
Colorado, 810.
marriage, Delaware, 812.
Florida, 814.
Georgia, 815.
Hawaii, 816.
Idaho, 817.
Illinois, 818.
incapacity, 85.
Indiana, 820.
Indian Territory, 819.
Iowa, 821.
Kansas, 822.
Kentucky, 823.
Maine, 825.
Michigan, 828.
Montana, 832.
Nebraska, 833.
New Hampshire, 835.
New Jersey, 836.
New Mexico, 837.
North Dakota, 840.

[*References are to Sections.*]

INSANITY—Continued.
Philippine Islands, 846.
Porto Rico, 847.
South Dakota, 850.
Tennesee, 851.
Texas, 852.
Vermont, 854.
Virginia, 855.
Washington, 856.
West Virginia, 857.
Wisconsin, 858.
Wyoming, 859.
nullity of marriage, 167.
Oklahoma, grounds for divorce, 388.
Pennsylvania, grounds for divorce, 388.
petition for divorce invalid, 389.
support, refusal, not valid ground, 399.
temporary, effect on marriage, 385.
Washington, grounds for divorce, 388.

INSINCERITY,
divorce, grounds, 422.

INSOLVENCY,
alimony, 801.

INSURANCE,
divorce, wife's rights, 609.

INTENT,
common law marriage, 73, 75.
domicil, 444.
essential to marriage, 1.
illicit relations, promise of marriage, 1.
marriage, validity, 61.
residence, 444.

INTERCOURSE, CARNAL,
common law marriage, 76.
marriage, common law, 76.

INTERIM MONEY,
alimony, 690.

INTERLOCUTORY DECREE,
divorce, 468, 469, 530.
marriage contract within, 11.

INTOXICATION,
alimony, temporary, 693.
annulment, answer, form, 988.
cruelty, 295.
divorce, as defense, 431.
forms, Massachusetts, 935.
grounds, 310, 321.
unsafe cohabitation, 414.
marriage, 85.
nullity of marriage, 178.

[*References are to Sections.*]

IOWA,
alimony, 882.
common law marriages, 821.
divorce, causes, 882.
evidence, 882.
forms, 933.
jurisdiction, 882.
non-age, 882.
remarriage, 882.
residence, 882.
service, 882.
marriage, age, 98, 821.
annulment, 882.
bigamous, 821.
consanguinity, 821.
criminal, 821.
incestuous, 821.
insanity, 821.
physical incapacity, 821.
prohibited, 821.
relationship, 821.
void, 821.
voidable, 821.

J

JAPANESE,
marriage, Nebraska, 833.

JUDGMENTS,
alimony, set off, 674.

JEWISH LAW,
divorce, 195.

JOINDER,
adultery, actions, 236.

JUDGMENT BY DEFAULT,
divorce, 528.

JUDGMENT FOR COMMITMENT,
forms, 1050.

JURISDICTION,
divorce, Alabama, 865.
Arizona, 867.
Arkansas, 868.
California, 869.
Colorado, 870.
Connecticut, 871.
Cuba, 872.
Delaware, 873.
District of Columbia, 874.
evidence, 515.
Florida, 875.
forms, 947.
Georgia, 876.
Hawaii, 877.

[*References are to Sections.*]

JURISDICTION—Continued.
Idaho, 878.
Illinois, 879.
Indiana, 881.
Indian Territory, 880.
Iowa, 882.
Kansas, 883.
Kentucky, 884.
Louisiana, 885.
Maine, 886.
Maryland, 887.
Massachusetts, 888.
Michigan, 889.
Minnesota, 890.
Mississippi, 891.
Missouri, 892.
Montana, 893.
Nebraska, 894.
North Carolina, 900.
New Hampshire, 896.
New Jersey, 897.
New Mexico, 898.
New York, 899.
Nevada, 895.
North Dakota, 901.
Ohio, 902.
Oklahoma, 903.
Oregon, 904.
Pennsylvania, 906.
Philippine Islands, 907.
Porto Rico, 908.
Rhode Island, 909.
South Dakota, 911.
Tennessee, 912.
Texas, 913.
Utah, 914.
Vermont, 915.
Virginia, 916.
Washington, 917.
West Virginia, 918.
Wisconsin, 919.
Wyoming, 920.
marriage, to annul, South Carolina, 910.

JURISDICTION OF DIVORCE,
acquired jurisdiction, 449.
alien, 442.
alimony, equity courts, 440.
by appearance, 450.
conferred by statute, 440.
consent of parties, 440.
counter claim, 451.
courts having, 440.
cross bill, non-residen , 452.
domicil, annulment suit, 453.
domicil, change, 445.

[*References are to Sections.*]

JURISDICTION OF DIVORCE—Continued.
definition, 443.
husband and wife, 446, 449.
intention of parties, 444.
Louisiana, 441.
place, 441, 442.
statutory time, 448.
wife, 446, 449.
equity courts, 440.
extra-territorial effect of decree, 447.
federal courts, do not possess, 440.
marriage, place of celebration, 441, 442.
non-resident, cross bill, 452.
place of offense, 441, 442.
residence, change, 445.
definition, 443.
statutory time, 448.
separate maintenance, 451.

JUSTICE OF PEACE,
marriage ceremony, 61.

JUSTIFICATION,
desertion, 434.
divorce 434.

KANSAS,
alimony, 883.
common law marriages, 822.
divorce, causes, 883.
children, 883.
evidence, 883.
gross neglect of duty, 409.
jurisdiction, 883.
non-age, 883.
remarriage, 883.
residence, 883.
service, 883.
marriage, age, 98, 822.
annulment, 883.
consanguinity, 822.
criminal, 822.
epileptics, 822.
feeble-minded, 822.
force, 822.
fraud, 822.
imbeciles, 822.
incestuous, 822.
insane, 822.
laws, 87.
physical disability, 822.
pregnancy, 822.
prohibited, 822.
relationship, 822.
void, 822.
voidable, 822.
partial divorce, causes, 883.

[*References are to Sections.*]

KENTUCKY,
absolute divorce, causes, 884.
adultery, 225.
alimony, 884.
petition, 680.
common law marriages, 823.
counsel fees, 720, 725.
divorce, evidence, 884.
insanity, grounds, 388.
jurisdiction, 884.
living apart, 413.
name of wife, 884.
non-age, 884.
remarriage, 884.
residence, 884.
service, 884.
domicil, 444.
marriage, age 98, 823.
annulment, 884.
bigamous, 823.
consanguinity, 823.
criminal, 823.
force, 823.
fraud, 823.
idiots, 823.
incestuous, 823.
insane, 823.
mulattoes, 823.
negroes, 823.
prohibited, 823.
relationship, 823.
void, 823.
voidable, 823.
partial divorce, causes, 884.
residence, 444.

KICKING,
cruelty, 278.

KLEPTOMANIAC,
nullity of marriage, 167.

L

LABIA, ADHESION,
impotency, 367.

LACHES,
divorce, vacating, 555.

LAW,
divorce, questions, of, 575.

LAWS OF DIVORCE,
synopsis, 865, 920.

LAWS OF MARRIAGE,
synopsis, 805, 859.

[*References are to Sections.*]

LAWYERS,
divorce, advertising to procure, 204.

LEGAL AGE,
infants, marriage, 95.

LEGISLATURE,
divorce, granting, 196.
regulation of, 59.
marriage, age, 59.
causes of dissolution, 59.
ceremonial incidents, 61.
consanguinity, 59, 60.
duties and obligations, 59.
epileptics, 59.
form and procedure, 59.
legal capacity of parties, 60.
manner of contracting, 59.
miscegenation, 59, 60.
no extra-territorial effect, 59.
obligation of contracts, 59.
parties, 59.
physical condition of parties, 59.
physician's certificate, 59.
power to void, 59.
property rights, 59.
qualifications of parties, 59.
regulation, 59.
remarriage, control, 59.
rights and immunities, 59.

LEGITIMACY,
bigamy, 265.

LETTERS,
adultery, evidence, 248.
adultery, proof, 229.
breach of promise, evidence, 38.
condonation, 424.
divorce, notice, 481.
marriage, 80.
proof, 268.

LEWDNESS,
breach of promise, defense, 30.

LEX DOMICILII,
marriage contract, governs, 63.

LEX LOCI CONTRACTUS,
marriage, forms governed, 63.

LIBEL,
divorce, Hawaii, 877.
particulars, 490.
verification, 503.
who may sign, 502.
forms, 925.
instructions for drawing, 925.

[*References are to Sections.*]

LIBELLEE,
divorce, evidence, 517.

LICENSE,
marriage, proof, 268.

LIEN,
alimony, decree, 798.

LIMITATION OF ACTIONS,
breach of promise, 26.

LIMITED DIVORCE,
causes, Arizona, 867.
Indiana, 881.
cohabitation, 605.
domicil, woman, 605.
marriage, right, 605.
property rights, 605, 610.
support, 605.

LIS PENDENS,
alimony, property, 787.
divorce, application, 201.

LOUISIANA,
adultery, 225n.
alimony, 885.
breach of promise, survival of action, 25.
common law marriages, 824.
divorce, 200, 465.
causes, 885.
defamation of character, 412.
evidence, 885.
jurisdiction, 441, 885.
living apart, 413.
non-age, 885.
remarriage, 885.
residence, 885.
separation, 532.
service, 885.
marriage, age, 98, 824.
annulment, 885.
bigamous, 824.
consanguinity, 824.
criminal, 824.
force, 824.
fraud, 824.
incestuous, 824.
negroes, 824.
relationship, 824.
prohibited, 824.
void, 824.
voidable, 824.
nullity of marriage, mistake, 174.
partial divorce, causes, 885.

LUNACY,
promise of marriage, void, 4.
record of proceedings conclusive, 4.

[*References are to Sections.*]

LUNATIC,
cohabitation, marriage of not cured, 85.
marriage, guardian, 85.
District of Columbia, 813.
Massachusetts, 827.
Rhode Island, 848.
South Carolina, 849.
Utah, 853.

M

MAGISTRATES,
marriage, celebration, 51.

MAIDEN NAME,
divorce, Alaska, 866.
Arizona, 867.
Arkansas, 868.
Connecticut, 871.
Delaware, 873.
forms, 942.
forms, Illinois, 932.
Kentucky, 884.
Maine, 886.
Massachusetts, 888.
Minnesota, 890.
Nevada, 895.
South Dakota, 911.
wife, divorce, 537.

MAINE,
adultery, confessions, 249.
alimony, 886.
common law marriages, 825
divorce, causes, 886.
children, 886.
evidence, 886.
jurisdiction, 886.
name of wife, 886.
non-age, 886.
property, 610.
remarriage, 886.
residence, 886.
service, 886.
domicil, 444.
marriage, age, 98, 825.
bigamous, 825.
criminal, 825.
idiot, 825.
incestuous, 825.
insane, 825.
parental consent, 825.
paupers, 825.
prohibited, 825.
relationship, 825.
void, 825, 886.
voidable, 825.
residence, 444.

[*References are to Sections.*]

MAINTENANCE,
forms, order allowing, 1040.

MAINTENANCE, SEPARATE,
See SEPARATE MAINTENANCE.

MALA FIDE CONTRACTS,
marriage, 12.

MALAYS,
marriage, Wyoming, 859.

MALES,
marriage, examination, 805.

MALFORMATION,
impotency, cause, 367.

MALICE,
alienation of affections, 159.

MANDAMUS,
alimony, 684.

MANIA,
divorce, grounds, 386.
marriage, effect, 386.

MANSLAUGHTER,
infamous crime, 300.

MARRIAGEABLE AGE,
statutory, 95.
table by states, 98.

MARRIAGE BROKAGE CONTRACTS,
void, 123.

MARRIAGE CEREMONY,
Sunday, performance, 10.

MARRIAGE CONTRACT,
definition, judicial, 3.
original and subsequent, 1.

MARRIAGE LAWS,
synopsis, 805-859.

MARRIAGE PER VERBA DE FUTURO CUM COPULA,
common law, 71, 72.

MARRIAGE PER VERBA DE PRAESENTI,
common law, 71.

MARRIAGE PROMISE,
engagement, nature, 1.

[*References are to Sections.*]

MARRIAGE SETTLEMENT,
divorce, absolute, 611.
forms, 1113.
deed of wife confirming, 1114.

MARRIED WOMEN,
wills, capacity to make, 62.

MARYLAND,
alimony, 887.
common law marriage, 826.
divorce, causes, 887.
children, 887.
evidence, 887.
jurisdiction, 887.
non-age, 887.
remarriage, 887.
residence, 887.
service, 887.
marriage, age, 98, 826.
annulment, 887.
impotence, 826.
incestuous, 826.
parental consent, 826.
voidable, 826.
bigamous, 826.
consanguinity, 826.
criminal, 826.
negroes, 826.
prohibited, 826.
relationship, 826.
void, 826.
partial divorce, causes, 887.

MASQUERADE,
common law marriage, void, 75.

MASSACHUSETTS,
adultery, paramour, defense, 227.
alimony, 888.
common law marriages, 827.
divorce, causes, 888.
children, 888.
co-respondent, 462.
forms, 934, 935, 938.
guardian, 466.
jurisdiction, 888.
name of wife, 888.
non-age, 888.
remarriage, 888.
residence, 888.
service, 888.
marriage, age, 98, 827.
annulment, 888.
bigamous, 827.
consanguinity, 827.
criminal, 827.
forms, 65.

[*References are to Sections.*]

MASSACHUSETTS—Continued.
idiots, 827.
incestuous, 827.
infants, 97.
lunatics, 827.
parental consent, 827.
prohibited, 827.
relationship, 827.
void, 827.
voidable, 827.
separate maintenance, agreements, 640.
separation, causes, 888.

MASTER,
alimony, reference, 758.
divorce trial, 576.

MASTURBATION,
cruelty, 294.

MATRIMONY,
intent of essential, 1.

MENACE,
marriage, Alabama, 805.

MENTAL ANGUISH,
damages, 162.

MENTAL CAPACITY,
promise of marriage, 4.

MENTAL CAPACITY TO MARRY,
drunkenness, 85.
idiots, incapacity, 85.
imbecile, 85.
insane, incapacity, 85.
intoxication, 85.
lunatics, 85.

MENTAL CRUELTY,
divorce, grounds, 275.

MENTAL SUFFERING,
breach of promise, compensatory damages, 42.
cruelty, 283.

MERCENARY MOTIVES,
marriage contract, fraud, 16.

MICHIGAN,
alimony, 889.
writ of ne exeat, 790.
common law marriages, 828.
divorce, causes, 889.
decree, 536.
evidence, 889.
jurisdiction, 889.

[*References are to Sections.*]

MICHIGAN—Continued.
non-age, 889.
parties, attorney, 462.
remarriage, 889.
residence, 889.
service, 889.
domicil, 444.
marriage, age, 98, 828.
bigamous, 828.
consanguinity, 828.
criminal, 828.
epilepsy, 828.
feeble-minded, 828.
force, 828.
fraud, 828.
idiots, 828.
imbecile, 828.
incestuous, 828.
insane, 828.
laws, 87.
prohibited, 828.
relationship, 828.
venereal disease, 828.
void, 828, 889.
voidable, 828.
partial divorce, causes, 889.
residence, 444.

MINISTERS,
marriage, celebration, 61.

MINNESOTA,
absolute divorce, causes, 890.
alimony, 890.
common law marriages, 829.
divorce, causes, 890.
children, 890.
evidence, 890.
jurisdiction, 890.
name of wife, 890.
non-age, 890.
remarriage, 890.
residence, 890.
service, 890.
marriage, age, 98, 829.
annulment, 890.
bigamous, 829.
consanguinity, 829.
criminal, 829.
epileptics, 829.
feeble-minded, 829.
force, 829.
fraud, 829.
imbeciles, 829.
incestuous, 829.
insane, 829.
laws, 87.
prohibited, 829.

[*References are to Sections.*]

MINNESOTA—Continued.
relationship, 829.
void, 829, 890.
voidable, 829.
partial divorce, causes, 890.

MINORS,
See Infant

MISCARRIAGE,
breach of promise, aggravated damages, 45.

MISCEGENATION,
contracts, impairing obligations, 105.
domicil, law of prevails, 105.
marriage, legislative control, 59, 60.
North Carolina, 839.
North Dakota, 840.
South Carolina, 105.
South Dakota, 850.
void, 105.

MISREPRESENTATION,
nullity of marriage, 173.

MISSISSIPPI,
absolute divorce causes, 891.
alimony, 891.
common law marriages, 830.
divorce, causes, 891.
evidence, 891.
jurisdiction, 891.
non-age, 891.
remarriage, 891.
residence, 891.
service, 891.
marriage, age, 98, 830.
bigamous, 830.
consanguinity, 830.
criminal, 830.
incestuous, 830.
Mongolians, 830.
negroes, 830.
parental consent, 830.
prohibited, 830.
relationship, 830.
void, 830.
voidable, 830.

MISSOURI,
absolute divorce, causes, 892.
alimony, 892.
common law marriage, 831.
counsel fees, 720.
divorce, causes, 892.
children, 892.
evidence, 892.
jurisdiction, 892.

[*References are to Sections.*]

MISSOURI—Continued.
non-age, 892.
property rights, 610.
remarriage, 892.
residence, 892.
service, 892.
domicil, 444.
marriage, age, 98, 831.
annulment, 892.
bigamous, 831.
consanguinity, 831.
criminal, 831.
epileptic, 831.
feeble-minded, 831.
imbeciles, 831.
incestuous, 831.
Mongolians, 831.
negroes, 831.
parental consent, 831.
prohibited, 831.
relationship, 831.
void, 831.
voidable, 831.
negro, defined, marriage, 105.
residence, 444.

MISTAKE,
divorce, defense, 428.
grounds, 359.
fact of, adultery, 232.
law of, adultery, 231.
marriage, effect, 359.
nullity of marriage, 174.

MITIGATION DAMAGES,
breach of promise, 43.

MOCK MARRIAGES,
annulment, 172.

MODIFICATION,
divorce, decree, 533.

MONEY,
support, not essential, 395.

MONEY CONSIDERATION,
marriage, void, 11.

MONEY PAYMENTS,
separation agreements, 215.

MONGOLIAN,
marriage with white person, 105.
marriage, Arizona, 807.
California, 809.
Idaho, 817.
Mississippi, 830.

[*References are to Sections.*]

MONGOLIAN—Continued.
Missouri, 831.
Nevada, 834.
Oregon, 843.
Utah, 853.
Wyoming, 859.

MONTANA,
absolute divorce, causes, 893.
alimony, 893.
common law marriages, 832.
divorce, causes, 893.
decree, form, 1073.
jurisdiction, 893.
non-age, 893.
remarriage, 893.
residence, 893.
service, 893.
marriage, abduction, 832.
age, 98, 832.
annulment, 893.
bigamous, 832.
consanguinity, 832.
criminal, 832.
feeble-minded, 832.
force, 832.
fraud, 832.
incestuous, 832.
insane, 832.
physical disability, 832.
prohibited, 832.
relationship, 832.
void, 832.
voidable, 832.
partial divorce, causes, 893.

MORPHINE,
cruelty, 295.
drunkenness, habitual, 311.

MOTHER,
divorce, custody of children, 587.
marriage, 110n.

MOTHER IN LAW,
marriage, 110n.

MULATTOES,
marriage, Arkansas, 808.
California, 809.
Colorado, 810.
Delaware, 812.
Idaho, 817.
Indian Territory, 819.
Kentucky, 823.
South Carolina, 849.
Wyoming, 859.

[*References are to Sections.*]

MUTUALITY,
infant, action by, 3.

MUTUALITY OF PROMISE,
marriage, 5.

N

NAME,
wife, divorce, 537.

NAME, MAIDEN,
See MAIDEN NAME.

NAME OF WIFE,
divorce, Alaska, 866.
Arizona, 867.
Arkansas, 868.
Connecticut, 871.
Delaware, 873.
Kentucky, 884.
Maine, 886.
Massachusetts, 888.
Minnesota, 890.
Nevada, 895.
South Dakota, 911.

NARCOTICS,
drunkenness, habitual, 311.

NATURAL LAW,
marriage, concept, 70.

NEBRASKA,
absolute divorce, causes, 894.
alimony, husband, 673, 894.
common law marriages, 833.
divorce, causes, 894.
children, 894.
evidence, 894.
jurisdiction, 894.
non-age, 894.
remarriage, 894.
residence, 894.
service, 894.
marriage, age, 98, 833.
annulment, 894.
bigamous, 833.
Chinese, 833.
consanguinity, 833.
criminal, 833.
force, 833.
fraud, 833.
idiots, 833.
incestuous, 833.
insane, 833.
Japanese, 833.
negroes, 833.

[*References are to Sections.*]

NEBRASKA—Continued.
prohibited, 833.
relationship, 833.
void, 833.
voidable, 833.
partial divorce, causes, 894.

NECESSARIES,
alimony, liability of husband, 681.

NECESSARIES FURNISHED WIFE,
forms, 1000.

NE EXEAT,
alimony, 790.
divorce, endorsement, forms, 1014.
bond, forms, 1017, 1018.
form of petition, 1013.

NEGRO,
marriage, Alabama, 805.
Arizona, 807.
Arkansas, 808.
California, 809.
Colorado, 810.
Delaware, 812.
definition, Missouri, 105.
Georgia, 815.
Idaho, 817.
Indiana, 820.
Indian Territory, 819.
Florida, 814.
Kentucky, 823.
Louisiana, 824.
Maryland, 826.
Mississippi, 830.
Missouri, 831.
Nebraska, 833.
Nevada, 834.
North Carolina, 839.
North Dakota, 840.
Oklahoma, 842.
Oregon, 843.
slave customs, 107.
South Carolina, 849.
Tennessee, 851.
Texas, 852.
Utah, 853.
Virginia, 855.
West Virginia, 857.
white person, 105.
Wyoming, 859.

NEGRO BLOOD,
marriage, fraud, 16.

NEPHEW,
marriage, 110n.

[*References are to Sections.*]

NERVOUS SHOCK,
breach of promise, compensatory damages, 42.

NEVADA,
absolute divorce, causes, 895.
alimony, 895.
common law marriages, 834.
divorce, causes, 895.
children, 895.
decree, form, 1073.
evidence, 895.
jurisdiction, 895.
name of wife, 895.
non-age, 895.
residence, 492, 895.
remarriage, 895.
service, 895.
marriage, age, 98, 834.
annulment, 895.
bigamous, 834.
consanguinity, 834.
criminal, 834.
fraud, 834.
incestuous, 834.
Indians, 834.
negroes, 834.
Mongolians, 834.
prohibited, 834.
relationship, 834.
void, 834, 895.
voidable, 834.
separation and maintenance, 895.

NEW HAMPSHIRE,
absolute divorce, causes, 896.
alimony, 896.
breach of promise, survival of action, 25.
common law marriages, 835.
counsel fees, 720.
divorce, causes, 896.
divorce, evidence, 896.
jurisdiction, 896.
non-age, 896.
religious beliefs, 410.
remarriage, 896.
residence, 896.
service, 896.
support, children, 596.
marriage, age, 98, 835.
annulment, 896.
bigamous, 835.
consanguinity, 835.
criminal, 835.
epileptic, 835.
feeble-minded, 835.
idiots, 835.
imbeciles, 835.
incestuous, 835.

[*References are to Sections.*]

NEW HAMPSHIRE—Continued.
insane, 835.
prohibited, 835.
relationship, 835.
venereal disease, 835.
void, 835, 896.
voidable, 835.
separation, causes, 896.

NEW JERSEY.
absolute divorce causes, 897.
alimony, 897.
common law marriage, 836.
divorce, causes, 897.
evidence, 897.
jurisdiction, 897.
non-age, 897.
remarriage, 897.
residence, 897.
service, 897.
marriage, age, 98, 836.
annulment, 897.
bigamous, 836.
consanguinty, 836.
criminal, 836.
epileptics, 836.
feeble-minded, 836.
incestuous, 836.
insane, 836.
prohibited, 836.
relationship, 836.
void, 836.
voidable, 836.
partial divorce, causes, 897.

NEW MEXICO,
absolute divorce, causes, 898.
alimony, 898.
common law marriages, 837.
divorce, causes, 898.
jurisdiction, 898.
nonage, 898.
remarriage, 898.
residence, 898.
service, 898.
marriage, age, 98, 837.
annulment, 898.
bigamous, 837.
consanguinity, 837.
criminal, 837.
force, 837.
incestuous, 837.
insanity, 837.
parental consent, 837.
prohibited, 837.
relationship, 837.
void, 837.
voidable, 837.

[*References are to Sections.*]

NEW TRIAL,
divorce, grounds, 579.

NEW YORK,
absolute divorce, causes, 899.
common law marriages, 838.
divorce, alimony, 899.
amendment, 467.
causes, 899.
co-respondent, 462.
evidence, 899.
jurisdiction, 899.
nonage, 899.
remarriage, 899.
service, 899.
marriage, age, 98, 838.
annulment, 899.
bigamous, 838.
consanguinity, 838.
criminal, 838.
force, 838.
fraud, 838.
incestuous, 838.
physical incapacity, 838.
parental consent, 838.
prohibited, 838.
relationship, 838.
void, 838.
voidable, 838.
partial divorce, causes, 899.

NIECE,
marriage, 110.

NISI DECREE,
divorce, 530.

NON-ACCESS,
adultery, of husband, 235.
annulment, answer, forms, 974, 985.

NON-AGE,
divorce, Alabama, 865.
Arizona, 867.
Arkansas, 868.
California, 869.
Connecticut, 871.
Cuba, 872.
Delaware, 873.
District of Columbia, 874.
Florida, 875.
Georgia, 876.
Hawaii, 877.
Idaho, 878.
Illinois, 879.
Indiana, 881.
Indian Territory, 880.
Iowa, 882.

[*References are to Sections.*]

NON-AGE—Continued.
Kansas, 883.
Kentucky, 884.
Louisiana, 885.
Maine, 886.
Maryland, 887.
Massachusetts, 888.
Michigan, 889.
Minnesota, 890.
Mississippi, 891.
Missouri, 892.
Montana, 893.
Nebraska, 894.
Nevada, 895.
New Hampshire, 896.
New Mexico, 898.
New Jersey, 897.
New York, 899.
North Carolina, 900.
North Dakota, 901.
Oklahoma, 903.
Oregon, 904.
Philippine Islands, 907.
Porto Rico, 908.
South Dakota, 911.
Tennessee, 912.
Texas, 913.
Utah, 914.
Vermont, 915.
Virginia, 916.
Washington, 917.
West Virginia, 918.
Wisconsin, 919.
Wyoming, 920.

NON-RESIDENTS,
Alimony, 667, 678, 683.
divorce, children, support, 599.
cross bill, 452.
jurisdiction, 882.
notice, forms, 1009, 1010.

NON-SUPPORT,
divorce, grounds, 395-400.
separate maintenance, 642.

NORTH CAROLINA,
absolute divorce, 900.
adultery, 225.
alimony, 900.
common law marriages, 839.
divorce, causes, 900.
evidence, 900.
fleeing from justice, 408.
jurisdiction, 900.
living apart, 413.
nonage, 900.
remarriage, 900.

[*References are to Sections.*]

NORTH CAROLINA—Continued.
residence, 492, 900.
service, 900.
marriage, age, 98, 839.
bigamous, 839.
consanguinity, 839.
criminal, 839.
impotency, 839.
incestuous, 839.
Indians, 839.
miscegenation, 839.
negroes, 839.
parental consent, 839.
prohibited, 839.
relationship, 839.
void, 839, 900.
voidable, 839.
partial divorce, causes, 900.

NORTH DAKOTA,
absolute divorce, causes, 901.
alimony, 901.
common law marriages, 840.
cruelty, mental suffering, 283.
divorce, causes, 901.
evidence, 901.
jurisdiction, 901.
nonage, 901.
remarriage, 901.
residence, 901.
service, 901.
marriage, age, 98, 840.
annulment, 901.
bigamous, 840.
consanguinity, 840.
criminal, 840.
force, 840.
fraud, 840.
incestuous, 840.
insanity, 840.
miscegenation, 840.
negroes, 840.
parental consent, 840.
physical disability, 840.
prohibited, 840.
relationship, 840.
void, 840.
voidable, 840.
partial divorce, causes, 901.
separation, causes, 901.

NOTICE,
affidavit, divorce, forms, 1008.
alimony, temporary, 702.
divorce, co-respondent, forms, 1012.
entry and order, 477.
registered letter, 481.
service, forms, 1011.

[*References are to Sections.*]

NOTICE BY PUBLICATION,
form of order, 1007.

NULLITY,
children, legitimacy, 613.
divorce, decree, 526.

NULLITY OF MARRIAGE,
absence, presumption of death, 175.
age of consent, under, 169.
alimony, when granted, 185.
bastardy, avoidance, 168.
bigamy, 175.
children, custody, 186.
legitimacy, 175.
common law, cohabitation, 175.
prior marriage, 175.
consanguinity, 170.
definition, 166.
disease, affected, 171.
duress, cohabitation, 168.
epileptic, 171.
estoppel, deceit, 175, 182.
evidence, burden of proof, 184.
cause of action, 184.
collusion, 184.
marriage, 184.
residence, 184.
fraud, damages, 188.
fraud, character, 173.
gonorrhea, 171.
idiocy, 167.
impotency, 171.
insanity, 167.
intoxication, 178.
jurisdiction, 180.
kleptomaniac, 167.
Louisiana, consent of parents, 169.
mistake, 174.
marriage with intent not to consummate, 177.
mental capacity, existing at time of marriage, 167.
misrepresentation, character, 173.
mistake, 174.
mock marriage, 172.
New York, infants, 169.
pleading, fraudulent consent, 183.
pregnancy by another, 176.
prior marriage, 175.
prohibited degrees, 170.
property rights, determination, 175, 187.
prosecution, threat, 168.
relationship, prohibited, 170.
remarriage, right, 179.
sexual intercourse before marriage, 176.
South Carolina, absence of party, 175.
state control, 166.
suits, abatement by death, 180.

[*References are to Sections.*]

NULLITY OF MARRIAGE—Continued.
delay in bringing, 182.
domicil of parties, 180.
parties, 181.
syphilis, 171.
threats, 168.
triennial cohabitation, 171.
tuberculosis, 171.
Vermont, mistake, 174.
wife, property rights, 187.

NULLITY SUITS,
alimony, 669.

O

OBLIGATION OF CONTRACTS,
marriage, legislative contract, 59.

OFFER AND ACCEPTANCE,
marriage, 5.
by third person, 5.
form and language, 5.
time limit, 5.
offer, withdrawal, 5.

OFFER OF MARRIAGE.
breach of promise, defense, 31.

OHIO,
absolute divorce, causes, 902.
alimony, 902.
common law marriage, 841.
divorce, causes, 902.
evidence, 902.
gross neglect of duty, 409.
jurisdiction, 902.
remarriage, 902.
residence, 902.
service, 902
marriage, age, 98, 841.
bigamous, 841.
consanguinity, 841.
criminal, 841.
imbeciles, 841.
incestuous, 841.
laws, 87.
prohibited, 841.
relationship, 841.
void, 841.
voidable, 841.
partial divorce, causes, 902.
separation, causes, 902.

OKLAHOMA,
absolute divorce, causes, 903.
alimony, 903.
alimony, husband, 673.

[*References are to Sections.*]

OKLAHOMA—Continued.
common law marriages, 842.
divorce, causes, 903.
children, 903.
evidence, 903.
service, 903.
gross neglect of duty, 409.
jurisdiction, 903.
non-age, 903.
remarriage, 903.
residence, 903.
insanity, grounds for divorce, 388.
marriage, age, 98, 842.
annulment, 903.
bigamous, 842.
consanguinity, 842.
criminal, 842.
force, 842.
incestuous, 842.
negroes, 842.
prohibited, 842.
relationship, 842.
venereal disease, 842.
void, 842, 903.
voidable, 842.

OPIUM,
drunkenness, habitual, 311.

OPTION TO MARRY,
not enforcible, 7.

OREGON,
absolute divorce, causes, 904.
alimony, 673, 904.
common law marriages, 843.
condonation, statutory provisions, 424.
divorce, causes, 904.
jurisdiction, 904.
non-age, 904.
parties, attorney, 462.
remarriage, 904.
residence, 904.
service, 904.
marriage, age, 98, 843.
annulment, 904.
bigamous, 843.
consanguinity, 843.
criminal, 843.
force, 843.
fraud, 843.
incestuous, 843.
Indians, 843.
Mongolians, 843.
negroes, 843.
prohibited, 843.
relationship, 843.
void, 843, 904.
voidable, 843.

[*References are to Sections.*]

P

PARDON,
divorce, effect, 304.

PANAMA,
common law marriages, 844.
divorce, causes, 905.
marriage, age, 844.
laws, 844.
notice, 844.
parental consent, 844.
void, 905.

PARAMOUR,
adultery, defense, 227.

PARTICEPS CRIMINIS,
adultery, defense, 227.

PARENTAL CONSENT,
marriage, Arizona, 807.
Arkansas, 808.
California, 809.
Colorado, 810.
Connecticut, 811.
Delaware, 812.
District of Columbia, 813.
Florida, 814.
Georgia, 815.
Idaho, 817.
Illinois, 818.
Maine, 825.
Maryland, 826.
Massachusetts, 827.
Mississippi, 830.
Missouri, 831.
New Mexico, 837.
New York, 838.
North Carolina, 839.
North Dakota, 840.
Panama, 844.
Pennsylvania, 845.
Philippine Islands, 846.
Rhode Island, 848.
Vermont, 854.
Washington, 856.

PARENTS,
alienation of affections, advice, 153.
alimony, liability, 666.
annulment, parties, 458.
children, consent to marriage, 3.
divorce, custody of children, 587.
parties, 456.
support of children, 596.
female infant, consent to marriage, 3.

[*References are to Sections.*]

PARTIAL DIVORCE,
allowance, 199.
causes, Alabama, 865.
Arkansas, 868.
California, 869.
Connecticut, 871.
Delaware, 873.
District of Columbia, 874.
Florida, 875.
Georgia, 876.
Hawaii, 877.
Illinois, 879.
Kansas, 883.
Kentucky, 884.
Louisiana, 885.
Maryland, 887.
Michigan, 889.
Minnesota, 890.
Montana, 893.
Nebraska, 894.
New Jersey, 897.
New York, 899.
North Carolina, 900.
North Dakota, 901.
Ohio, 902.
Pennsylvania, 906.
Philippine Islands, 907.
Rhode Island, 909.
South Dakota, 911.
Tennessee, 912.
Utah, 914.
Vermont, 915.
Virginia, 916.
Wisconsin, 919.
character, 199.
legal separation, 199.

PARTIES,
capacity, 2.
capacity, cousins, 3.
divorced persons, 2.
infants, promise voidable, 3.
married persons, void, 2.
sexual obligations, 2.
competency, 2.
consent of essential, 2.

PARTIES TO DIVORCE,
aliens, 457.
alimony, 456.
annulment proceedings, 458.
children, 456.
Colorado, attorney, 462.
co-respondent, 462.
guardian, 456, 460.
Idaho, attorney, 462.
incompetents, 459, 460.
Indiana, attorney, 462.

[*References are to Sections.*]

PARTIES TO DIVORCE—Continued.
infant wife, 459.
insane person, 459.
intervening parties, 462.
Massachusetts, correspondent, 462.
Michigan, attorney, 462.
New York, co-respondent, 462.
Oregon, attorney, 462.
parents, 456.
parties to marriage, 455.
property rights, 456.
public official, 462.
spendthrift, 459.
Utah, attorney, 462.
Washington, attorney, 462.
wife, 461.

PAUPER,
marriage, Delaware, 812.
Maine, 825.

PENETRATION,
adultery, essential, 225.

PENNSYLVANIA,
absolute divorce, causes, 906.
common law marriages, 845.
divorce, alimony, 906.
causes, 906.
evidence, 906.
jurisdiction, 906.
remarriage, 906.
residence, 906.
service, 906.
insanity, grounds for divorce, 388.
marriage, age, 98, 845.
annulment, 906.
bigamous, 845.
consanguinity, 845.
criminal, 845.
force, 845.
fraud, 845.
incestuous, 845.
parental consent, 845.
prohibited, 845.
relationship, 845.
void, 845.
voidable, 845.
partial divorce, causes, 906.

PERMANENT ALIMONY,
abandonment by husband, 749.
adultery of husband, 748.
allowance, 741.
amount, how determined, 740.
arbitration, 759.
children, 752.
conduct of parties, 744, 745.

[*References are to Sections.*]

PERMANENT ALIMONY—Continued.
continuing allowance, 741.
cruelty of husband, 751.
definition, 660.
divorce, necessity, 757.
estate of husband, 756.
family, condition, 752.
gross sum, 741.
husband, abandonment, 749.
cruelty of, 751.
resources, 743.
impotency, 750.
mutual agreement, 747.
nature in general, 740.
property, joint, 746.
reference to arbitrator, 759.
reference to master, 758.
statutory in character, 740.
valid marriage essential, 742.
when allowed, 740.
wife at fault, 746.
possession of property, 754, 755.
provision, 753.

PER VERBA DE FUTURO CUM COPULA,
common law marriage, 71.

PER VERBA DE PRAESENTI.
common law marriage, 71.

PERSONAL SERVICE,
divorce, 479, 882.

PERSONATION,
divorce, 540.
marriage, Arizona, 807.

PETITION,
divorce, particulars, 490.

PETITIONS FOR DIVORCE,
forms, 925.

PHILIPPINE ISLANDS,
absolute divorce, causes, 907.
alimony, 907.
divorce, causes, 907.
divorce, children, 907.
jurisdiction, 907.
non-age, 907.
marriage, age, 98, 846.
abduction, 846.
annulment, 907.
bigamous, 846.
consanguinity, 846.
criminal, 846.
force, 846.
fraud, 846.

[*References are to Sections.*]

PHILIPPINE ISLANDS—Continued.
incestuous, 846.
insane, 846.
impotency, 846.
parental consent, 846.
priests, 846.
prohibited, 846.
relationship, 846.
void, 846.
voidable, 846.
partial divorce, causes, 907.

PHYSICAL CAPACITY TO MARRY,
barrenness, 86.
constitutional guarantees, 87.
copulation, capacity, 86.
epileptics, 87.
eugenics laws, 88.
feeble-minded, 87.
imbecile, 87.
impotency, 86.
venereal disease, 88.

PHYSICAL CRUELTY,
divorce, grounds, 275.

PHYSICAL INCAPACITY,
annulment, forms, 979.
marriage, Alabama, 805.
Arizona, 807.
Arkansas, 808.
California, 809.
Colorado, 810.
District of Columbia, 813.
Georgia, 815.
Hawaii, 816.
Idaho, 817.
Indian Territory, 819.
Iowa, 821.
Kansas, 822.
Montana, 832.
New York, 838.
North Dakota, 840.
Porto Rico, 847.
South Dakota, 850.
Texas, 852.
Utah, 853.
Vermont, 854.
Virginia, 855.
West Virginia, 857.

PIMPS,
adultery, evidence, 250.

PLATONIC RELATIONS,
marriage, 136n.

PLEADING,
adultery, specifications, 237.

[*References are to Sections.*]

PLEADING—Continued.
alienation of affection, 157.
alimony, 680, 792.
breach of promise, 33.
cruelty, acts, 296.
divorce, abandonment, 494.
adultery, 497.
affidavit, 490.
alimony, 490.
alleging causes, 493.
amenability to charge of libel, 505.
amendments, 491.
answer, 500.
Arizona, 867.
Arkansas, 868.
causes joined, 504.
children, custody, 490.
complaint, 490.
condonation, 500.
constructive desertion, 494.
cross complaint, 500.
cruel treatment, 496.
desertion, 494.
drunkenness, 495.
evidence, 512.
incapacity, 495.
insanity, 500.
issue and proof confined to pleadings, 498.
libel, 490.
Nevada, residence, 492.
no waiver, 499.
North Carolina, residence, 492.
petition, 490.
recrimination, 500.
reply, 501.
residence, 492.
venereal disease, 500.
verification of libel, 503.
who may sign libel, 502.
nullity of marriage, fraud, 183.
separate maintenance, 650.

POISONING,
divorce, forms, 935.

POLICE POWER,
eugenics law, 88.

POLYGAMY,
adultery, no defense, 226.
law governing, 63, 65.
marriage, prior, 261.

POOR DEBTOR,
alimony, oath, 800.

PORTO RICO,
absolute divorce, causes, 908.

[*References are to Sections.*]

PORTO RICO—Continued.
alimony, 908.
divorce, causes, 908.
jurisdiction, 908.
non-age, 908.
remarriage, 908.
residence, 908.
marriage, age, 98, 847.
annulment, 908.
bigamous, 847.
consanguinity, 847.
criminal, 847.
force, 847.
fraud, 847.
incestuous, 847.
insane, 847.
physical disability, 847.
prohibited, 847.
relationship, 847.
void, 847.
voidable, 847.

POSTPONEMENT OF MARRIAGE CEREMONY,
effect on contract, 15.

POVERTY,
divorce, delay in suit, 426.
support, refusal, 398.

PREGNANCY,
breach of promise, aggravated damages, 45.
fraud, when by another, 356.
marriage, Kansas, 822.
Tennessee, 851.
nullity of marriage, 176.

PREPARATIONS FOR MARRIAGE,
evidence of promise, 6.

PRESUMPTION,
divorce, evidence, 516.
marriage, 136.

PRESUMPTION OF MARRIAGE,
burden of proof, 131.

PRIESTS,
marriage, Philippine Islands, 846.

PRIOR DECREE,
separate maintenance, effect, 639.

PROCEDURE,
divorce, Georgia, 876.

PROCESS,
divorce, who may serve, 478.

[*References are to Sections.*]

PROCREATION,
impotency, does not invalidate, 373.
breach of promise, defense, 29.

PROFANITY,
cruelty, 289.

PROHIBITED DEGREES,
breach of promise, 28.
marriage contract, dissolution, 20.
nullity of marriage, 170.

PROHIBITED MARRIAGE,
Alabama, 805.
Arkansas, 808.
California, 809.
Colorado, 810.
Connecticut, 811.
Delaware, 812.
District of Columbia, 813.
Florida, 814.
Georgia, 815.
Hawaii, 816.
Idaho, 817.
Illinois, 818.
Indiana, 820.
Indian Territory, 819.
Iowa, 821.
Kansas, 822.
Kentucky, 823.
Louisiana, 824.
Maine, 825.
Maryland, 826.
Massachusetts, 827.
Michigan, 828.
Minnesota, 829.
Mississippi, 830.
Missouri, 831.
Montana, 832.
Nebraska, 833.
Nevada, 834.
New Hampshire, 835.
New Jersey, 836.
New Mexico, 837.
New York, 838.
North Carolina, 839.
North Dakota, 840.
Ohio, 841.
Oklahoma, 842.
Oregon, 843.
Philippine Islands, 846.
Pennsylvania, 845.
Porto Rico, 847.
Rhode Island, 848.
South Carolina, 849.
South Dakota, 850.
Tennessee, 851.
Texas, 852.

[*References are to Sections.*]

PROHIBITED MARRIAGE—Continued.
Utah, 853.
Vermont, 854.
Virginia, 855.
Washington, 856.
West Virginia, 857.
Wisconsin, 858.
Wyoming, 859.

PROMISE,
common law marriage, 76.

PROMISE, BREACH OF,
See Breach of Promise
evidence of being unmarried, 2.

PROMISE OF MARRIAGE,
acceptance, acts and relations of parties, 5.
affection, want of, fraud, 16.
age, disparity, fraud, 16.
age of parties, 1.
agreement, mutual, 1.
bastard child, breach of contract, 16.
bastardy proceedings, dismissal, 7.
bona fide contract, 12.
breach, conduct of parties, 21.
breach of previous promise, 7.
capacity of parties, 1
capacity of parties, mental capacity, 4.
character of parties, fraud, 16.
church customs, part of contract, 13.
church rules, date, 14, 15.
competency of parties, 2.
concealment, 16.
conditional promise, 9.
conduct of parties, 2.
consideration, breach of previous promise, 7.
consideration, immoral, 7.
consideration, money, void, 11.
consideration, sexual intercourse, 7.
contingent events, 14.
contingent on divorce, 11.
contingent promise, 9.
contract, complete, 1.
executory, 1.
original, 1.
subsequent ratification, 1.
cousins, when void, 2.
date of ceremony, mutual agreement, 6.
declarations of woman, 6.
disease, postponement of ceremony, 15.
divorce, contingent, 11, 14.
divorced persons, valid, 2.
divorced wife, 1n.
duress, not binding, 16.
engagement, nature, 1.
executory contract, 1.
executrix, 7n.

[*References are to Sections.*]

PROMISE OF MARRIAGE—Continued.
female, declaration, 6.
fraud, 16.
guardianship, under, incompetent, 4.
health of parties, postponement, 15.
husband and wife, intent, 1.
illicit relations, 1.
imbecility, void, 4.
impotency, statutory invalidity, 2.
incapacity, fraud, 16.
infancy, voidable, 3.
infants, at common law, 3.
consent of parents, 3.
guardian, 3.
intercourse, sexual, as proof, 6.
interlocutory decree, within, 11.
lewd women, valid, 11.
lunacy proceedings, incompetency, 4.
mala fide contract, 12.
marriage with third party, 14.
married parties, 2, 11, 12.
mental capacity, 4.
mercenary motives, fraud, 16.
mutuality, 5.
negro blood, fraud, 16.
offer and acceptance, 5.
offer, by third person, 5.
offer, form and language, 5.
offer, withdrawal, 5.
option, non-enforcible, 7
parties, competency, 2.
parties to, age, 1.
performance, capacity, 2.
physical incapacity, fraud, 16.
place of ceremony, 14.
postponement of ceremony, 15.
preparations, as evidence, 6.
religious customs, part of contract, 13.
religious scruples, 11.
res gestae, declaration of female, 6.
seduction, proof of acceptance, 6.
validity of contract, 7.
sexual intercourse as consideration, 7.
as proof, 6.
sexual obligations, implication, 2.
spendthrift, incompetent, 4.
statute of frauds, when within, 8.
subsequent promise, 7.
Sunday, made, 10.
time of performance, 14.
venereal disease, postponement, 15.
wager, dependent on, void, 11.
wedding, preparation for as evidence, 6.
wife, divorced, 1n.
wife of another, void, 1n.
woman's residence,
writing, when should be, 8.

[*References are to Sections.*]

PROOF,
marriage, 136.

PROOF OF MARRIAGE,
admissions, 132.
bible entry, 141.
birth certificate, 140.
burden of proof, 131.
certificate, 139.
circumstantial evidence, 135.
cohabitation, 136, 137.
confessions, 134.
declarations, 133.
denial by one party, 131.
divorce decree, 142.
foreign marriage, 144.
impediments, removal, 137.
necessity, 130.
officiating person, 143.
platonic relations, 136n.
presumption, 131.
records, 140.
reputation, 136.
unofficial records, 141.
witnesses, 138.

PROOF OF SERVICE,
divorce, 486.

PROPERTY,
alienation of affections, 159.
alimony, contract, 777, 778.
division, 675.
joint, 746.
injunction, 789.
lis pendens, 787.
receiver, 788.
when owned by wife, 701.
breach of promise, 21.
collusion, agreement to divide, 420.
divorce, 197.
fraudulent conveyance, 791.
husband's rights, 607.
limited, 605.
Maine, 610.
Missouri, 610.
receiver, alimony, 788.
separate maintenance, 635, 654.
separation agreements, 212.
wife, alimony, 754, 755.

PROPERTY RIGHTS,
divorce, 610.
parties, 456
vacating, 559.
marriage, legislative control, 59.
nullity of marriage, 175, 187.

[*References are to Sections.*]

PROSTITUTES,
adultery, evidence, 250.

PROVOCATION,
divorce, 433.

PUBERTY,
marriage, infants, 95.

PUBLIC,
divorce, exclusion from trial, 573.

PUBLICATION,
divorce, 480.
non-residents, forms, 1009, 1010.

PUBLIC POLICY,
marriage, by married parties, 11.
contingent promise, 9.
divorce, contingent on security, 11.
wagers or money, 11.
promise of marriage, wife of another, 1n.

Q

QUAKERS,
marriage, celebrating, 61.

QUALIFIED DIVORCE,
character, 199.

QUARRELS, FAMILY,
cruelty, 284.

QUESTIONS OF LAW AND FACT,
divorce trials, 575.

R

RABBINICAL DIVORCES,
foreign decrees, validity, 629.

RACES,
marriage, 60.
between, 105.
obligation of contract, 105.

RAPE,
adultery, grounds, 225.
breach of promise, evidence 37.

RECEIVER,
alimony, 788.
divorce, powers, 202.

RECEIVERSHIP,
alimony, 674.

[*References are to Sections.*]

RECOGNIZANCE TO APPEAR,
forms, 1049.

RECONCILIATION,
alimony, effect, 770.
condonation, 424.
counsel fees, effect, 727.
desertion, offer in good faith, 336, 341.
divorce, evidence, 511.

RECORDS OF MARRIAGE,
proof, 140.

RECRIMINATION,
definition, 427.
divorce, as defense, 427.
definition, 427.
dismissal of suit, 565.
evidence, 511.
pleadings, 500.

REFEREE,
alimony, reference, 758.
divorce, custody of children, 594.
divorce trial, 576.

REFERENCES,
suit money, 716.

REFUSAL TO SUPPORT,
ability, meaning, 399.
definition, 395.
desertion, grounds, 395.
divorce, grounds, 395.
duration of refusal, 396.
gambling, not grounds for divorce, 395.
home, support furnished, 395.
imprisonment, not valid ground, 399.
insanity, not valid ground, 399.
money, failure to give, 395.
pecuniary ability, definition, 399.
physical weakness, 398.
poverty, 398.
property, squandering, 400.
sickness, not valid ground, 399.
squandering property, 400.
wife able to support self, 397.

REGISTERED LETTER,
divorce, notice, 481.

RELATIONSHIP,
breach of promise, defense, 28.
marriage, 60.
Alabama, 805.
Alaska, 806.
Arizona, 807.
Arkansas, 808.

[*References are to Sections.*]

RELATIONSHIP—Continued.
California, 809.
Colorado, 810.
Connecticut, 811.
Delaware, 812.
District of Columbia, 813.
Florida, 814.
Georgia, 815.
Hawaii, 816.
Idaho, 817.
Illinois, 818.
Indiana, 820.
Indian Territory, 819.
Iowa, 821.
Kansas, 822.
Kentucky, 823.
Louisiana, 824.
Maine, 825.
Massachusetts, 827.
Michigan, 828.
Minnesota, 829.
Mississippi, 830.
Missouri, 831.
Montana, 832.
Nebraska, 833.
Nevada, 834.
New Hampshire, 835.
New Jersey, 836.
New Mexico, 837.
New York, 838.
North Carolina, 839.
North Dakota, 840.
Ohio, 841.
Oklahoma, 842.
Oregon, 843.
Pennsylvania, 845.
Philippine Islands, 846.
Porto Rico, 847.
Rhode Island, 848.
South Carolina, 849.
South Dakota, 850.
Tennessee, 851.
Texas, 852.
Utah, 853.
Vermont, 854.
Virginia, 855.
Washington, 856.
West Virginia, 857.
Wisconsin, 858.
Wyoming, 859.
nullity of marriage, 170.

RELATIONSHIP OF PARTIES,
marriage, brother, 110n.
brother-in-law, 110.
brother-in-law, 110n.
cousins, 110.
daughter, 110n.

[*References are to Sections.*]

RELATIONSHIP OF PARTIES—Continued.
daughter-in-law, 110n.
degrees forbidden, 110.
father, 110n.
granddaughter, 110n.
grandfather, 110n.
grandmother, 110n.
grandson, 110n.
mother, 110n.
mother-in-law, 110n.
nephew, 110n.
niece, 110.
sister, 110n.
sister-in-law, 110.
son, 110n.
son-in-law, 110n.
step-daughter, 110n.
stepmother, 110n.
uncle, 110.

RELEASE,
breach of promise, pleading, 35.

RELEASE FROM MARRIAGE CONTRACT,
defense, 32.

RELIGIOUS BELIEFS,
adultery, 226.
divorce, 410.

RELIGIOUS CUSTOMS OF MARRIAGE,
part of contract, 13.

REMARRIAGE,
alimony, effect, 772.
bigamy, 266.
divorce, Alabama, 865.
Alaska, 866.
Arizona, 867.
Arkansas, 868.
California, 869.
Colorado, 870.
Connecticut, 871.
Delaware, 873.
District of Columbia, 874.
Florida, 875.
foreign, 630.
Georgia, 876.
Hawaii, 877.
Idaho, 878.
Illinois, 879.
Indiana, 881.
Iowa, 882.
Kansas, 883.
Kentucky, 884.
Louisiana, 885.
Maine, 886.
Maryland, 887.

[*References are to Sections.*]

REMARRIAGE—Continued.
Massachusetts, 888.
Michigan, 889.
Minnesota, 890.
Nevada, 895.
New Hampshire, 896.
Mississippi, 891.
Missouri, 892.
Montana, 893.
Nebraska, 894.
New Jersey, 897.
New Mexico, 898.
New York, 899.
North Carolina, 900.
North Dakota, 901.
Oklahoma, 903.
Ohio, 902.
Oregon, 904.
Pennsylvania, 906.
Rhode Island, 909.
South Dakota, 911.
Tennessee, 912.
Texas, 913.
Utah, 914.
vacating, 558.
Vermont, 915.
Virginia, 916.
Washington, 917.
West Virginia, 918.
Wisconsin, 919.
Wyoming, 920.
extra-territorial effect, 631.
legislative control, 59.
right after annulment, 179.

REOPENING TRIAL,
divorce, 578.

REPLICATION,
divorce, forms, 962.

REPRODUCTION,
impotency, defect in void, 373.

REPUDIATION OF MARRIAGE.
infants, 95.
breach of promise, 21.

REPUTATION,
marriage, proof, 136.

RESCISSION OF CONVEYANCE,
divorce, forms, 972.

RES GESTAE,
marriage declaration, 6.

[*References are to Sections.*]

RESIDENCE,
change, 445.
definition, 443.
divorce, Alabama, 865.
Alaska, 866.
Arizona, 867.
Arkansas, 868.
California, 869.
Colorado, 870.
Connecticut, 871.
Delaware, 873.
District of Columbia, 874.
evidence, 514.
Florida, 875.
Georgia, 876.
Hawaii, 877.
Idaho, 878.
Illinois, 879.
Indiana, 881.
Indian Territory, 880.
Iowa, 882.
Kansas, 883.
Kentucky, 884.
Louisiana, 885.
Maine, 886.
Maryland, 887.
Massachusetts, 888.
Michigan, 889.
Minnesota, 890.
Mississippi, 891.
Missouri, 892.
Montana, 893.
Nebraska, 894.
Nevada, 895.
New Hampshire, 896.
New Jersey, 897.
New Mexico, 898.
North Carolina, 900.
North Dakota, 901.
Ohio, 902.
Oklahoma, 903.
Oregon, 904.
Pennsylvania, 906.
pleadings, 492.
Porto Rico, 908.
Rhode Island, 909.
South Dakota, 911.
Tennessee, 912.
Texas, 913.
Utah, 914.
vacating decree, 560.
Vermont, 915.
Virginia, 916.
Washington, 917.
West Virginia, 918.
Wisconsin, 919.
Wyoming, 920.
intent of party, 444.

[*References are to Sections.*]

RESTRAINING ORDER,
divorce, forms, 943, 1060.

RESTRAINT OF MARRIAGE,
contracts, 118, 119.
deeds, 120.
devises, conditional, 117.
divorce, bequests, 115.
generally, 115.
property, bequest, 116.
second marriage, 120.
wills, 116.
wills, second marriage, 120.

REVIVAL OF OFFENSE,
condonation, 425.

RHODE ISLAND,
absolute divorce, causes, 909.
alimony, 909.
breach of promise, jointure of courts, 33.
common law marriages, 848.
divorce, causes, 909.
children, 909.
discretionary causes, 351.
evidence, 909.
jurisdiction, 909.
libel, 503.
remarriage, 909.
residence, 909.
service, 909.
marriage, age, 98, 848.
annulment, 909.
bigamous, 848.
consanguinity, 848.
criminal, 848.
idiots, 848.
incestuous, 848.
lunatics, 848.
parental consent, 848.
prohibited, 848.
relationship, 848.
void, 848.
voidable, 848.
partial divorce, causes, 909.

RIGHT OF COURTESY,
separation agreements, 212.

RIGHT OF POWER,
separation agreements, 212.

RIGHTS AND IMMUNITIES,
marriage, legislative contract, 59.

RUPTURE,
impotency, cause, 367.

[*References are to Sections.*]

S

SACRAMENT,
marriage not treated as, 55.

SCANDAL,
divorce, delay in suit, 426.

SCHOOL TEACHERS,
marriage, discharge, 120.

SECURITY,
alimony, 786.

SEDUCTION,
breach of promise, 21.
aggravated damages, 45.
arrest, 27.
defenses, 28.
exemplary damages, 47.
pleading, 35.
infant, liability for breach of marriage, 3.
marriage acceptance, as proof, 6.
marriage, as consideration, 7.

SEPARATE MAINTENANCE,
abandonment, 635.
abandonment by husband, 642, 643.
abandonment by wife, 644.
adultery, 643.
adultery, effect, 640.
adultery of wife, 645.
agreement, bar to action, 640.
alimony, 670.
alimony, temporary, effect, 639.
allowance, amount, 653.
amount, determination, 652, 653.
ante-nuptial agreements, effect, 639.
causes, abandonment by husband, 642, 643.
construction desertion, 643.
desertion by husband, 642, 643.
generally, 641.
non-support, 642.
wife leaving husband, 643.
coercion, 640.
common law relief, 636.
condonation, effect, 647.
constructive desertion, 643.
complaint, forms, 650, 965.
counsel fees, 721.
cruel treatment, 643.
decree, forms, 968.
definition, 635.
desertion by husband, 642, 643.
desertion, construction, 643.
divorce, decree, 538.
effect, 635.
jurisdiction, 451.
unsuccessful action, 639.

[*References are to Sections.*]

SEPARATE MAINTENANCE—Continued.
dower does not affect, 635.
equity jurisdiction, 636.
evidence, 651.
forms, law and facts, 968.
forms of petition, 966.
fraud, effect, 640.
marriage essential, 637.
Massachusetts, agreements, 640.
non-resident wife, 648.
non-support, 642.
physical separation essential, 638.
pleading, 650.
prior decree, effect, 639.
property, conveyance or encumbrance, 654.
effect, 635.
resumption of marital relations, 646.
right of, basis, 635.
settlement, bar to action, 640.
statute of limitations, 648.
statutory remedies, 636.
termination, 655.
venue, 648.
wife, freedom from fault, 644.
wife leaving husband, 643.
wife's unchastity, 645.

SEPARATION,
adultery, defense, 228.
causes, Massachusetts, 888.
North Dakota, 901.
children, custody, 586.
counsel fees, 720.
desertion, intent, 327.
form of decree, 969.
limited, Indiana, 881.
New Hampshire, 896.
Ohio causes, 902.
partial divorce, 199.
suit money, 711.

SEPARATION AGREEMENT,
action to enforce, 219.
adultery, 212.
defense, 233.
agreement by parties, 210.
alienation of affections, 212.
alimony, basis for fixing, 217.
right to sue, 212.
arts essential, 210.
chastity, 212.
consideration, husband, release from support, 214
money payments, 214.
mutual promises, 214.
construction, 212.
conversation, criminal, 212.
divorce, effect on, 217, 432.
enforcement, 211.

[*References are to Sections.*]

SEPARATION AGREEMENT—Continued.
forms, 1116, 1117.
future separation, agreement as to, 211.
law of jurisdiction governs, 212.
modification, 218.
money payments, 214.
nature in general, 210.
proceedings, delay in instituting, 218.
property, disposition, 212.
rescission, burden of proof, 218.
revocation, 215.
right of courtesy, relinquishment, 212.
right of dower, 212.
statutory, compliance, 212.
support of wife, 215.
surviving parties, 216.
termination, death of party, 218.
fraud, 218.
renewal of marital relations, 218.
separation, 218.
trustee, interposition, 213.
validity of agreements, 211.
wife, right to sue, 212.
support, 215.

SEPARATION AND MAINTENANCE,
Nevada, 895.

SEPARATION, DEED,
form, 1117.

SEPARATION FROM BED AND BOARD,
divorce decree, 531.

SEPARATION, TEMPORARY,
divorce, 195.

SERVICE,
divorce acceptance, 484.
Alabama, 865.
Arizona, 867.
California, 869.
Colorado, 870.
Connecticut, 871.
Delaware, 873.
District of Columbia, 874.
Florida, 875.
Hawaii, 877.
Idaho, 878.
Illinois, 879.
Indiana, 881.
Indian Territory, 880.
Iowa, 882.
Kansas, 883.
Kentucky, 884.
Louisiana, 885.
Maine, 886.
Maryland, 887.

[*References are to Sections.*]

SERVICE—Continued.
Massachusetts, 888.
Michigan, 889.
Minnesota, 890.
Mississippi, 891.
Missouri, 892.
Montana, 893.
Nebraska, 894.
Nevada, 895.
New Hampshire, 896.
New Jersey, 897.
New Mexico, 898.
New York, 899.
North Carolina, 900.
North Dakota, 901.
Ohio, 902.
Oklahoma, 903.
Oregon, 904.
outside state, 483.
Pennsylvania, 906.
proof, 486.
regularity, 487.
Rhode Island, 909.
South Dakota, 911.
summons, 476, 479.
Tennessee, 912.
Texas, 913.
Utah, 914.
Vermont, 915.
Virginia, 916.
Washington, 917.
West Virginia, 918.
Wisconsin, 919.
Wyoming, 920.

SET OFF,
alimony, 674.

SETTLEMENTS
separate maintenance, bar to action, 640.

SEX.
marriage between persons of same sex, 89.

SEXUAL IMPOTENCY,
breach of promise, defense, 29.

SEXUAL INTERCOURSE.
abuse of, cruelty, 282.
breach of promise, aggravated damages, 45.
exemplary damages, 47.
California, 281.
condonation, 424.
cruelty, denial, 281.
denial of deemed desertion, 281.
desertion, when considered, 333.
divorce, forms, Massachusetts, 935.
impotency, absence, 375.

[*References are to Sections.*]

SEXUAL INTERCOURSE—Continued.
infants, marriage, 95.
marriage, consideration, 7.
proof of contract, 6.
nullity of marriage, 176.
Washington, 281.

SEXUAL OBLIGATIONS,
implied power to perform, 2.

SEXUAL RELATIONS,
common law marriage, 76.

SHAKERS,
divorce, religious beliefs, 410.

SICKNESS,
breach of marriage promise, 23.
support, refusal, not valid ground, 399.

SISTER,
alienation of affections, advice, 153.
marriage, 110n.

SISTER-IN-LAW,
marriage, 110.

SLANDER,
breach of promise, aggravated damages, 46.
exemplary damages, 47.

SLAVES,
marriage, 139.
slave customs, 107.

SODOMY,
cruelty, 294.
divorce, 405.

SON,
marriage, 110n.

SON IN LAW,
marriage, 110n.

SOUTH CAROLINA,
divorce, 199.
not allowed, 910.
marriage, age, 98, 849.
abduction, 849.
annulment, 910.
bigamous, 849.
common law, 849.
consanguinity, 849.
criminal, 849.
idiots, 849.
incestuous, 849.
Indiana, 849.

[*References are to Sections.*]

SOUTH CAROLINA—Continued.
jurisdiction to annul, 910.
lunatics, 849.
mulattoes, 849.
negroes, 849.
prohibited, 849.
relationship, 849.
void, 849.
voidable, 849.
nullity of marriage, absence of party, 175
races, marriage between, 105.

SOUTH DAKOTA,
absolute divorce, causes, 911.
alimony, 911.
common law marriage, 850.
divorce, causes, 911.
evidence, 911.
jurisdiction, 911.
name of wife, 911.
nonage, 911.
remarriage, 911.
residence, 911.
service, 911.
marriage, age, 98, 850.
annulment, 911.
bigamous, 850.
consanguinity, 850.
criminal, 850.
force, 850
fraud, 850.
impersonation, 850.
incestuous, 850.
insanity, 850.
miscegenetic, 850.
physical disability, 850
prohibited, 850.
relationship, 850.
void, 850.
voidable, 850.
partial divorce, causes, 911.

SPECIFICATIONS,
divorce, forms, 958.
divorce, parties, 459.
marriage contracts, incompetent, 4.

SPITTING,
cruelty, 278.

STATE,
divorce, regulation, 59.
laws of marriage, synopsis, 805-859.
marriageable age, table, 98.
marriage laws, synopsis, 805-859.
marriage, regulation, 59.

STATUTE OF FRAUDS,
marriage contract, when within, 8.

[*References are to Sections.*]

STATUTE OF LIMITATIONS,
breach of promise, 26.

STATUTES,
marriage, held directory, 61.

STATUTES OF MARRIAGE,
synopsis, 805-859.

STENOGRAPHER,
suit money, 716.

STEPDAUGHTER,
marriage, 110n.

STEPFATHER,
marriage, 110n.

STEPMOTHER,
marriage, 110n.

STERILITY,
impotency, 367.

STRIKING,
cruelty, 278.

SUIT MONEY,
alimony, 711.
allowance, when made, 713.
amount, 719.
how determined, 714.
debts, prior, 716.
definition, 711.
depositions, 716.
discretionary with court, 711.
dismissal of action, 718.
divorce, forms, application, 1031, 1033.
forms, notice, 1060.
forms, order to pay, 1037, 1038.
hotel expenses, 716.
husband, ability to pay, 714.
investigations, 716.
merit of action, dependent on, 715.
name in which allowed, 717.
printing of record, 716.
proceedings for recovery, 711.
purposes for which allowed, 716.
references, 716.
stenographer, 716.
traveling expenses, 716.
wife, necessities, 714.
witnesses, 716.

[*References are to Sections.*]

SUMMONS,
divorce, prayer for, forms, 940.
service, 476, 479.
time and place for appearance, 476.
forms, 1006.

SUNDAY,
marriage contract made, 10.

SUPPORT.
children, divorce, 595, 596.
definition, 395.
desertion, liability of husband, 344.
divorce, limited, 605

SUPPORT OF WIFE,
separation agreements, 215.

SUPPORT, REFUSAL,
non-support, grounds for divorce, 395-400.

SURVIVAL OF ACTIONS,
breach of promise, 25.

SURVIVING PARTIES,
separation agreements, 216.

SYPHILIS.
adultery, evidence, 247.
cruelty, affliction, 280n.
marriage, Utah, 853.
nullity of marriage, 171.

TEACHERS,
marriage, discharge, 120.

TELEPHONE,
marriage, 81.

TEMPER, INCOMPATABILITY,
divorce, grounds, 415.

TEMPER, VIOLENT,
divorce, grounds, 415.

TEMPORARY ALIMONY,
agreements between parties, 699.
allowance, 693.
a mensa et thoro, 195.
amount, 690, 708.
discretionary, 694.
application, 703.
children, 709.
commencement, 709.
conditional orders, 707.
counsel fees, 721.
decree, 706.

[*References are to Sections.*]

TEMPORARY ALIMONY—Continued.
defenses, 700.
definition, 660, 690.
discretion of court, 694.
duress, 693.
fraud, 693.
guardian, 693.
hearing, 704.
husband's ability, 696.
allowance, 697.
infancy, 693.
insanity, 693.
intoxication, 693.
marital relation, proof, 705.
marriage essential, 695.
proof, 695.
modification, 710.
notice, 702.
objections, 700.
order for payment, 706.
proceedings, 692.
property owned by wife, 701.
termination, 709.
vacation, 710.
wife's good faith, 698.

TEMPORARY SEPARATION,
divorce, 195.

TENANCY IN COMMON,
divorce, 610.

TENNESSEE,
absolute divorce, 912.
alimony, 912.
common law marriages, 851.
divorce, causes, 912.
evidence, 912.
jurisdiction, 912.
non-age, 912.
remarriage, 912.
service, 912.
marriage, age, 851.
annulment, 912.
bigamous, 851.
consanguinity, 851.
criminal, 851.
force, 851.
fraud, 851.
impotency, 851.
impotency, loss, 367.
incestuous, 851.
insanity, 851.
negroes, 851.
pregnancy, 851.
prohibited, 851.
relationship, 851.
voidable, 851.
partial divorce, causes, 912.

[*References are to Sections.*]

TEXAS,
absolute divorce, causes, 913.
alimony, 913.
common law marriages, 852.
counsel fees, 720.
divorce, causes, 913.
evidence, 913.
jurisdiction, 913.
non-age, 913.
remarriage, 913.
residence, 913.
service, 913.
marriage, age, 98, 852.
annulment, 913.
bigamous, 852.
consanguinity, 852.
criminal, 852.
force, 852.
fraud, 852.
insanity, 852.
negroes, 852.
physical incapacity, 852.
prohibited, 852.
relationship, 852.
void, 852.
voidable, 852.

THREATS OF BODILY HARM,
nullity of marriage, 168.

TIME OF MARRIAGE,
definite, not required, 14.
postponement of ceremony, 15.

TORT WISE ACTIONS,
breach of promise, 24.

TRAVELING EXPENSES,
suit money, 716.

TRIAL,
divorce, appeal, right, 580.
Colorado, 870.
commissioner, 576.
continuances, 572.
descent of plaintiff, 579.
discretion of court, 570.
examination of witnesses, 574.
exclusion of public, 573.
findings of court, 577.
master, 576.
new evidence, 578, 579.
new trial, 579.
property rights, 579.
questions of law and fact, 575.
referee, 576.
reopening, 578.
time statutory, 571.

[*References are to Sections.*]

TRIENNIAL COHABITATION,
nullity of marriage, 171.

TRUSTEE,
alimony, 802.
separation agreements, 213.

TUBERCULOSIS,
breach of promise, defense, 29.
nullity of marriage, 171.

TUMORS,
impotency, 367.

U

UNCHASTITY,
breach of promise, defense, 30.
fraud, 356.

UNCLE,
marriage, 110.

UNSOUND MIND,
annulment of marriage, forms, 975.

UTAH,
asbolute divorce, causes, 914.
alimony, 914.
common law marriages, 853.
cruelty, mental suffering, 283.
divorce, causes, 914.
decree, form, 1073.
evidence, 914.
jurisdiction, 914.
non-age, 914.
parties, attorney, 462.
remarriage, 914.
residence, 914.
service, 914.
marriage, age, 98, 853.
annulment, 914.
bigamous, 853.
consanguinity, 853.
criminal, 853.
force, 853.
fraud, 853.
gonorrhea, 853.
idiots, 853.
impersonation, 853.
incestuous, 853.
lunatics, 853.
Mongolians, 853.
negroes, 853.
physical incapacity, 853.
prohibited, 853.
relationship, 853.
syphilis, 853.
void, 853.
voidable, 853.
partial divorce, causes, 914.

[*References are to Sections.*]

V

VACATING DECREE,
administrator, 559.
agreement of parties, 554.
by another state, 560.
coercion, 554.
cohabiting after, 554.
collusion, 553.
death, 559.
death of plaintiff, 554.
evidence insufficient, 547.
false testimony, 551.
forms, 1005.
fraud, 545.
impersonation, 552.
imposition, 545.
laches, 555.
motion of court, 548.
nisi made absolute, 557.
petition, 549.
property rights, 559.
remarriage, 558.
repealed statute, 556.
statutory grounds, 545.
suppression of evidence, 554.
term of rendition, 546.
who may petition, 550.

VAGINA, MALFORMATION,
impotency, 367.

VENEREAL DISEASE,
adultery, as evidence, 247.
breach of promise, damages, 44.
defense, 29.
exemplary damages, 47.
cruelty to communicate, 280.
divorce, pleading, 500.
marriage, Delaware, 812.
eugenics law, 88.
Michigan, 828.
New Hampshire, 835.
Oklahoma, 842.
postponement, 15.
Vermont, 854.
Washington, 856.

VENUE,
divorce, change, 475.
action, 475.
separate maintenance suits, 648.

VERMONT,
absolute divorce, causes, 915.
alimony, 915.
common law marriages, 854.
divorce, causes, 915.

[*References are to Sections.*]

VERMONT—Continued.
evidence, 915.
jurisdiction, 915.
non-age, 915.
remarriage, 915.
residence, 915.
service, 915.
marriage, age, 98, 854.
annulment, 915.
bigamous, 854.
consanguinity, 854.
criminal, 854.
force, 854.
fraud, 854.
incestuous, 854.
insanity, 854.
parental consent, 854.
physical disability, 854.
prohibited, 854.
relationship, 854.
venereal disease, 854.
void, 854.
voidable, 854.
nullity of marriage, mistake, 174.
partial divorce, causes, 915.

VIOLENCE,
divorce, evidence, 511.

VIRGINIA,
absolute divorce, causes, 916.
alimony, 916.
breach of promise statute, 24.
common law marriages, 855.
divorce, causes, 916.
evidence, 916.
fleeing from justice, 408.
jurisdiction, 916.
non-age, 916.
remarriage, 916.
residence, 916.
service, 916
marriage, abduction, 855.
age, 98, 855.
annulment, 916.
bigamous, 855.
consanguinity, 855.
criminal, 855.
incestuous, 855.
insane, 855.
negroes, 855.
physical incapacity, 855.
prohibited, 855.
relationship, 855.
void, 855.
voidable, 855.
partial divorce, causes, 916.

[*References are to Sections.*]

VOID AND VOIDABLE MARRIAGES,
Alabama, 805.
Alaska, 806.
Arizona, 807.
Arkansas, 808.
California, 809.
Colorado, 810.
Connecticut, 811.
definition, 165.
Delaware, 812.
District of Columbia, 813.
Florida, 814.
Georgia, 815.
Hawaii, 816.
Idaho, 817.
Illinois, 818.
Indiana, 820.
Indian Territory, 819.
Iowa, 821.
Kansas, 822.
Kentucky, 823.
Louisiana, 824.
Maine, 825.
Maryland, 826.
Massachusetts, 827.
Michigan, 828.
Minnesota, 829.
Mississippi, 830.
Missouri, 831.
Montana, 832.
Nebraska, 833.
Nevada, 834.
New Hampshire, 835.
New Jersey, 836.
New Mexico, 837.
New York, 838.
North Carolina, 839.
North Dakota, 840.
Ohio, 841.
Oklahoma, 842.
Oregon, 843.
Pennsylvania, 845.
Philippine Islands, 846.
Porto Rico, 847.
ratification, 165.
Rhode Island, 848.
South Carolina, 849.
South Dakota, 850.
Tennessee, 851.
Texas, 852.
Utah, 853.
Vermont, 854.
Virginia, 855.
Washington, 856.
West Virginia, 857.
Wisconsin, 858.
Wyoming, 859.

[*References are to Sections.*]

VOIDING MARRIAGES,
forms, 973.

W

WAGERS,
marriage, void, 11.

WARDS,
alimony, enforcement, 785.

WASHINGTON,
absolute divorce, causes, 917.
alimony, 917.
common law marriages, 856.
discretionary causes of divorce, 352.
divorce, causes, 917.
evidence, 917.
jurisdiction, 917.
non-age, 917.
parties, attorney, 462.
remarriage, 917.
residence, 917.
service, 917.
insanity, grounds for divorce, 388.
marriage, age, 98, 856.
annulment, 917.
bigamous, 856.
consanguinity, 856.
criminal, 856.
drunkards, 856.
force, 856.
fraud, 856.
insane, 856.
parental consent, 856.
prohibited, 856.
relationship, 856.
venereal disease, 856.
void, 856.
voidable, 856.
sexual intercourse, denial, 281.

WEST VIRGINIA,
absolute divorce, causes, 918.
alimony, 918.
common law marriages, 857.
divorce, causes, 918.
evidence, 918.
jurisdiction 918.
non-age, 918.
remarriage, 918.
residence, 918.
service, 918.
marriage, age, 98, 857.
annulment, 918.
bigamous, 857.
consanguinity, 857.
criminal, 857.

[*References are to Sections.*]

WEST VIRGINIA—Continued.
incestuous, 857.
insanity, 857.
negroes, 857.
physical disability, 857.
prohibited, 857.
relationship, 857.
voidable, 857.

WHIPPING,
cruelty, 278.

WIFE,
alienation of husband's affection, 152.
alimony, as creditor, 801.
at fault, 746.
alimony, distinguished from, 662.
good faith, 698.
imprisonment, 771.
ownership of property, 701.
provision, 753.
possession of property, 754, 755.
counsel fees, adultery, 725.
desertion, 725.
name, 724.
desertion of husband, 338, 340.
divorce, allowance of costs, 732.
domicil, 446.
dower, 608.
liability, 732.
party, 461.
property, pleadings, 490.
name, divorce, 537.
promise of marriage, intent, 1.
separate maintenance, 635.
adultery, 645.
freedom from fault, 644.
leaving husband, 643.
separation agreements, 215.
suit money, necessities, 714.
support, when grounds for divorce, 397.
wills, common law rule, 62.

WILLS,
antenuptial, of women, 62.
common law rule, 62.
husband, common law rules, 62.
marriage, revocation of woman's will, 62.
record, 120.
statutory provisions, revocation, 62.
survival, marriage, 62.
women, married, capacity to make, 62.
revival by death of husband, 62.
revocation by marriage, 62.

WISCONSIN,
absolute divorce, causes, 919.
alimony, 919.

[*References are to Sections.*]

WISCONSIN—Continued.
common law marriages, 858.
counsel fees, 722.
divorce, causes, 919.
decree, 529.
evidence, 919.
jurisdiction, 919.
living apart, 413.
non-age, 919.
remarriage, 919.
residence, 919.
service, 919.
eugenics law, 88.
marriage, age, 98, 858.
annulment, 919.
bigamous, 858.
consanguinity, 858.
criminal, 858.
epileptics, 858.
force, 858.
fraud, 858.
impotency, 858.
idiots, 858.
incestuous, 858.
insane, 858.
laws, 87.
prohibited, 858.
relationship, 858.
void, 858.
voidable, 858.
partial divorce, causes, 919.

WITNESSES,
divorce, parties, 513.
service, identifying, 485.
trial, examination, 574.
marriage, canon law, 70.
proof, 138, 268.
suit money, 716.

WOMAN,
promise of marriage by wife of another void, 1n.
antenuptial wills, 62.
wills, capacity to make, 62.

WRIT OF NE EXEAT,
alimony, 790.

WYOMING,
absolute divorce, cause, 920.
alimony, 920.
common law marriages, 859.
divorce, causes, 920.
evidence, 920.
jurisdiction, 920.
non-age, 920.
remarriage, 920.
residence, 920.
service, 920.

[*References are to Sections.*]

WYOMING—Continued.
marriage, age, 98, 859.
annulment, 920.
bigamous, 859.
consanguinity, 859.
criminal, 859.
force, 859.
fraud, 859.
idiots, 859.
incestuous, 859.
insane, 859.
Malay, 859.
Mongolians, 859.
Mulattoes, 859.
negroes, 859.
prohibited, 859.
relationship, 859.
voidable, 859.

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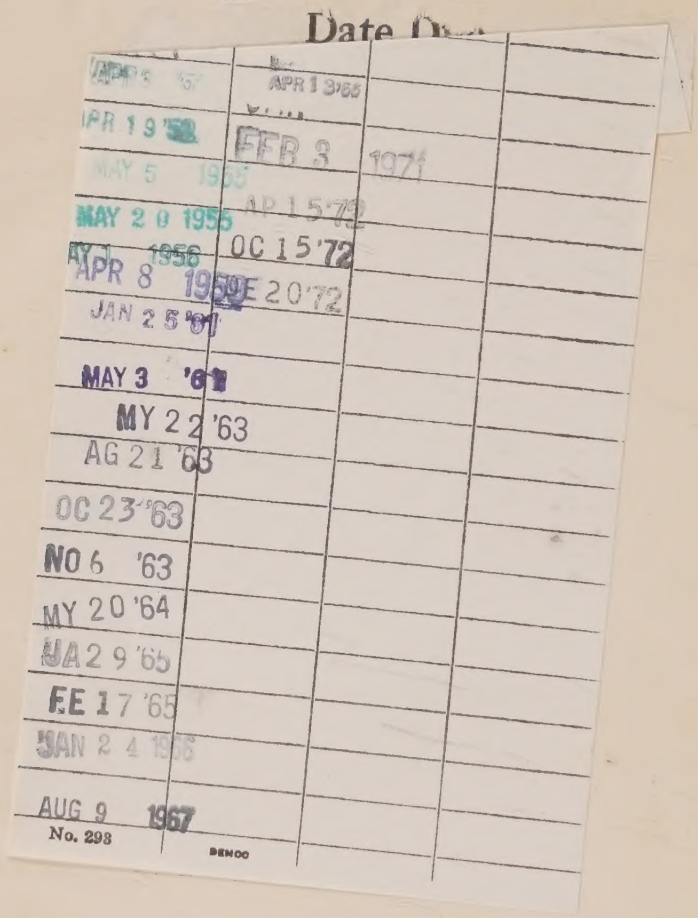

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